COMMISSION DECISION

of 10 May 2007,

pursuant to Article 86(3) of the EC Treaty, on the special rights granted to La Banque Postale, Caisses d'Epargne and Crédit Mutuel for the distribution of the livret A and livret bleu

(Only the French version is authentic)
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COMMISSION DECISION

of 10 May 2007

pursuant to Article 86(3) of the EC Treaty on the special rights granted to La Banque Postale, Caisse d’Epargne and Crédit Mutuel for the distribution of the livret A and livret bleu

(Only the French version is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Having given the French authorities, La Banque Postale, Caisse d'Epargne et de Prévoyance and Crédit Mutuel the opportunity to make known their views on the objections raised by the Commission,

Whereas:

1. Procedure

(1) On 7 June 2006 the Commission adopted a letter of formal notice concerning the special rights to distribute the livret A and livret bleu, which was sent to the French authorities on 13 June 2006. Following a letter from the French authorities stating that the letter of formal notice did not contain confidential information, the Commission sent it to the three distributing networks concerned, La Banque Postale, Caisse d’Epargne et de Prévoyance and Crédit Mutuel (hereinafter referred to as “the distributing networks”), on 10 July 2006.

(2) Following this letter, Crédit Mutuel and La Banque Postale communicated their comments by letter dated 29 September 2006. The French authorities submitted their comments regarding the letter of formal notice by letter dated 2 October 2006. Caisse d’Epargne et de Prévoyance submitted their comments on 3 October 2006. The comments of the distributing networks and the third parties involved in the procedure were communicated to the French authorities by letter dated 10 October 2006. The French authorities submitted their remarks on the third parties' comments by letter sent to the Commission on 27 October 2006.

(3) On 13 October 2006, the Commission sent a questionnaire to the third parties involved. The Commission sent the three distributing networks a request for additional information on 18 October 2006, to which Crédit Mutuel, La Banque Postale and Caisse d’Epargne et de Prévoyance replied on 26 October, 31 October and 3 November 2006 respectively.
On 14 November 2006, the Commission sent a letter to the French authorities containing the additional replies of the three distributing networks and the third parties concerned. This letter also contained additional questions from the Commission. The French authorities replied to this letter on 11 and 22 December 2006.

In a letter dated 23 November 2006, the French authorities asked to be sent a document submitted by a third party. The Commission granted this request on 24 November 2006, after explaining that it had already sent this document to the French authorities on 10 October 2006.

The Commission met with Caisse d'Epargne et de Prévoyance (8 November 2006), La Banque Postale (14 November 2006), the French authorities (19 December 2006) and Crédit Mutuel (15 January 2007).

2. State measure in question and companies concerned

2.1. The State measure in question

This Decision concerns the special rights granted by France to La Banque Postale, Caisse d’Epargne et de Prévoyance and Crédit Mutuel for the distribution of the 

livret A and livret bleu savings accounts.

Articles L221-1 to 221-6 of the French Monetary and Financial Code lay down the provisions common to these products. Articles L221-7 to 221-10, L518-25 and L518-26 of the Code establish the specific provisions applicable to Caisse d’Epargne et de Prévoyance and La Banque Postale. A decree dated 27 September 1991 specifies the arrangement applicable to Crédit Mutuel.

These provisions, and the regulatory texts that implement them, state that the livret A and livret bleu are savings products for private individuals; that they may be opened free of charge; that money may be withdrawn from or deposited into them at any time without charge; and that their balance may not exceed EUR 15 300.

The interest rate paid to savers for the livret A, which is not subject to tax, is pegged in equal measure to the Euribor 3-month index and to inflation. After tax and social security deductions that exempt the saver from further tax, the rate

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1 These are the commercial names given to the savings products, which are referred to in Article L221-1 of the Monetary and Financial Code under the names "livret A de la Caisse nationale d’épargne", "premier livret des caisses d'épargne et de prévoyance" and "compte spécial sur livret du crédit mutuel".

2 Articles R221-9 and R221-10 of the Monetary and Financial Code also list certain legal persons that may open such savings accounts (for example, charitable institutions).

3 Not including capitalised interest.

4 Article L157 of the General Tax Code with regard to income tax. Articles 1600-0 C to E and G of the Code, with regard to the general social contribution and to the social debt repayment contribution.

5 Regulation No 2003-03 of the banking and financial regulation committee.
paid to the saver for the *livret bleu* is equal to that paid for the *livret A*. The Caisse des Dépôts et Consignations (hereinafter referred to as the “CDC”) bears the costs of paying this interest.

(11) The sums collected are channelled through the CDC which, in exchange, pays the distributing networks an intermediation commission that is proportional to the total amount collected and varies according to network. The CDC uses these resources primarily to finance social housing.

(12) These provisions are such that the *livret A* and *livret bleu* offer similar features for both savers and the distributing networks. Therefore, for the purposes of this Decision they may be the subject of a joint analysis.

(13) By restricting the authority to distribute the *livret A* and *livret bleu* to La Banque Postale, Caisses d’Epargne et de Prévoyance and Crédit Mutuel, the Monetary and Financial Code has granted them special rights (hereinafter referred to as "the national measure") that apply to products with specific characteristics determined by the State, in particular the exemption from tax of interest earned.

2.2. Undertakings involved

(14) Law No 90-568 of 2 July 1990 on the organisation of public postal services and on France Telecom created the public institution La Poste and laid down what financial services it may provide. Law No 2005-516 of 20 May 2005 on the regulation of postal activities created, as from 1 January 2006, a credit institution owned by La Poste. This institution, "La Banque Postale", has the task of administering on behalf of the State the Caisse Nationale d’Epargne, a State-guaranteed public savings bank established in 1881 to receive the *livret A* deposits collected by the network of La Poste.

(15) Caisses d’Epargne et de Prévoyance (hereinafter referred to as "Caisses d’Epargne") is part of the savings-bank network that was granted cooperative status under Law No 99-532 of 25 June 1999 on savings and financial security. It is a credit institution. The *livret A*, created in 1816, was the only savings product that Caisses d’Epargne could offer its customers until 1978.

(16) Crédit Mutuel is a credit institution consisting of a network of local branches with the status of cooperative companies. The State granted partial tax-exempt status to the *livret bleu* under the Amending Finance Law No 75-1242 of 27 December 1975.

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6 The differences between the *livret A* and *livret bleu* are: different tax-exemption mechanisms (whose consequences are, however, identical for the saver in terms of the net interest received); different intermediation commissions (1.3% of the total amount collected for La Banque Postale, 1.1% for Crédit Mutuel and 1% for Caisses d’Epargne et de Prévoyance); different minimum amounts to open an account (EUR 1.50 for the *livret A* and EUR 15 for the *livret bleu*); deposits into a *livret bleu* are not guaranteed by the State. There are also certain differences between the *livret A* from La Banque Postale and the *livret A* from Caisses d’Epargne (see section 9.44). These differences are irrelevant when assessing the effects of the special rights, but they will be taken into account when assessing the general interest tasks carried out by each distributing network.

7 Since 1991 the net rate for private individuals has been identical to that for the *livret A*, which in effect makes the *livret bleu* completely tax exempt.
3. Legal framework

3.1. Application of Article 86(1) of the Treaty

(17) Under Article 86(1) of the Treaty, the Member States may neither enact nor maintain in force any measure that violates the provisions of the Treaty on behalf of undertakings to which they grant special or exclusive rights.

(18) While this Article presupposes the existence of undertakings that enjoy certain special rights, it does not follow that all such rights are necessarily compatible with the Treaty. Their compatibility must be judged in the light of the provisions of the Treaty.

(19) The second paragraph of Article 43 of the Treaty stipulates that freedom of establishment includes the right to take up and pursue activities as self-employed persons. Both legal and natural persons from the Member States are entitled to this freedom.

(20) The first paragraph of Article 49 of the Treaty prohibits restrictions on freedom to provide services within the Community in respect of service providers of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

(21) The distribution of the _livret A_ and _livret bleu_ and the channelling through the CDC of the funds collected in that regard constitute a self-employed activity within the meaning of the Treaty falling under the financial services sector. Selling savings products constitutes provision of services within the meaning of the Treaty. In particular, these services form part of the business of taking deposits or other repayable funds from the public carried out by credit institutions, an activity which is subject to the harmonised conditions laid down by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions. The Directive lays down arrangements concerning freedom of establishment and freedom to provide services in this sector.

(22) In accordance with Article 86(1) of the Treaty, it should be assessed whether the special rights granted to the distributing networks are compatible with Articles 43 and 49 of the Treaty, which prohibit restrictions on the freedom of establishment and the freedom to provide services enjoyed by nationals of one

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Member State on the territory of another Member State (hereinafter referred to as "the foreign operators"). Moreover, nationals of the Member State that introduced the measure enjoy the same rights that nationals of another Member State would enjoy under Community law in the same situation, in accordance with the case law of the Court of Justice of the European Communities.\footnote{Judgment of the Court of Justice in Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941, paragraph 29. Along the same lines, see the order of the Court of Justice in Case C-250/03 Mauri [2005] ECR I-267, paragraph 21.}

3.2. Concept of freedom of establishment

(23) To determine whether a national measure infringes the freedom of establishment protected by Article 43 of the Treaty, it must first be determined whether the measure applies without discrimination on the basis of nationality.

(24) In this case, the three distributing networks are undertakings established in France, the Member State that introduced the measure in question. Since all other banking establishments, whether they have their headquarters in France or another Member State, are unable to distribute the \textit{livret A} or \textit{livret bleu}, there is no reason to consider this measure discriminatory on the grounds of nationality.

(25) The fact that the provisions in question apply without distinction to all financial institutions, regardless of their nationality, does not, however, exclude the preferential arrangements applicable to the distributing networks from the scope of Article 43 of the Treaty. Article 43 precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, hamper or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty.\footnote{Judgment of the Court of Justice in Case C-19/92 Kraus [1993] ECR I-1663.}

(26) According to the case law of the Court, "the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons".\footnote{Judgment of the Court of Justice in Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 25.}

(27) The special rights granted to La Banque Postale, Caisses d’Epargne and Crédit Mutuel for the distribution of the \textit{livret A} and \textit{livret bleu} savings accounts exclude any operator that would like to offer these products to its current or future customers, in order to collect their savings and to channel the sums collected through the CDC in exchange for a commission. This exclusion applies to both foreign operators and operators already established in France for some time.

(28) As such, this exclusion directly limits by law the field of activity of these operators, which itself constitutes a restriction contrary to Article 43 of the Treaty. In the CAF case, the Court of Justice found that "such legislation, by restricting the ability to form CAF [tax insurance centres] to certain legal entities
meeting strict conditions, (…) is liable to make more difficult, or even completely prevent, the exercise by economic operators from other Member States of their right to establish themselves in Italy with the aim of providing the services in question”. Along the same lines, the Court of First Instance of the European Communities held that an exclusive right constituted, in itself, an obstacle to free establishment: "the Flemish rules granting the exclusive right to VTM make it impossible for a competing company from another Member State which wishes to broadcast, from Belgium, television advertising intended for the Flemish community as a whole to establish itself in Belgium since that finding alone is a sufficient indication of an impediment to freedom of establishment, (…)”.

(29) In this case, it is sufficient to remark that the distribution of the *livret A* and *livret bleu* constitutes, within the meaning of the Treaty, an activity as a self-employed person protected by Article 43. Given that the special rights to distribute the *livret A* and *livret bleu* constitute in themselves a restriction on freedom of establishment, the Commission must examine whether there are overriding considerations of public interest to justify that restriction (see Parts 7 to 9).

3.3. Position of the French authorities

(30) The French authorities dispute this interpretation of the case law of the Court. In the first place, they consider that the CAF judgment dealt "mainly with discrimination based on nationality" and that, therefore, its reasoning could not be applied to the present case.

(31) The Commission considers that the scope of the CAF judgment is not limited to cases of discriminatory measures. The Court of Justice distinguished between the regulations applicable to the CAF that are discriminatory in nature and those that apply generally. The distinction made by the Court of Justice between discriminatory measures and those that apply indiscriminately to any person or undertaking is not used to establish the existence of a restriction on freedom of establishment, but rather to determine the conditions in which such a restriction can be considered acceptable.

(32) The French authorities go on to state that the *livret A* and *livret bleu* represent "only a very low proportion of the financial assets of French households" and that their distribution "currently represents a negligible percentage of retail bank activity". Consequently, they argue, the special rights

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13 Judgment in *Servizi Ausiliari Dottori Commercialisti* cited above, paragraph 34. See also paragraphs 33 to 37.

14 Judgment of the Court of First Instance in Case T-266/97 *VTM* [1999] ECR II-2329, paragraph 114. See also paragraphs 108 and 112.

15 Judgment in *Servizi Ausiliari Dottori Commercialisti* cited above, paragraphs 36 and 37.

16 The conditions to be met in order for a measure to be considered compatible with the Treaty are stricter if the measure is discriminatory (only the reasons listed in Article 46 of the EC Treaty may be invoked).
granted to three banking networks for the distribution of this product do not constitute, in the terms of CaixaBank judgment\(^\text{17}\), a "serious obstacle" to the establishment in France of a foreign operator in order to carry out retail banking activities. Given that the special rights do not significantly impact such operators' access to the market, they do not contravene Article 43 of the Treaty.

(33) The Commission does not consider it necessary to decide on the relative importance of the distribution of the *livret A* and *livret bleu* in order to be able to determine the existence of an obstacle to freedom of establishment. It should be remembered that the right of establishment "allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State (…)\(^\text{18}\), regardless of whether the activities constitute in themselves a relevant market within the meaning of competition law or are smaller in scale and therefore merely form part of such relevant market. To establish the existence of a restriction on freedom of establishment, the Court of Justice thus restricted itself, in the CAF case, to examining "the services in question" – which were "certain types of tax advice" – without considering that it was necessary either to define the relevant market concerned or to assess the importance of this specific activity, both for consumers and for foreign operators, in relation to the broader activity of tax and accounting advice\(^\text{19}\). Nor did the Court of Justice examine whether the foreign operators had other equally effective or more effective means of establishing themselves for the purpose of exercising this type of activity. Thus, the Court of Justice has always confined itself to examining whether a measure was liable to prohibit, hamper or render less attractive the exercise of fundamental freedoms guaranteed by the Treaty\(^\text{20}\), without it being necessary to establish that the obstacle is of a serious nature. A measure liable to have a restrictive effect on freedom of establishment must be considered a restriction, even if the obstacle is not serious\(^\text{21}\).

(34) In conclusion, the Commission considers that the special rights in question constitute, in themselves, a restriction on freedom of establishment, the justification for which must be examined in relation to the general interest objectives cited (see Parts 7 to 9).

(35) Given the above, it is not necessary to carry out an analysis under Article 43 of the Treaty of the economic effects described below in order to establish that the measure constitutes a restriction on establishment within the meaning of the

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\(^{17}\) Judgment of the Court of Justice in Case C-442/02 *CaixaBank* [2004] ECR I-8961, paragraphs 13 and 14.

\(^{18}\) *Gebhard* judgment cited above, paragraph 23.

\(^{19}\) In any event, in the present case the activity is far from being minor: it gives rise to stable, significant remuneration and makes it possible to offer financial services to a large number of customers from all categories of the French population (see Parts 4 to 6).

\(^{20}\) See, for example, the judgment of the Court of Justice in Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 22 and the *CaixaBank* judgment cited above.

\(^{21}\) There is no *de minimis* rule in the field of fundamental freedoms. In this regard, see the judgment of the Court of Justice in joined cases C-177 and 178/82 *Criminal proceedings against Jan Van de Haar and Kaveka de Meern BV* [1984] ECR I-1797.
case law of the Court of Justice. Nevertheless the Commission will respond, subsidiarily, to the objections of the French authorities with regard to the issue of whether the special rights in question constitute a "serious obstacle" to the establishment and development of foreign operators in France. Accordingly, the Commission will first examine the effect of these rights in practice on the French market (see Parts 4 to 6). This analysis demonstrates even more clearly the particularly restrictive effects of the measures in question. The Commission will conclude by presenting its analysis in the light of the principle of freedom to provide services (see Part 10).

4. Relevant activity

(36) Unlike the Commission, the French authorities consider that it is necessary to examine whether in practice the special rights to distribute the 
*livret A* and *livret bleu* constitute a serious obstacle to establishment on the French market. The French authorities consider that, in order to assess the effects of the national measure, the market should first be defined. They propose analysing the impact of the *livret A* and *livret bleu* in the context of a market including at least all activities involving the collection of deposits from private individuals, or even retail banking activities as a whole.

(37) The Commission's merger decisions cited by French authorities do not, however, make it possible to conclude that the relevant market is as broad as claimed. In the Commission's decisions, retail banking is treated as a "sector" that can be segmented into "a certain number of services" including savings and the taking of deposits. In none of the cases cited was it necessary for the Commission to establish a precise market definition in order to conclude its analysis. The most that can be said is that the Commission considers that retail banking "comprises activities related to payment systems and related services (safe deposit boxes, etc.), savings products ("regulated" savings accounts, certificates of deposit and term accounts), off-balance sheet savings (SICAVs, investment funds and pension funds) and consumer credit"\(^{22}\). The French competition authorities adopt this same segmentation when, for example, they examine the impact of concentrations on the market of "bank savings for private individuals" while leaving open the question of the precise definition of the markets\(^{23}\).

4.1. Examination of the relevant products

(38) In this context, to carry out the subsidiary examination of the practical effects of the national measure, as requested by the French authorities, it is

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\(^{22}\) Commission Decision of 23 October 1995 in case M643 CGER Banque/SNCI (OJ C 293, 8.11.1995, p. 8). Moreover, in this case the parties had proposed defining a regulated savings market. This segmentation, which led to the identification of an "affected market" (see section 6 of form CO relating to the notification of a concentration), had served as the basis for the examination carried out by the Commission, which had been able to leave open the question of the market definition at the end of its analysis.

appropriate to examine whether there are products which, due to their characteristics in terms of price and usage, can be substituted for the *livret A* and *livret bleu*. The primary characteristics requiring examination are the liquidity, risk and net return\(^{24}\) of the various products, in order to assess whether consumers can consider them sufficiently interchangeable.

(39) The primary technical characteristics of the *livret A* and *livret bleu* are the following: high degree of liquidity\(^{25}\), no fees, very low entry threshold\(^{26}\), zero risk, return fixed by the State at a level higher than inflation, indexed-linked to the money market and greater appeal thanks to the tax exemption. That places them in a market including similar regulated tax-exempt products such as the Codevi, the *livret d’épargne populaire* (LEP) and the *livret jeune*\(^{27}\). Provided they offer a net return that is as attractive as that of the *livret A* and *livret bleu*, taxed savings accounts can also serve as a substitute, especially since they are governed by similar regulations\(^{28}\).

(40) The French authorities and certain interested third parties consider that, at the very least, the market should be defined more broadly as being the market for households' liquid savings, including all products that can be very rapidly converted into cash while keeping the capital protected\(^{29}\). This definition would result in including, in addition to the above-mentioned products, home-ownership savings, current accounts on which banks pay interest, the *Plan d’Epargne Populaire bancaire* (PEP), term accounts, certificates of deposit, UCITS, monetary SICAVs and life insurance products denominated in euros.

(41) The home-ownership savings account, *compte épargne logement* (CEL), offers a return that is significantly lower than that of the *livret A*\(^{30}\), so much so

\(^{24}\) Including management fees and any taxes.

\(^{25}\) Funds are immediately available.

\(^{26}\) Minimum payments from EUR 1.50 (*livret A*) and EUR 15 (*livret bleu*).

\(^{27}\) The interest rate paid to the saver for these three products is regulated by the State and is equal to or greater than that of the *livret A*. The Codevi is a tax-exempt savings account with a maximum allowed balance of EUR 6 000. The LEP is a savings book reserved for persons who pay little or no tax. The *livret jeune* is a savings account for 12-26 year olds.

\(^{28}\) These are accounts intended to collect savings and are characterised by the absence of entry and management fees, a high degree of liquidity and the absence of associated means of payment.

\(^{29}\) The French authorities therefore envisaged three market definitions: that of retail banking, that of the collection of deposits from private individuals and that of households’ liquid savings. For the reasons explained below, the Commission considers that the last, most narrow proposed definition remains too broad given the difficulty of substituting some of the products cited by the French authorities for the *livret A* and *livret bleu*. The Commission considers therefore, a fortiori, that the two other definitions cannot be accepted. With regard to a possible market for the collection of deposits from private individuals, this would result in including, in addition to the products in the liquid-savings market, of products such as listed and unlisted securities and life insurance as a whole. Even if consumers are sometimes able to juggle these various types of products and the *livret A* and *livret bleu* as part of their portfolio, it is nonetheless true that the latter's characteristics in terms of risk, return and liquidity are such that it would appear impossible to substitute the other products examined for them.

\(^{30}\) As of 31 August 2006, the CEL was offering a rate of 1.75%, subject to social security charges, compared to the tax-exempt rate of 2.75% for the *livret A*. 


that it appears that consumers' primary reason for using this product is a desire to obtain a loan at special conditions for the purchase or renovation of a property. However, this product also shares certain characteristics with the *livret A* and *livret bleu* such as liquidity, a very low risk and tax exemption (the latter being only partial for the CEL). The CEL, moreover, is traditionally included in liquid banking saving products. For the purposes of this Decision, one can therefore consider that there is a certain substitutability between the CEL and the *livret A* and *livret bleu*.

(42) On the other hand, the investigation of this case has shown that the other products cited are not substitutes similar enough to the *livret A* and *livret bleu* to be included in the analysis. It is true that it can be difficult to categorise the various savings products, since consumers may sometimes, depending on their specific needs and the relevant market conditions, make varying choices between products that have rather different characteristics. Nevertheless, products whose purpose, technical features (in particular liquidity and risk) or tax implications (and, more broadly, return including management fees) are clearly different from the *livret A* and *livret bleu* cannot be regarded as near substitutes for those products. The primary differences between the products cited by the French authorities and the *livret A* and *livret bleu* are the following.

(43) The home-ownership savings scheme, *Plan d'Epargne Logement* (PEL), is not a liquid savings product: it targets a specific project, the acquisition of housing, and the amounts invested are blocked for four years, whereas one of the main features of the *livret A* and *livret bleu* is their high degree of liquidity. Nor do the other banking savings products offer the same liquidity as the *livret A* and *livret bleu*: the PEP is a long-term savings product whose distribution was stopped on 25 September 2003. The amounts invested in the term accounts and certificates of deposit are unavailable for the duration of the contract (one month to five years); generally, with this type of product it is only possible to make a single payment, which must be above a significant minimum. Moreover, with regard to return it should be emphasised that the interest earned is taxed.

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31 In Banque de France’s statistics and analyses, this product is included under the heading "deposits with periods of notice", which also includes: the *livret A* and *livret bleu*, Codevi, LEP, *livret jeune* and taxed savings accounts.

32 If any funds are withdrawn prior to the end of the four-year period, the PEL is transformed into a CEL. This is not, however, the intended usage of consumers who sign up for a PEL, and when this is the case, they are classified as CEL holders. For the purposes of this Decision, it does not therefore appear appropriate to treat the PEL as equivalent to the CEL. Once the four years have passed, the saver may withdraw the sums invested in the PEL without penalty. This characteristic is not sufficient to consider the PEL as a substitute for the *livret A* and *livret bleu* because, notably, their purposes are clearly different (at the time of subscription, the saver chooses to invest in a PEL for the purpose of acquiring housing and not to purchase a liquid savings product).

33 Many *livret A* and *livret bleu* accounts see numerous in-and-out movements of funds. By way of illustration, a survey shows that savers perceive these products primarily as a reserve of funds available at all times. Source: TNS-Sofres survey commissioned by ING Direct and carried out in June 2006. The survey examined whether French citizens supported a broader distribution of the *livret A* (hereinafter referred to as the "TNS-Sofres survey").

34 If funds are withdrawn prior to the end of the four-year period, the PEP is automatically closed and all tax exemptions cancelled.
The net return of stock-linked savings products (UCITS and monetary SICAVs) differs significantly from that of the livret A and livret bleu: these are investments that in principle require the payment of entry, management and exit fees and the interest from which is taxed\(^{35}\). In terms of usage, these products generally require high minimum payments and are relatively complex to use, which presupposes some familiarity with the functioning of the monetary and financial markets. The livret A and livret bleu, on the other hand, are geared towards the general public. Remunerated current accounts, for their part, are not savings products\(^{36}\). Given the significant differences listed above, the PEL, the PEP, term accounts, certificates of deposit, life assurance policies, UCITS and monetary SICAVs and current accounts do not appear to be sufficiently interchangeable with the livret A and livret bleu for consumers to be able to regard them as substitutable with the latter.

### 4.2. Conclusion regarding the relevant activity

In these proceedings, the effects of the national measure will be assessed in relation to products that can be substituted for the livret A and livret bleu and which can be used by all banks to enter or extend their presence on the market for liquid banking savings products. The market, which is national in scope, will hereinafter be understood to include the livret A and livret bleu, the Codevi, the LEP, the livret jeune, ordinary savings accounts and the CEL.

This definition is similar to that outlined by the French Competition Council in its Opinion No 96-A-12 of 17 September 1996 on competitive conditions in the French banking and credit system. The Competition Council took the view that the livret A and livret bleu could "constitute one segment of a broader market that could be, subject to a detailed examination as part of a contradictory procedure, that of liquid savings products for private individuals or that of liquid savings products at regulated rates".

Alternatively, it follows from the Commission's analysis below that at any rate the granting of these special rights makes it less attractive in France to develop an activity involving the distribution and collection of liquid bank savings, even if there are other savings products that can be distributed to private individuals. The Commission considers (see Parts 5 and 6) that, given the characteristics of the livret A and livret bleu, restricting their distribution to

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\(^{35}\) Interest paid on a UCITS that is included in a stock-linked savings plan is partially tax exempt, but only at the end of a two to five-year term. For life-insurance products denominated in euro, the tax exemption takes effect only after an eight-year term. Moreover, the competition authorities are increasingly assigning insurance products and banking products to two distinct markets.

\(^{36}\) The purpose of a remunerated current account is to provide means of payment; this is not at all the case with the livret A and livret bleu. If the goal is to save, such current accounts are not very attractive because they pay little interest. CaixaBank, for example, offered a taxed return of 1.5%, compared with a net, tax-exempt return of 2.25% for the livret A at the same point in time; currently, the majority of current accounts in France do not earn interest; only six institutions pay interest on such accounts, at low levels of 0.5% to 3% gross, provided the customer maintains a minimum balance or subscribes to an additional service. Consequently, these accounts cannot as a rule be considered to be substitutes for the livret A and livret bleu.
certain networks makes it more difficult and expensive for a foreign operator to establish itself in France. The national measure comprises not only direct restrictive effects on the liquid bank savings market (see Part 5), but also indirect restrictive loss-leader effects (see Part 6).

5. Direct restrictive effects of the national measure

(48) The special rights in question have the direct effect of limiting a significant share of the market to three banks. The *livret A* and *livret bleu* continue to occupy a dominant position on the liquid bank savings market compared to other regulated savings accounts and savings accounts subject to tax. In this respect, the special rights in question hinder access to the liquid bank savings market in France for Community nationals and their exercise of banking service activities.

5.1. The special rights directly limit a significant share of the market to three banks

(49) In terms of value and volume, the *livret A* and *livret bleu* occupy an important position on the liquid bank savings market.

*In terms of value*

(50) In terms of value, the restricted activity occupies a significant share of the liquid bank savings market: EUR 128.4 billion in 2005\(^{37}\), i.e. 33%. The amount of these funds is relatively stable over time: over a ten-year period it ranged between EUR 119 and 128 billion.

(51) Thanks to the *livret A*, La Banque Postale and Caisses d’Epargne are the leaders on the liquid bank savings market (18.6% and 26.4% respectively). These percentages are higher than their natural market share (of bank deposits, excluding securities and life insurance, 11.5% and 14.8% respectively)\(^{38}\).

(52) The French authorities emphasise, however, that over the last fifteen years there has been a significant redeployment of households’ financial assets away from the *livret A*. In their view, the stability of the funds masks the fact that relatively fewer funds are invested in the *livret A*, given the overall increased wealth of the population and the production of interest on these products. They argue that the stability of the funds also hides that fact that significant funds are moving in and out of these accounts.

(53) The information provided by the French authorities does indeed show that over a long period the relative importance of the *livret A* has changed. That does not change the fact, however, that measured by value approximately one-third of the funds on the market are currently invested in products distributed by only

\(^{37}\) Source: Banque de France

\(^{38}\) Source: Banque de France
three banks. There is no indication that this proportion will change significantly in the short to medium term (three to five years), which is the period relevant for assessing obstacles to entering the market\textsuperscript{39}.

\textbf{(54)} The fact that the funds are stable does not of course prevent significant sums from being moved in and out of these products. This is in fact logical, if one considers that the funds are completely liquid, and the rate of movement does not appear to be higher than that of other similar products. It should be mentioned that although some of these accounts show a great deal of movement, the funds in many other accounts remain untouched. \[A \text{ significant portion}]\textsuperscript{*}% of La Banque Postale's \textit{livret A} and \textit{livret bleu} accounts saw no movement whatsoever during the past two years. Of Caisses d’Epargne’s \textit{livret A} accounts, \[a \text{ very significant portion}]\% (which represent \[significant portion]\% of the funds) did not see a single financial transaction in 2005. A significant portion of the funds collected is therefore \textit{de facto} not very mobile, which makes it difficult for new foreign operators to acquire market share. The special rights thus have the direct effect of limiting a significant share of the market to the three distributing networks. The market cannot be directly accessed by foreign operators, because they are unable to compete by offering consumers the same product, and is in part rather static.

\textit{In terms of volume}

\textbf{(55)} Even more significant than the effects of the \textit{livret A} and \textit{livret bleu} on market share in terms of value is their impact on market share in terms of volume. Between 46 and 50 million persons (70 to 80\% of the population) hold a \textit{livret A} or \textit{livret bleu}, making them France’s most popular savings products.

\textbf{(56)} This means that the three distributing networks hold a very significant market share in terms of volume, i.e. they have a very substantial portfolio of customers. The order of magnitude of the figures can be gauged by comparing them to the number of customers of the other banking establishments in France, i.e. approximately [15-25] million for Crédit Agricole (including LCL), between six and nine million for most of the other large network banks\textsuperscript{40} and [400 000 ; 500 000] for a recent entrant such as ING. By comparison, only 24\% of the French population have a Codevi, which is available through all banks. A comparison of the numbers of Codevi and \textit{livret A} holders per bank shows [5-10] million (Crédit Agricole) and [1-4] million (Société Générale) for the Codevi and [20-25] million (La Banque Postale), [20-25] million (Caisses d’Epargne) and [4-8] million (Crédit Mutuel) for the \textit{livret A}.

\textbf{(57)} As a direct consequence of the special rights, any person in France wishing to hold a \textit{livret A} or \textit{livret bleu} must go to one of the three distributing networks. But as the figures on the number of \textit{livret A} and \textit{livret bleu} holders show, the vast majority of the French wish to have one of these savings accounts and thus are obliged to become customers of one of the three distributing networks.

\textsuperscript{39} See Part 5 on the current appeal of the \textit{livret A} and \textit{livret bleu}.

\textsuperscript{*} Business secret.

\textsuperscript{40} Société Générale, BNPP and Banques Populaires.
These products are also held by an extremely broad segment of the French population, in both urban and rural areas and across all age groups and all socio-professional categories.

(58) This customer portfolio constitutes a significant advantage in a mature banking market in which it is crucial for all players to gain new customers. Admittedly, this covers various types of individual situations, given that a significant number of the holders of the livret A and livret bleu accounts have other banking and financial products with other banks. Even so, these are all customers whom the three distributing networks have in their portfolios and with whom they are in a position to develop their banking relationship.

(59) In fact, this situation does not change substantially over time: it is estimated that approximately […]* livret A accounts are opened every year, which accounts for approximately [1-4]% of these savings accounts. The orders of magnitude are similar for the number of closures of these accounts, but it should be noted that nearly [a significant portion]% of livret A closures at La Banque Postale follow the death of the holder. In 2005, there was a net loss of approximately […] accounts. It follows that relatively few of these accounts are closed by their holders in order to go to a competitor. Moreover, these accounts are generally held onto over long periods: approximately 70% of the accounts have been open for more than ten years, and only 3% are less than one year old41.

(60) The second direct consequence of the extremely high distribution rate of the livret A and livret bleu is that the vast majority of the French already have a liquid bank savings account, some of them from a very young age. A new entrant is therefore confronted with a market on which it is particularly difficult to win customers, since it must be done primarily by attrition rather than by the creation of new customers. At the same time, customers in the banking sector do not change banks readily.

(61) The livret A and livret bleu are currently popular and appear likely to remain so, offering as they do objective benefits (high liquidity, respectable return supplemented by the tax exemption and zero risk)42. The history of the livret A is such that the French have a strong emotional attachment to it. Created almost two

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* Business secret.

41 Source: TNS-Sofres survey. By comparison, one bank has provided figures showing that 40% of its Codevi have been open for more than ten years and 9% for less than one year.

42 Under the draft finance law for 2005, the government emphasised, along the same lines, that "from August 2000 the increase in the rate of return on the livret A, to a level higher than market rates, combined with turbulent stock markets, have made this safe, liquid and tax-free investment appealing once again" (National Assembly, response to question No L 24, housing budget). The appeal of the livret A was described in the following terms in March 2003 in issue No 111 of the Banque de France bulletin ("The livret A: another look at changes to a traditional savings product", D. Gabrielli and F. Wilhelm) : "[…] this continues to be an appealing account for households: it is the most popular financial product in the country and continues to represent a very significant proportion of the monetary investments of French economic agents. At a time when households can choose from more and more investment products, the funds invested have increased over the last two years following a period of decline. At the end of two decades of financial innovation, the livret A continues to play a leading role in households' monetary investments […]." (p. 73)
centuries ago, the _livret A_ inspires confidence (stability and protection of the capital invested in the product) and enjoys a positive image thanks in part to the general-interest tasks it helps finance. Consumers know the product very well. French authorities, as well as the interested third parties, emphasise "the universality" of this "legendary" product, which is part of France's "collective inheritance".

(62) Because of their importance in terms of value and volume on the liquid bank savings market, the _livret A_ and _livret bleu_ make it relatively difficult for new operators to enter the market: the savings are in part not very mobile, and most consumers are already catered for through a popular, appealing product. It is necessary, however, to examine whether the credit institutions are capable of offering French consumers, whether or not they have a _livret A_ or _livret bleu_, comparable products that are sufficiently appealing to be able to establish themselves and grow on the French market. In this respect, various factors indicate that the existence of the _livret A_ and _livret bleu_ makes it more difficult and costly to break into the French market.

5.2. The _livret A_ and _livret bleu_ remain dominant in relation to other regulated saving accounts

(63) To compete with the _livret A_ and _livret bleu_, French and foreign banks can offer comparable regulated products (Codevi, LEP, _livret jeune_, CEL). It should be noted, however, that the funds invested in these products represent only EUR 149 billion, slightly more than the cumulated funds of the _livret A_ and _livret bleu_. However, these are four different products which are distributed by a wider network, composed of all banks in France, including the networks that distribute the _livret A_ and _livret bleu_. In volume terms, the significant differences in the number of holders of the _livret A_ and _livret bleu_ and other regulated savings products have already been discussed in Section 5.1.

(64) The limitations of these products explain why they have been less successful than the _livret A_ and _livret bleu_: until recently, the Codevi had a maximum balance of just EUR 4 600\(^44\); the LEP is for individuals with moderate incomes; the _livret jeune_ is for 12-26 year olds only\(^45\); and the CEL offers a lower net return. By comparison, the _livret A_ and _livret bleu_ have no conditions for

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\(^{43}\) In their reply to the Commission dated 11 December 2006, the French authorities described the _livret A_ as follows: "the universal nature of the _livret A_/bleu is the result of its specific characteristics: by law, it is accessible to everyone (including minors, foreigners, non-residents) (...). In practice accessible to all, the _livret A_ is and remains a product that is simple to use (...). The _livret A_ is a complete product, (...) which can be used alongside a traditional savings account and as a "form" of bank account".

\(^{44}\) In January 2007, this maximum balance was raised to EUR 6 000, which is still well below that of the _livret A_.

\(^{45}\) The report by Mr Nasse and Mr Noyer on the balance of savings funds (29 January 2003, p. 16) concludes that, in view of the _livret jeune's_ characteristics, it constitutes only "limited competition" for the _livret A_.

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opening\textsuperscript{46} and offer appealing operational features (simple to use, no fees, payments and withdrawals from EUR 1.50 for the \textit{livret A})\textsuperscript{47}.

(65) The French authorities emphasise, however, that because the majority of \textit{livret A} accounts do not reach the ceiling of the Codevi, for most consumers these two products would be perfectly substitutable. From a purely technical point of view, the two products do appear to be quite substitutable, even if the Codevi is probably less flexible\textsuperscript{48}. Even for consumers not reaching the Codevi ceiling, it could make sense to choose, among two very similar products, the one with the fewest restrictions, i.e. the \textit{livret A}. Moreover, one must take into account the impact of other, more subjective factors relating to the history of the \textit{livret A} and its image.

(66) For savers with significant funds, the Codevi and \textit{livret A} or \textit{livret bleu} can moreover constitute complementary products, making it possible to reach a ceiling of EUR 19 900, tax free, compared with the ceiling of EUR 4 600 with a Codevi only\textsuperscript{49}. For ease of management, many private individuals also tend to have their current account and liquid savings account in the same bank. If a customer wishes to have a \textit{livret A} or \textit{livret bleu}, only the three distributing networks concerned are in a position to offer a one-stop shopping solution.

(67) In short, although certain standard regulated products do constitute substitutes for the \textit{livret A} and \textit{livret bleu}, the fact remains that the latter are particularly appealing to consumers, whether for their objective characteristics or historical tradition. Under these conditions, because of the special rights to distribute the \textit{livret A} and \textit{livret bleu}, it will be relatively more difficult for a new entrant to enter and grow on the French market for liquid bank savings, even if that entrant is in a position to offer other tax-exempt products.

5.3. Taxed saving accounts have difficulty in offering a real alternative to the \textit{livret A} and \textit{livret bleu}

(68) Ordinary savings accounts can also offer a substitute for the \textit{livret A} and \textit{livret bleu}; in 2005, EUR 113 billion were held in such accounts. Being able to offer a savings book can help new entrants establish themselves, attract customers and collect funds. A bank can for example choose to offer a savings account with

\footnotesize{\textsuperscript{\begin{enumerate}
\item Exception: one \textit{livret A} or \textit{livret bleu} per natural person. Notably, there is no condition of nationality or residence to open a \textit{livret A}.
\item A report by Senator Alain Lambert (“The French banking system: current situation and future prospects”) cites a number of other reasons to explain the "imperfections" faced by the products that could, in part, substitute for the \textit{livret A} and \textit{livret bleu} (Report No 52 of 30 October 1996, p. 88).
\item The Codevi requires higher minimum payments and does not offer a cash withdrawal card. The TNS-Sofres survey also indicates that the \textit{livret A} is perceived as being "more flexible and easier to use".
\item The data precede the increase to the ceiling. There is a real demand for liquid savings products with ceilings greater than the Codevi. This has recently resulted in the development by certain banks of "super-livrets" with ceilings higher than the Codevi's EUR 4 600. On its internet site, La Banque Postale offers a "smart tip" enabling consumers to save up to EUR 19 900 tax free by simultaneously opening a \textit{livret A} and a Codevi with La Banque Postale.
\end{enumerate}}}
a particularly attractive interest rate on which, in the short run, the bank earns no margin. The goal is to acquire customers to whom other, more profitable products can be sold ("loss-leader effect ").

(69) The French authorities consider that such a strategy is possible in France, as ING's success illustrates, and that the existence of the livret A and livret bleu is not likely to prevent that. In particular, they believe that the livret A does not play the role of a "standard" in evaluating the return and characteristics of other savings accounts and that the tax exemption it offers has little real impact.

(70) On the contrary, the Commission at the end of its investigation considers that the existence of the livret A and livret bleu makes such a strategy less effective and more costly in France. As far as the role of a "standard" is concerned, it can be accepted that since the livret A was pegged to the Euribor 3-month index, it is no longer possible to distinguish the impact of the one or the other on the fixing of the rate on taxed savings accounts that is offered to savers. However, given the importance of the livret A on the market, it seems clear that its net rate constitutes a reference used by competitors to fix their rates. Thus in 2004, several banks offered their customers an interest rate of 3.05%, which after tax is equivalent to the 2.25% offered on the livret A and livret bleu.

(71) In the medium term, however, because of the tax exemption, competitors are not necessarily always in a position to align their rates with the livret A. Under the current market conditions, it would be necessary to be able to offer more than 3.76%, i.e. a rate higher than that offered by the banks surveyed, including the "loss-leader rates" offered temporarily by new entrants on this market, who lose money by doing so. Thus the rate of the livret A appears to function as an upper limit that other banks seek to match (outside of promotional periods). In this way, the tax exemption granted only to the livret A and livret bleu increases the costs for foreign banks that would like to offer a similar product. Thus it appears difficult to offer a product whose rate is comparable to the net rate of the livret A and that is financially sustainable over the long term.

(72) But given the appeal of the livret A and the attachment to it in France, a bank should actually be in a position to offer not an equivalent rate but rather a higher net rate over an extended period of time. Consumers must be convinced to trade an account guaranteed by the State that is stable and safe and helps finance

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50 Source: Morgan Stanley Research "Decelerating Retail Volumes and Deteriorating Economic Outlook" (10 December 2004).

51 Over a three-year period, for example, the difference between the rate offered by a competitor and the equivalent gross rate of the livret A varied between + 25 and -102 base points ("bp"). For most of this period, both rates were almost identical; there were three times as many months during which the difference was significantly unfavourable to the taxed savings account (i.e. a difference equal to or greater than 25 bp) than there were months during which the rate of the taxed savings account was greater than the equivalent gross rate of the livret A. Source: confidential data, business secrets.

52 It should be added that the gross rate offered on taxed savings accounts must also take into account the cost, for the credit institutions, of the contribution paid to the deposit guarantee fund. Funds invested in the livret A, on the other hand, are not included in the basis for calculating this cost for La Banque Postale.
general interest services for a new savings account that does not provide the same guarantees or have the same history.

(73) The French authorities contest, however, the degree of importance consumers place on the tax exemption when making their choice. They emphasise that the exemption represents only slight savings over the course of a year and that, by definition, it interests only those households subject to income tax, i.e. approximately half the French population.

(74) However, the Commission's investigation of the case indicates that, on the contrary, the tax exemption plays a major role in the choice of consumers. In financial terms, having to pay tax on the funds would represent a loss of income of 26% annually for savers. In terms of consumers' attitudes and habits, France is notable in Europe for its citizens' attachment to tax-exempt saving: 72% of liquid savings are invested in this type of product, compared to the European average of 31%. The example cited by the French authorities of the drop in funds collected following a "minor" change to the tax regime applicable to the PEL also seems to demonstrate the importance of this factor in the choice of the consumers. Several Banque de France bulletins also confirm "the significant impact of tax breaks on the investments made by French households."54

(75) The French authorities emphasise, however, that ING successfully entered the French market using a strategy based on a taxed savings account. In this respect, it should first be emphasised that ING is an isolated example and that it is unknown, for each successful entry, how many banks fail to or give up on launching themselves on the French market for liquid bank savings because of the existence of the special distribution rights for the livret A and livret bleu.

(76) Regarding ING, the bank has provided data to the effect that its entry on the French market was relatively more difficult and expensive than its entry on the Italian and Spanish markets. ING considers that its establishment and development costs were between [...] times higher in France than in Italy or Spain55. It was thus forced to practise a more aggressive commercial policy and earn margins lower than those in other countries. La Banque Postale emphasises, however, that the gross rate offered on ING's livret Orange falls within the average of the rates ING offers in other European countries. By this reasoning, the existence of the livret A is not forcing ING to offer a higher rate in France. This is not accurate: according to the confidential data communicated by ING, the gross rate offered in France has been [...] higher than the rate offered in Germany, Spain and Italy for [...] months (with the exception of [...] , that cited


55 ING offers the livret d'épargne Orange, with characteristics very similar to the livret A and livret bleu: no fees for opening an account or making deposits and withdrawals, total liquidity, minimum threshold of EUR 15. The maximum balance, however, is much higher (EUR 3 million) given the absence of any tax exemption.

56 ING estimates its costs for winning customers, in relation to an index of 100 in France in 2003, to be 94 in France in 2006, 50 in Spain and 77 in Italy. Advertising expenditure, in relation to an index of 100 in France in 2003, was estimated at 181 in France in 2006, 116 in Spain and 133 in Italy.
by La Banque Postale, during which the rate offered in France, while remaining higher than that in Germany and Spain, was just five bp lower than that in Italy). In total, ING estimates that it incurred [60-80] million in additional costs because of competition from the *livret A*\(^\text{57}\).

(77) Thanks to its significant investments in order to enter the French market, ING managed to develop its market share in terms of value. However, ING did not succeed in establishing itself outside a circle of high-income customers. By comparison, ING Italy and Spain have 30% and 150% more customers respectively than ING France. More generally, an interested third party emphasises that the increase in the amount of funds in taxed saving accounts (all banks taken together) masks the fact that the number of households with such accounts stagnated at around 6% from 2000 to 2005.

(78) All in all, the existence of the *livret A* and *livret bleu* makes it more difficult and costly to enter the French market for liquid bank savings by offering a taxed savings account. Beyond having to pay a gross rate which after tax is comparable to the tax-exempt rate of the *livret A*, a new entrant must struggle to win new customers, who often already have a *livret A* or *livret bleu*.

(79) Under these conditions, it hardly is surprising that few French banking establishments have developed savings accounts to compete directly with La Banque Postale, Caisses d'Epargne and Crédit Mutuel and their *livret A* and *livret bleu* accounts. This reduces the range of products available to consumers. With regard to banks from other Member States, only one has managed to establish a lasting presence on this market, by being willing to pay higher costs than those required in neighbouring countries.

5.4. Conclusion on the direct restrictive effects of the national measure

(80) It is clear from the above, in so far as such further evidence is necessary, that the national measure must be considered a restriction within the meaning of Article 43 of the Treaty.

(81) The special distribution rights for the *livret A* and *livret bleu* make it more difficult and costly to enter and develop a presence on the market for liquid bank savings in France. Significant market share in terms of value and, especially, volume remains limited to three credit institutions. In this context the available substitutes, whether other regulated savings products or taxed savings accounts, do not enable banks to acquire deposits and customers under the same conditions.

(82) With regard to foreign operators\(^\text{58}\) in particular, it should be emphasised that, as a new entrant, a competitor trying to establish itself on a market is in a

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\(^{57}\) The calculation assumes 20% fewer deposits and a profit margin of 20 fewer bp because of the need to offer an appealing return compared to the tax-exempt *livret A*.

\(^{58}\) As noted earlier (see Part 3), nationals of the Member State that introduced the measure enjoy the same rights that nationals of another Member State would enjoy under Community law in the same situation. In this regard, see the *Servizi Ausiliari Dottori Commercialisti* judgment cited above, paragraph 29.
fragile commercial and financial situation. Consequently, all constraints that limit the new entrant's activity have a greater impact than they would on the activities of established banks. In the present case, the existence of the *livret A* and *livret bleu*, which foreign banks may not distribute, clearly constitutes a significant constraint for any new entrant. The new entrant must compete with a product that is widely distributed, popular and tax-exempt. The law excludes the new entrant from one segment of the market, and the existence of the product in question makes it more difficult and costly to win customers and their deposits. The effect of the special rights appears to have a greater impact on foreign operators than on banks already established in France, which cannot sell this product either, because the latter already have a developed customer base, a public image and a network of agencies.

(83) For foreign operators, the special distribution rights constitute a significant obstacle to carrying out an activity involving the collection of liquid bank savings from private individuals in France. The effect of this exclusion is to strengthen the restrictions that these operators encounter when they wish to establish themselves on the French market.

6. Indirect restrictive effects of the national measure

6.1. The indirect loss-leader effects of the national measure are liable to make it even more restrictive

(84) It has been suggested in a number of reports, for example by the French Competition Council, the French Parliament and research bodies, that the *livret A* and *livret bleu* have a "loss-leader effect" which enables the distributing networks to acquire customers at little cost, to secure their loyalty and to offer them other banking products. This view is shared by a group of banks (Crédit Agricole, Société Générale, BNPP, Banques Populaires and ING, hereinafter "the complainants").

(85) There are around 50 million *livrets A* and *livrets bleu*, making them the favourite savings products of French consumers. This is in itself evidence of their appeal. Because of the special rights, the benefits of this popularity are enjoyed by just three networks, which therefore have a very broad customer base covering

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59 A study commissioned by Caisses d’Epargne carried out on 19 November 2006 by M. Ivaldi, B. Chizzolini and V. Cerasi and entitled "Is the distribution system of livret A a significant barrier to entry into the French banking market?" drew the opposite conclusion: that any barrier to entry created by the distribution system is in fact minimal. The Commission would note that this study fails to define the relevant market under consideration and evaluates entry costs only in the case where a new network of agencies is created. In the light of these elements, the Commission cannot share the conclusions of this study.

60 See in particular the opinion of the French Competition Council (Opinion No 96-A-12 of 17 September 1996, p. 8), an information report by French Senator Alain Lambert (Report No 52 of 30 October 1996, p. 72) and a study by Nathalie Daley of CERNA, the Centre for Industrial Economics (*La banque de détail en France: de l'intermédiation aux services*, February 2001, p. 9).
a large part of the French population and totally out of proportion to their market shares in other banking products. This brings the distributing networks into regular contact with a very large number of customers, on whom they build up useful data in order to offer them other services at low cost.

(86) The French authorities and the distributing networks dispute the existence of any loss-leader effect, arguing that, if such an effect did exist, it would be reflected in larger and growing market shares. They also point to the large number of "single-product" customers holding a livret A or livret bleu\(^61\) which, they claim, is evidence that there is no customer loyalty and no cross-selling based on that product.

(87) Examination of the case shows that it is difficult to deny the existence of a loss-leader effect, although there may be room for discussion on its extent and, especially, on how to quantify it. Since the business of banking entails high fixed costs and low marginal costs, it is part of a bank's strategy to develop cross-selling\(^62\), there being little marginal cost in offering an additional product to one of its customers. In their reply, the French authorities themselves concur with this view, observing that banks analyse their profitability by customer and not by product. The Commission's survey of the retail banking industry also shows that cross-selling, using as a basis both current accounts and passbook savings accounts, is rather more prevalent in France than in the rest of the Community.

(88) The existence of "single-product" livret A and livret bleu customers does not prove the absence of a loss-leader effect, as such an effect is at least likely to have had an impact on all customers who have one or more products other than livrets A and livrets bleus with Caisses d'Epargne ([more than one third] \%), La Banque Postale ([more than one third] \%) or Crédit Mutuel ([a very significant portion]%\(^63\). On the basis of the available data, it is difficult to identify what proportion of these customers have been acquired and kept loyal as a result of the livret A and livret bleu. Nevertheless, the TNS-Sofres survey provides some interesting pointers: the prime reason cited for entering a relationship with La Banque Postale and Caisses d'Epargne is the desire to open a livret A\(^64\). On the question of customer loyalty, it is worth noting that 70% of livrets A have been open for over ten years.

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61 Customers who have dealings with more than one bank but whose only account with the distributing networks concerned is a livret A or livret bleu.

62 By way of illustration, in a recent study by Accenture on the strategic priorities of banks worldwide, 79% of banks surveyed gave as their first priority cross-selling aimed at maintaining and developing the portfolio of existing customers.

63 It also seems obvious that a special right to a given product automatically creates "multi-bank" customers, unless that special right leads to a monopoly on all markets (in other words, the "inducement" effect, whatever its force, cannot work on absolutely all customers). Similarly, the fact that the market shares of the distributing networks are not growing (and the disparity between their commercial market shares and their market shares in sales outlets) can be explained by a number of reasons, whether or not they derive an advantage from the special rights to distribute livrets A and livrets bleus.

64 However, this information must be interpreted with care as it is of course skewed by the existence of special rights: all "multi-bank" customers who use the distributing networks concerned only to gain access to a livret A or livret bleu fall into this category by definition.
The loss-leader effect does not work on all customers, as is shown by the existence of customers holding only a *livret A* or *livret bleu*. However, the distributing networks are nevertheless interested in this type of customer, as they can continue to offer them other products on preferential terms. In the case of La Banque Postale, that advantage has been even greater since January 2006, as it is now able to offer its customers a range of products comparable to that of other banks.

To try to evaluate the loss-leader effect relating to the *livret A* and *livret bleu*, it is also worth examining its impact on a strategic target group for banks, especially in a mature market, i.e. children and young people who have yet to open a bank account. It appears that over six million *livrets A* and *livrets bleus* are currently held by minors. According to the TNS-Sofres survey, 40% of savers opened their *livret* before the age of 18 and 70% before the age of 25. In more than a third of these cases, the account was opened by a third party; this includes the practice in certain municipalities and maternity hospitals of offering them as gifts on childbirth. The complainants claim that the *livret A* and *livret bleu* are effective and inexpensive methods of capturing young customers at an early age. They point out that most customers sign up with their main bank at between 17 and 18 years of age and that 55% of customers who have dealings with more than one bank keep as their main bank the one with which they had their first account. All these factors demonstrate the strategic importance for banks of being the first to establish a relationship with young customers. Moreover, thanks in particular to the *livret A* and the *livret bleu*, the younger end of the market appears to be dominated by the three distributing networks, which achieve results that are higher than their natural market shares.

Lastly, a significant proportion of consumers tend to concentrate their bank dealings on a single bank. If those consumers have already had a *livret A* or *livret bleu* for some time, they may find it natural and easier to concentrate their dealings on the distributing networks. In this regard too the *livret A* and *livret bleu* would have a loss-leader effect and serve to secure customer loyalty.

The distribution of *livrets A* and *livrets bleus* therefore has a loss-leader effect which exacerbates the restrictive nature of the national measure in the French market.

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66 The rate of recruitment before the age of 16 is […]% for Caisses d’Epargne and […]% for Crédit Mutuel, compared with […]% for all banks in the market (Source: OPERBAC 2006 survey).

67 Source quoted by the complainants: study by Actudes.

68 […]% of 0-17 year-olds with bank accounts are with Caisses d’Epargne and […]% with La Banque Postale; […]% of young person’s savings accounts have been opened at the three distributing networks (source: OPERBAC 2006 survey).

69 [More than 50]% of French people had dealings with just one bank in 2006, […]% increase in 1999 (source: OPERBAC 2006 survey).
6.2. The *livret A* and *livret bleu* would be effective tools for new entrants seeking to establish themselves in France

(93) Given their direct and indirect restrictive effects, the special distribution rights constitute an obstacle to both freedom of establishment and access to the French market which can be regarded as serious. It may also be useful to consider, although it is not necessary to do so with regard to the case law of the Court under Article 43 of the Treaty, to what extent the abolition of these rights - and hence the possibility open to all banks to offer this product to their customers - would make it easier for banks from other Member States to establish themselves in France.

(94) First, the French authorities dispute that this product can serve as a useful tool for entering the French banking market. They argue that the business of banking consists of converting savings into loans, but this is not possible with the *livret A* and *livret bleu* because all the funds are channelled through the CDC.

(95) Examination of the case shows that the product in question could form a major component in a strategy for entry to the French market. First, the activity itself is a means of securing a significant and stable income without taking major risks. Thus, the special rights have the direct effect of reserving for the three distributing networks established in the Member State that initiated the national measure an activity worth €[...]. billion in 2004, i.e. [...]% of the net retail banking income of La Banque Postale, [...]% of that of Caisses d’Epargne and [...]% of that of Crédit Mutuel. Over the long term this can be regarded as a stable income, as the intermediation commission did not vary between 1991 and 2004, although it was reduced twice in 2005.

(96) Second, as noted above, the *livret A* and the *livret bleu* can be an effective product for acquiring customers and securing their loyalty, particularly in the case of young customers. The complainants argue that "for a bank wishing to enter a market, the key factor is to establish a relationship with the customer." The *livret A* and *livret bleu* appear especially suited to this purpose, as they allow banks to reach out to all sections of the French population.

(97) Finally, the fact that all the funds are centralised is not necessarily a drawback, as the conversion of the collected savings into loans requires an infrastructure that is more developed and hence more risky to set up. Moreover, banks now devote a growing share of their activities to pure distribution activities, such as the selling of life insurance. Furthermore, the *livret A* or *livret bleu* can be a valuable tool even for lending activities, the key factor being to acquire customers whom the bank can then offer loans.

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70 Compared with traditional banking activities, this distribution activity does not create any intermediation risk (in the present case it involves a long-standing and popular product with low marginal costs, which provides an income in the form of a commission).

71 [...]% of the net banking income of the Crédit Mutuel if one excludes the CIC, which does not distribute the *livret bleu*. Source: annual reports.

72 The complainants argue that lending activities do not necessarily draw on the collection of savings, but may be financed from other sources.
The French authorities claim that it would be more appropriate to base an entry strategy on the purchase of an existing banking network or on an innovative, flagship loss-leader.

From a legal point of view, as soon as a national measure effectively constitutes an obstacle to market access, the Court considers that there is no point in examining whether there are other effective means of entering that market. As regards the substance of the argument, buying a network requires a very large volume of capital and a rare market opportunity, while other tools such as consumer credit or mortgage lending appear to be more risky and more expensive ways of gaining market entry.

The *livret A* or *livret bleu* is clearly not the only possible avenue for entering the French market. Nevertheless, it would enable foreign banks to offer a product familiar to the public which is safe and yields an attractive net rate of interest, while enjoying an intermediation commission that guarantees them a certain turnover. In the absence of a network as extensive as that of competitors who are long established in France, foreign banks might find in the *livret A* or *livret bleu* a product that helps them build up market shares in value and volume. It cannot be ruled out that this tool might be applied as part of a direct banking service via the Internet, but this is not the only application, as some credit institutions established in other Member States, such as HSBC, already have a significant network in France.

In these circumstances, it can be concluded that the special rights are not only a restriction on freedom of establishment in themselves (see Part 3), but in practice also hinder access to the market for liquid bank savings in France. The national measure makes it less attractive for credit institutions established in other Member States to exercise their right to freedom of establishment in France. In view of these considerations, the special rights granted to the distributing networks must be regarded as restricting the freedom of establishment guaranteed by Article 43 of the Treaty. The justification for such a restriction must be examined in the light of the criteria laid down by previous Court decisions (see Part 7).

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73 See for example paragraph 15 of the judgment in *CaixaBank* cited above.

74 These products require a project on the customer's part, risk selection by the bank and sufficient solvency to guarantee repayment.

75 See the judgment in *CaixaBank*, cited above, paragraph 13 of the grounds.

76 Since 2000 the CCF group, which has 780 branches, has been part of the HSBC group, which has its headquarters in London.
7. Justification of the measure with regard to Article 43 of the Treaty on account of imperative requirements in the general interest

(102) Restrictions on freedom of establishment can be accepted only if the national measures meet four conditions: "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

(103) While the first condition need not be re-examined here, the French authorities cite two imperative requirements in the general interest to justify the special rights in question: first, the financing of social housing through the build-up of savings and, second, the accessibility of banking services. They point out that the Court has not supplied a restrictive list of what constitute "imperative requirements in the general interest" and has accepted reasons as diverse as the encouragement of long-term savings and consumer protection.

(104) The Commission observes that, although the Court has accepted the encouragement of long-term savings as an imperative requirement in the general interest, the financing of social housing, being an economic objective, cannot be allowed as a justification in relation to Article 43 of the Treaty. The financing of social housing is undoubtedly a legitimate objective of general interest, but, in the Commission's view, it cannot constitute an imperative requirement in the general interest within the meaning of the Court's decisions. By contrast, access to housing, which is ultimately the prime objective pursued in the financing of social housing, could be defined as an imperative requirement in the general interest. On principle, there is no problem in defining the objective of the accessibility of banking services as an imperative requirement in the general interest.

(105) If the reasons cited are to be considered admissible, the measure in question must be suitable for attaining the objectives pursued and must not go beyond what is necessary.

8. Necessity and proportionality of the measure with regard to Article 43

(106) The French authorities argue that the system in place is suitable for securing the attainment of these objectives. First, it has long since proved its capacity to meet the financing requirements of social housing organisations in a stable and inexpensive manner. Second, the *livret A* has effectively played - and to some extent continues to play - a role in introducing a number of people to banking services.

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77 See the judgment in *Gebhard*, cited above, paragraph 39.

78 Judgment of the Court of Justice in Case C-158/96 *Kohll*, paragraph 41.

79 In any event, the Commission sees no direct and essential link between the build-up of savings on the one hand and access to housing on the other. The two aspects must therefore be considered separately.
(107) The Commission is not seeking to contest the system’s capacity to meet the said objectives. However, it considers that the special rights in question are not indispensable in order to attain them. First, the aim of building up savings is no justification for confining the distribution of these products to certain networks, as such a build-up could be encouraged by traditional methods of tax benefits for households, without the need for restrictions on the distributing institutions, as is shown by the examples of life insurance and, in the specific case of savings by the general public, the LEP.

(108) Second, there are many tax and budgetary tools that could be used to finance social housing. Among these, an appeal for national savings via tax-free savings books may be a valuable instrument, but it does not necessarily require the granting of special rights, as the examples of the Codevi and the LEP show.

(109) Lastly, the objective of accessibility to banking services is one that can be promoted by all banks, as the French authorities have shown by drawing on all players in the banking system to implement its policy of extending the right to a bank account to the poorest sections of the population. All other things being equal, the granting of special rights can only restrict access to banking services.

(110) Given the extent of its direct and indirect effects, the national measure also appears to infringe the principle of proportionality (see Parts 4 to 6).

(111) If the special distribution rights were to be abolished ("universalisation"), the French authorities point to two risks that would still justify maintaining the present system – the risk of a drop in the funds collected (see Part 8) and creaming-off (see Part 9).

8.1. Position of the French authorities on the risk of a drop in the funds collected

(112) The French authorities insist that the special rights are essential in order to ensure the steady collection of sufficient funds to finance social housing.

(113) Regarding the level of funds involved, the French authorities warn that, if the special rights were abolished, credit institutions might have less incentive to offer livrets A and livrets bleus - which generate the funds that are channelled through the CDC - and promote their own savings products instead, leading to a drop in the total amount of funds (net outflow). The French authorities suggest three main reasons why such "cannibalisation" might occur.

(114) First, they argue that there is no scope for an increase in the total funds involved because of the problem of saturation: 80% of the population already has a livret A or livret bleu. In their view, if the special rights were abolished, livrets would be

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80 The French Competition Council came to a similar conclusion: "it is not apparent that the financing of social housing could not be achieved by other means." (Opinion No 96-A-12 of 17 September 1996, p.12).
transferred from the distributing networks to other banks without creating any new influx of funds.

(115)Second, they point out that the collection of funds depends mainly on the banks' commercial policy and not on the rate of interest on offer. But it will be in the banks' interests to switch savings to other vehicles offering higher returns, either because they contribute to their own refinancing or because they earn them a bigger distribution commission. As an example of this risk, the French authorities point to the trend in the amount of savings in the LEP, the Codevi and the PEL.

(116)Finally, the French authorities argue that the current distribution method is the best way of collecting funds, as the State can maintain a special relationship with the three distributing networks, in particular by appointing a Government Commissioner.

(117)Regarding the stability of the amount of funds collected, the French authorities point out that deposits are concentrated very heavily in a small number of *livrets A* and *livrets bleus* and that if the account-holders in question were to switch their savings to other vehicles, this alone might cause a sudden and significant drop in the funds collected. Given the importance of the general interest tasks financed by the funds collected from *livrets A* and *livrets bleus*, the French authorities are not prepared to run the risk of a sudden drop in those funds.

### 8.2. Commission's assessment

**Effects of universalisation on the level of savings**

(118)The Commission considers that the French authorities have failed to provide sufficient evidence of the risk of a drop in funds collected to justify retaining the special rights. First, the Commission does not share the French authorities' view that there is no scope for an increase in the total amount of funds involved. Second, the risk of cannibalisation seems uncertain. Lastly, the existence of a special relationship with the distributing networks does not appear to be a crucial factor.

(119)The Commission believes that there is scope for an increase in the total amount of funds from three types of customer: first, although the *livret A* and *livret bleu* have achieved exceptional penetration, there is still a not insignificant number of people who do not hold one. Second, many account-holders do not use their account: [more than one third]% of *livrets A* at La Banque Postale and [more than one third]% at Caisses d’Epargne are dormant. A significant proportion of these accounts have very small amounts in them, leaving scope for an increase. One

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81 [A high proportion]% of the funds involved are collected from just [a very small number]% of the *livrets A*. If universalisation were introduced and half of the holders of those accounts chose to switch their savings to other vehicles, the CDC would face a drop of […]% in the total funds obtained from *livrets A* and *livrets bleus*.

82 By convention, accounts are described as "dormant" or "inactive" when they have not been used for any financial transaction for two years in the case of La Banque Postale or one year in the case of Caisses d’Epargne. The difference in periods is reflected in the data submitted by the two institutions.

83 [A very high proportion]% of *livrets* at Caisses d’Epargne with a balance of less than €150 are inactive, while [a very high proportion]% of inactive *livrets* at La Banque Postale have a balance of
reason for this is that some account-holders no longer realise that they have a livret A. Such persons can therefore be assimilated to non-account-holders and their accounts could be reactivated by a more dynamic livret A distribution policy. Third, another reason for dormant accounts is that the account-holder has ceased to carry out transactions at any bank other than his or her main bank.

The Commission believes that the universal distribution of livrets A and livrets bleus might increase the amount of funds collected from these three categories of customer. By making livrets A and livrets bleus available at all banks, universalisation would make the product more accessible to consumers, who would no longer have only three credit institutions to turn to in order to open and manage an account. This would have three main positive effects: free consumer choice, greater proximity and a better quality of service. A free choice of service-provider is important, as it enables consumers to decide which institution to bank with based on a set of criteria which they themselves can determine and rank depending on their preferences. Although the three distributing banks have an extensive and evenly spread branch network, universalisation would significantly expand the distribution network for the livret A and livret bleu in both rural and urban areas. This means not only closer geographical proximity, but also advantages in terms of management and quality of service (for example, better reception of customers). More broadly, competition helps establish positive rivalry between banks, as regards both technical innovation and customer service.

In practice, some consumers do not wish to have a livret A or livret bleu to avoid having their banking business spread over several institutions. Other consumers have held a livret A in the past, but closed it because they were unhappy with the

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84 This might explain the difference in figures between the actual number of livrets held by individuals, i.e. around 80% of the population, and the surveys which show that a substantial proportion of French people (43% according to an INSEE survey on personal assets in 2003-2004, 53% according to the TNS-Sofres survey) do not have one.

85 By way of illustration, according to the TNS-Sofres survey, 24% of livret A holders would consider increasing their savings in the event of universalisation (however, this figure may cover both accounts in active use and dormant accounts).

86 At present 18 686 branches in France do not distribute livrets A and livrets bleus and around 21 000 branches do (Banque de France statistics). This means that universalisation would almost double the size of the distributing network.

87 See the International Monetary Fund report, which insists on the costs arising from the reserved livret A distribution system in terms of reduced competition and innovation (France: Financial System Stability Assessment: country report No 04/344, p. 100). The problem has also been highlighted recently by the French Competition Council (No 05-A-08 of 31 March 2005 on the possible conditions for introducing a basic banking service, point 69).

88 Around 20% of French people have no livret A or livret bleu. The TNS-Sofres survey found that 12% of former account-holders has closed them in order to concentrate all their accounts in one place and 48% of non-holders would consider opening a livret if distribution were universal (this figure should be treated with care, as individuals do not by any means systematically carry out their intention of opening an account; it does however highlight the interest in this product, even among non-holders).
institution concerned\textsuperscript{89}. Universalisation would allow them to take advantage of competition between institutions without having to turn their back on the product. Others again have a \textit{livret A} which they do not use because they cannot hold it at their main bank and are unwilling to carry out the extra administrative formalities to look after it. The possibility of opening a \textit{livret A} at their main bank could save consumers time, as they could then conduct various transactions at the same time; it would also increase efficiency by making it easier for them to manage their savings, in particular to set up a link to their current account.

(122) Universalisation could therefore increase the amount of funds collected as new customers acquire \textit{livrets A} or \textit{livrets bleus}, while others reactivate unused accounts.

(123) Whether or not new funds flow into the \textit{livrets A} and \textit{livrets bleus} in the event of universalisation, the French authorities warn that, if the special rights are abolished, existing deposits might be cannibalised, as the banks would initially attract existing \textit{livrets} and then in a second phase suggest that savers transfer those savings to other vehicles. The Commission feels that such a development might occur on the margins, but is unlikely for three main reasons: the underlying assumption overestimates consumers' mobility between banks; it underestimates their attachment to the \textit{livret A} and \textit{livret bleu}; and it constitutes a narrow view of the banks' future commercial policy. Nor do the examples cited by the French authorities support this line of reasoning.

(124) The TNS-Sofres survey found that holders of \textit{livrets A} were, on the face of it, moderately interested in changing institution in the event of universalisation. Only 9\% of them said they would transfer their account to another bank, 11\% would probably do so and 52\% would definitely not do so. Care should be taken here not to underestimate the inertia of consumers in the banking sector; bank customers are often reluctant to change banks for a number of reasons which are tied up not only with the cost of switching (nil in this case), but also with the administrative formalities involved and with consumer habits\textsuperscript{90}. It is therefore likely that a significant proportion of holders of a \textit{livret A} or \textit{livret bleu} whose main bank is an institution other than the distributing networks would not make the effort to transfer their account in the short or medium term, given that the net interest rate received would be identical everywhere. So the first argument as to why there is a risk of a drop in the funds collected, i.e. that \textit{livrets A} and \textit{livrets bleus} would be transferred from the distributing networks to other banks, would not apply either very quickly or to any great extent.

(125) Too much importance also appears to be attached to the banks' commercial policy in the distribution of the \textit{livret A} and \textit{livret bleu}, as the key factor in the collection of funds actually seems to be the net interest rate paid out on the \textit{livret}. Savers are noticeably very sensitive to interest rates, as shown by the substantial drop in

\textsuperscript{89} According to the TNS-Sofres survey, 16\% of former account-holders closed their \textit{livret} because they were unhappy with the institution in question (more generally, 25\% of former account-holders cite "reasons connected with the institution").

\textsuperscript{90} Source: Commission's intermediate report on the retail banking market, 2006.
funds in 1996 and 2005. A drop in funds instigated by the banks is also unlikely, given the French public's lasting attachment to this savings product, despite the variety of products on offer in the market for twenty years and the constraint of having to open an account at one of only three distributing networks. It is also noticeable that many holders of livrets A or livrets bleus have financial products at one or more other banks, which are therefore already able to offer them other products in competition with the livret A or livret bleu. This means that, if holders of livrets A or livrets bleus choose to keep them, it is because they are attached to them and find them useful. This state of affairs would not be altered by universalisation.

(126) The French authorities' argument on cannibalisation is also based on the assumption that there is a high degree of substitutability between the livret A and livret bleu and other products such as life insurance or taxed savings accounts, which banks would promote in the event of universalisation. As stated above (see Part 5), life insurance cannot be regarded as forming part of the same relevant market as the livret A and livret bleu. A massive and rapid movement of savings deposited in livrets A and livrets bleus in favour of life-insurance products therefore seems unlikely. As regards taxed savings accounts, it has been noted (in Section 5.3) that the net return on such accounts over an average period was not likely to encourage consumers to opt for them in preference to a livret A or livret bleu.

(127) On the specific question of the banks' commercial policy, it is worth pointing out that although, in the present context, banks may actually have an interest in promoting other products to the detriment of the livret A and livret bleu, they will have less incentive to do so as soon as they themselves are able to offer that product to their customers. According to the market survey, if the livret A - with its attractive net interest rate - were universally available, it is not out of the question that some banks might promote it as the main form of investment for cash savings, offering taxed savings accounts as a back-up once the ceiling has been reached, along the same lines as the super-livrets designed to take over from the Codevi. The livret A and livret bleu might therefore benefit from new inflows of funds through the switching of savings from taxed savings accounts. Moreover, credit institutions might find it useful to distribute livrets A without having to resort to a destructive cannibalisation strategy, as this product would provide them with a stable, secure and non-negligible commission, while allowing them to offer a whole range of savings products more closely tailored to their customers' needs and to keep or attract customers to whom they could sell other products.

(128) The examples cited by the French authorities are not very convincing either. They point to the substantial drop in funds collected under the PEL following an amendment of the rules on tax exemptions. Although this example certainly illustrates the power which banks have to dictate to their customers, it does not

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91 The CDC makes the same observation in its 2005 annual report on the centralised savings funds: "as with each variation in interest rate on the livret A, savers reacted rapidly, making withdrawals totalling €3.6 billion over the year" (p. 22).

92 The argument is of course based on a "normal" rate of commission for this type of distribution activity (see Section 9.66 for the expected rate).
appear to be entirely transferable to the present case, as universalisation of the *livret A* implies no change in its tax status.

(129) The main problem encountered with the Codevi is decentralisation (a smaller proportion of funds is centralised at the CDC, currently set at 6.5%). However, the rate at which funds collected from *livrets A* and *livrets bleus* are centralised at the CDC depends entirely on the French authorities, which means that no risk of this sort can materialise without their consent. Moreover, the complainants have made a public commitment not to call into question the centralisation of all funds at the CDC

(130) The French authorities point out that the three networks which distribute the *livret A* and *livret bleu* play a dominant role in the collection of funds under the LEP. This is presented as an illustration of the unambitious commercial policy pursued by other banks in relation to regulated savings products. Yet this conclusion appears to have little foundation. It is a fact that other banks play an important and steady part in distributing the LEP. There is no reason to deduce from the data available that the banks practise a policy of restrictive and selective distribution in relation to the Codevi and the LEP. The rate of growth recorded on these products over five years by a group of representative banks is identical or slightly higher than the average.

(131) More generally, the funds collected from *livrets A* and *livrets bleus* grew by 8% between 2001 and 2005, compared with an increase of 33% for cash savings products universally available at banks. These figures cast doubts on the justification put forward by the French authorities that these rights need to be maintained in order to preserve the level of funds collected. Even if one looks only at products which are partly channelled through the CDC, i.e. the LEP and the Codevi, one finds that there has been a real upsurge in the collection of funds - an increase of 22% over five years - which does not bear out the French authorities' warnings of cannibalisation and no doubt has something to do with the fact that banks are in competition with each other to place these products. Similarly, one may also ask whether a certain form of cannibalisation is not already taking place within the distributing networks, all of which may now distribute most banking products, even though the French authorities rightly point out that such a strategy carries a financial risk under the equalisation system currently in force (see Part 9). In any event, the special rights do not appear to guarantee a dynamic trend in the collection of funds, while, conversely, growth is possible in the volume of funds collected in products that are universally available.

(132) As regards the "special" relationship which can be maintained between the State and the three distributing networks, the French authorities have not provided the Commission with any specific example illustrating its importance. Moreover, it is

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93 See in particular the letter sent to the Commission on 13 October 2006 and forwarded to the French authorities on 10 November 2006.


worth pointing out that universally available savings products may also be subject to controls by public authorities.\(^96\).

**Effects of universalisation on the volatility of collected savings**

(133) Leaving aside the level of funds collected and the degree of dynamism in collecting them, the French authorities also argue that the special rights are necessary to maintain stability over time. The Commission feels that the French authorities fail to provide sufficient evidence of the risk of volatility in the collection of savings to justify maintaining the special rights. First, the Commission has not identified any objective reason for believing that universalisation would inevitably lead to a drop in savers' total deposits. Second, it does not observe any greater volatility in the collection of funds from universally available products than in the case for the *livret A* and *livret bleu*.

(134) As has already been pointed out, there is no reason why universalisation should make it less attractive for French people to hold a *livret A* or *livret bleu* or reduce their attachment to those products. This comment applies equally - if not more so - to the "exposed segment" of *livrets* that have reached the ceiling; the holders of such accounts often bank with a number of institutions, are relatively familiar with the types of investments available and generally have substantial financial savings invested in a diversified portfolio. They are therefore already "exposed" to the risk of cannibalisation. If they choose to keep a *livret A* or *livret bleu* it is because they find it useful, and it is unlikely that their main bank, which is today unable to persuade them to opt for other forms of investment, would be in a better position to do so (assuming it wanted to) if the special rights were to disappear. For these savers the *livret A* or *livret bleu* is a savings product that offers perfect liquidity, a means of diversifying risk and much-appreciated tax efficiency - and so it will remain in a system of universal distribution. Furthermore, unless there is a change in legislation, these savers would have no incentive to transfer their *livret* to another institution, as this would entail closing the account they hold with one of the distributing networks in order to open a new one at their main bank. If they did so, they would be unable to invest more than €15 300 in their new *livret A*, whereas many savers whose accounts have reached the ceiling have exceeded that level on account of the capitalised interest. So, in the event of universalisation, the effect of these rules would be to discourage holders of *livrets A* whose savings had reached the ceiling from transferring their account to another institution.

(135) The Commission has not observed any greater volatility in the collection of funds from universally available products than in the case for *livrets A* and *livrets bleus*\(^97\). Nearly 50% of the savings channelled through the CDC stem from universally available products (in particular the Codevi and the LEP) and this proportion remains constant over time to an extent comparable with the *livret A* and *livret bleu*\(^98\). The fact that these products are distributed by all banking

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96. In the case of the LEP, for example, Article L.221-17-2 of the Monetary and Financial Code confers such a task on the *Inspection Générale des Finances* (French Inspectorate-General for Finance).

97. The aspect of more particular interest here is the downward volatility of funds collected, as a regular increase would be unlikely to pose any problems for the financing of social housing.

98. See table on page 21 of the 2005 annual report by the Savings Fund Directorate of the CDC.
institutions does not therefore appear to imply any particular volatility which might constitute an obstacle to long-term investments by the CDC. On the contrary, a joint report in March 2002 by the French Inspectorate-General for Finance and the Conseil Général des Ponts et Chaussées (General Council for Bridges and Roads) on the financing of social housing states that, under the present system of special rights, "securing loans using the special resources of savings funds (mainly the livret A) is not immune from risks, and a great deal of prudence needs to be exercised in evaluating the financing capacities that can be mobilised through that channel in future. (...) Future developments in the savings fund resources used for loans for rented social housing are uncertain, particularly as regards deposits in the livrets A. (...) The trend in the volume of funds from livrets A channelled through the CDC is no longer exempt from a certain degree of volatility, connected with a structural downward trend in the funds collected since the beginning of the 1990s". The present system of distributing the livret A and livret bleu does not therefore appear to offer any particular guarantees for an adequate and stable volume of collected funds in future.

**Conclusion regarding the risk of a drop in funds**

(136) In the end, examination of this case has revealed wide differences of views regarding the impact of universalisation on the amount of funds collected: the French authorities and the three distributing networks stress the risk of a drop in funds collected and of greater volatility, whereas the other banks consulted anticipate an increase in the amounts involved. Following its investigation, the Commission believes that there is scope for an increase in the total funds, that the risk of cannibalisation is low – as has also been suggested in a number of French administrative reports – and that no evidence has been produced of an increased risk of volatility in the funds collected.

(137) This leaves the existence of a risk inherent in any change to the system, which obviously cannot be eradicated. However, the Commission considers that, in the absence of satisfactory evidence, the mere claim that there is an indeterminate risk cannot be sufficient to warrant the existence of special rights in breach of the rules of the Treaty.

(138) Public authorities have two powerful levers with which to influence the level and stability of savings deposits. First, they can act on the rate paid to the saver: the calculation method introduced in 2003 has not ruled out entirely the possibility of discretionary intervention in extreme cases. This mechanism is effective, given the sensitivity of savers to the interest rate on the livret A, and could just as easily be applied in the event of universalisation, as the livret will still be a regulated savings product. Second, in order to tackle a structural fall in the amount of funds

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100 In their report on balance in savings funds, Nasse and Noyer describe the argument as not "crucial" (report of 29 January 2003, p. 18). The French Competition Council shares this view: "there are no grounds for considering that opening up this product to competition would be likely to cause a drop in the amount of funds in the short and medium term. Over the longer term, the trend in the amount of funds in livrets A would be very much dependent on the advantages it had to offer over other savings products, whether they be administered savings or contractual savings" (Opinion No 96-A-12 of 17 September 1996, p. 12).
collected, the public authorities could decide to raise the ceiling on deposits in the *livret A* and *livret bleu*. Given the significant number of *livrets A* which have reached the ceiling, it can be assumed that raising it would probably encourage an increase in the amount of funds collected.

(139) The French authorities could decide to use two other tools to combat the risk of a drop in funds, where necessary. First, it has been suggested that they might consider introducing a "click mechanism" to penalise institutions practising a policy of cannibalisation. If the *livret A* funds collected by an institution were to fall significantly compared with the average, its remuneration from the CDC could be reduced or even withdrawn for that year\(^{101}\). It would then be possible to set a premium consisting of a share in the collected funds, based on the model already existing for the LEP and for the *livret A* at Caisses d’Epargne.

(140) Even if there were a certain drop in funds as a result of universalisation, which the Commission thinks unlikely, such a trend would still not undermine the financing of social housing, given the diminishing role in such financing played by funds collected from the *livret A* and *livret bleu*. First, within the savings funds earmarked for social housing (LEP, *livret A* and *livret bleu*), there has been a relative drop in the share collected from the *livret A* and *livret bleu* from 82% in 1996 to 70% in 2005\(^{102}\). Second, a significant proportion of the funds collected are not used directly to finance social housing but invested in financial assets. Lastly and most importantly, although the French authorities have not provided the Commission with estimated figures for the risk of a drop in funds or an assessment of its impact on the financing of social housing, it is possible to use as a reference the information transmitted by the Government to Parliament. In its replies to Parliament in connection with the finance bill for 2005, the Government itself stated that the average drop in funds observed over an average period did not in itself threaten the system’s balance. Research by experts in the early 1990s\(^{103}\) - quoted by the French Government at the end of 2004\(^{104}\) - found that, "on the basis of an annual drop in funds of €7.6 billion, the balance of the system would not be undermined in the short term […] and the balance of the system could be maintained with some gradual erosion of deposits at a constant rate of 2.5% (…) leading to a total volume of deposits of €71.7 billion in 2005", i.e. a sustainable amount that is well below the current level of €128 billion. The French authorities have therefore demonstrated their capacity to adapt to a possible reduction in the relative share of the *livret A* and *livret bleu* in financing social housing. This suggests that, although the level of funds collected from *livrets A* and *livrets bleu* is undoubtedly important, it does not appear to be crucial over the long term for performing the general-interest task of financing social housing, which is also supported by funds collected from other savings products, by budgetary appropriations and by tax aid from the State.

\(^{101}\) Such a mechanism would primarily have a preventive role, as institutions would not want to take the financial risk of losing their distribution income in a given year.

\(^{102}\) Source: annual report by the Savings Funds Directorate of the CDC, 2005.

\(^{103}\) Work by the Lebègue Commission in 1991 and the report on public housing in 1992 as part of preparations for the XIth plan.

\(^{104}\) Answer given in connection with the finance bill for 2005 (National Assembly, answer to question No L 24, housing budget).
The Court of Justice has ruled that "the measures taken (...) must not be disproportionate to the intended objective"\(^{105}\) and that there are no grounds for a derogation if "other systems which are more transparent and are also capable of filling the fiscal vacuum referred to by the (...) Government, whilst being less restrictive of the freedom to provide services, are conceivable"\(^{106}\).

In the present case, the Commission considers that the special rights in question go beyond what is necessary for attaining the objectives of access to housing and encouragement for savers. Accordingly, the reasons examined in this part of the decision do not justify legislation on the distribution of the \textit{livret A} and \textit{livret bleu} which has as restrictive an effect on freedom of establishment as is the case here. The special rights must therefore be deemed contrary to Article 86(1) of the Treaty, read together with Article 43 of the Treaty.

9. Analysis of the measure under Article 86(2) of the Treaty

9.1. The SGEI relating to the financing of social housing

The financing of social housing through the development of savings is also presented by the French authorities as a service of general economic interest ("SGEI").

Under the case law of the Court of Justice, if it is to qualify for exemption from Article 86(2) of the Treaty, an SGEI must meet six conditions, as explained by Mr Advocate-General Léger: "undertakings (first condition) entrusted (second condition) with the operation of a service of general economic interest (third condition) are to be subject to the rules contained in the Treaty in so far (fifth condition) as the application of those rules does not obstruct (fourth condition) the performance of the particular tasks assigned to them, subject to the reservation that the development of trade (sixth condition) must not be affected to such an extent as would be contrary to the interests of the Community"\(^{107}\).

In this instance, the first condition does not present any difficulty. As far as the second condition is concerned, the Commission notes that La Banque Postale, Caisses d’Epargne and Crédit Mutuel have been entrusted by the State with the task of distributing the \textit{livret A} and \textit{livret bleu} and transferring the funds thus raised to the CDC for the financing of social housing. The participation of these undertakings in the financing of social housing may be deemed to be a service of general economic interest that meets the third condition.

\(^{105}\) Judgment of the Court of Justice in Case C-352/85 \textit{Bond van Adverteerders} [1988] ECR 2085, paragraph 36.


(146) The Commission thus notes that La Banque Postale, Caisses d’Epargne and Crédit Mutuel do indeed, through the distribution of the *livret A* and *livret bleu*, participate in an SGEI involving the financing of social housing. However, it considers that the application of the principles of necessity and proportionality pursuant to Article 86(2) of the Treaty (fourth and fifth conditions) is not substantially different, in this instance, from that examined in Part 8 as regards imperative requirements in the general interest examined in relation to Article 43 of the Treaty. Consequently, the derogation provided for in Article 86(2) of the Treaty should not be applied to allow the financing of social housing through the development of savings.

9.2. The SGEI relating to access to banking

(147) The French authorities cite another objective of general interest to justify the need for the special rights, namely the objective of providing access to banking services. They consider that the derogation provided for in Article 86(2) of the Treaty should be applied.

(148) The Commission considers that, while the objective of providing access to banking services may, in theory, constitute both an "imperative requirement in the general interest", to be examined under Article 43 of the Treaty, and a "service of general economic interest", the fact remains that the latter must comply with the six conditions cited in Section 9.1 if it is to be properly invoked by the national authorities under the derogation provided for in Article 86(2) of the Treaty. More particularly, attention should be paid to the consequences of the case law of the Court of Justice, which, in examining this question in the light of Article 86(2) of the Treaty, takes account of considerations of a budgetary nature to justify the application of derogations from the rules laid down in the Treaty, though this type of consideration cannot be invoked under the heading of imperative requirements in the general interest examined with reference to Article 43 (see in particular Sections 9.5 and 9.6)\(^\text{108}\)

9.3. First and third conditions

*Position of the French authorities*

(149) The French authorities consider that the three undertakings which distribute the *livret A* and *livret bleu* are entrusted with an SGEI in the form of the provision of access to banking services, the financing of which requires an adjustment between "good" and "bad" savings books, which would be jeopardised by abolishing the special rights. The first condition regarding the classification of the distributing networks as undertakings does not therefore present any difficulty.

(150) As far as the definition of the service (third condition) is concerned, the French authorities state that "over time, the *livret A* and *livret bleu* have become instruments for getting people to open bank accounts, particularly – but not exclusively – the least well-off". This role played by the *livret A* and *livret bleu*

stems firstly from the very definition of the product: the processing of debit and credit transactions on the *livret A* as from EUR 1.5 (EUR 15 for normal savings books) and the direct debiting and crediting of certain contributions and remunerations. This role also stems from the conditions under which the savings books can be opened, with the distributing networks opening a *livret A or livret bleu* free of charge, *de facto* or *de jure*, to any person applying for one, irrespective of their income. The French authorities point out that many less well-off people use these savings books as a means of gaining access to banking services, which they are generally refused in the conventional banking system. More than 660 000 persons who do not have a bank account are reported at present to have only a *livret A or livret bleu* as their sole means of accessing banking services. While the system establishing the right to have an account, introduced in 1984, does provide for a list of free basic services, the French authorities point out that the operating conditions restrict its use. The two sets of arrangements, it is argued, thus demonstrated the complementarity which is necessary to allow as many people as possible to have access to banking services.

**Commission assessment**

(151) Member States have broad freedom to define what they regard as services of general economic interest. Nevertheless, the relevant services must involve a clearly defined general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities, and the relevant undertakings have to have been entrusted with a specific task assigned to them by the State. In the case in point, the Commission considers that the French authorities’ presentation of this service is vague.

(152) The Commission has already had occasion to conclude that an SGEI exists in the banking sector, in particular where the purpose is to ensure access to banking services in rural areas. In this instance, the French authorities merely state that "the accessibility objective (...) also results from the maintenance of contact points, including in sensitive areas", without specifying what requirements the distributing networks must meet with regard to this objective, how it relates to the *livret A* and *livret bleu*, or what additional costs are imposed by this geographical

109 1998 INSEE survey cited by the French authorities. The survey put the number of adults living in a household that did not have a current account at 3%. Half of them, i.e. 660 000 persons, have a *livret A* or *livret bleu*.

110 In particular, the requirement that the applicant must not already hold a bank account. In order to make use of the right, the applicant must therefore close the account which he previously held, which the banks are not necessarily willing to do. The French authorities refer in particular to the Opinion of the Competition Council of 31 March 2005 on the conditions under which the establishment of a basic banking service could be envisaged (Opinion No 05-A-08), point 22.

111 Paragraph 22 of the Commission communication on services of general interest in Europe (JO C 17, 19.1.2001, p. 4).

112 See, for example, the Commission decision of 22 February 2006 in case N 166/05 authorising government rural network support funding to the Post Office Limited (JO C 141, 16.6.2006, p. 2).
coverage. La Poste does in fact already benefit from specific compensation to offset its geographical coverage requirements, regardless of the livret A.

(153) However, the French authorities present the livret A and livret bleu not so much as a means of ensuring geographical coverage as an instrument for providing access to banking services for the whole of the population. They do not restrict this role to those in need, since they state that the objective relates in particular – but not exclusively – to the least well-off. In other words, the livret A and livret bleu perform a role in opening up banking services to other sections of the public than persons in difficulty. The French authorities state, without going into further detail, that the livret A may also, because of its simplicity of use, be useful to the elderly, to young people and to foreigners who have difficulty with French. At all events, the French authorities stress that the objective of providing access to banking services is not focused a priori on any specific section of the population. The savings book is presented as being primarily for general use.

(154) The Commission shares the French authorities' view that access to basic banking services is of fundamental importance in modern-day society. Ensuring that the population as a whole has access to banking services is undoubtedly an activity which exhibits, within the meaning of the case law of the Court of Justice, special characteristics as compared with other economic activities and is accordingly to be regarded as an SGEI. The livret A has certainly played an important role historically in this respect.

(155) However, according to the figures provided by the French authorities themselves, the proportion of the French population holding a bank account is particularly high, at 98%. The overwhelming majority of the French population does thus at present have access to banking services without having to rely on the livret A. The establishment of a universal service can be justified only where "market forces may not result in a satisfactory provision" of the relevant service. Nor do the banking services provided to the population as a whole through the livret A or the livret bleu exhibit any special characteristics that would allow them to be regarded, in general, as an SGEI. In the particular case of the livret bleu, the Commission notes that its operating features make it more like an ordinary savings book than like the livret A (no obligation to open one for each and every applicant, minimum EUR 15 as initial amount and deposit, bank cheques which can be used for payments, no requirement that a physical savings book be issued). The Commission therefore considers that the accessibility objective may constitute an SGEI, but that this task is clearly not necessary for the great majority of the French population, who experience no particular difficulties in having access to banking services which the livret A would help them to.

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113 Law No 90-568 of 2 July 1990 on the organisation of the public service performed by La Poste and on France Télécom provided that, as from 1 January 1994, La Poste pays business tax on the basis of special derogation arrangements laid down by that Law. The Commission decision of 21 December 2005 on the measures relating to the creation and operation of La Banque Postale endorsed the definition of this SGEI.

114 Commission Communication on services of general interest in Europe.

overcome\textsuperscript{116}. Accordingly, the Commission considers that the objective of providing access to banking services which the \textit{livret A} is supposed to fulfil applies only to persons who have particular difficulties in gaining access to basic banking services.

(156) The \textit{livret A} continues to play an important role in combating exclusion from banking services. The Centre Walras\textsuperscript{117} defined exclusion from banking services as follows: "a person is excluded from banking and financial services if they encounter a degree of hindrance in their banking and financial practices that prevents them from leading a normal life in society". Identifying the categories of persons relying on the \textit{livret A} instrument in order to have access to basic banking services and quantifying such categories of persons are delicate matters. Of the persons who have access to banking services only through a \textit{livret A}, it appears appropriate, barring exceptions, to exclude, under the accessibility objective, both minors, who represent more of a strategic section of the population to be targeted than a segment suffering from a specific problem of exclusion from banking services, and persons forming part of a household that has a current account. With regard more particularly to the less well-off, according to a study published in November\textsuperscript{118}, 4\% of persons living on social security rely on their savings books as their sole means of access to banking services\textsuperscript{119}, which is a lower figure than that cited by the French authorities\textsuperscript{120}. The \textit{livret A} nevertheless plays a useful complementary role to a current account for 31\% of social welfare recipients\textsuperscript{121}. Although the social role of the \textit{livret A} should decline as the right to hold an account develops, as a result of numerous measures taken for this purpose since

\begin{footnotesize}
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  \item\textsuperscript{116} Despite requests from consumers associations, the French authorities have moreover not deemed it necessary to introduce a basic banking service. The French Competition Council noted, with regard to competition problems liable to be created by a service provided on too broad a basis: "if the universal banking service were accessible to everyone unconditionally, consideration would have to be given to the disruptions this could cause for the suppliers present on the market. The scope of the universal banking service must remain sufficiently limited to ensure that it does not compete with the alternative supplies of banking establishments and does not risk compromising the profitability of the operators which are present on the market" (Opinion No 05-A-08 of 31 March 2005, point 50).
  
  \item\textsuperscript{117} Set up in 1993 within the Université Lumière-Lyon 2, the Centre Walras is a research unit working with the Centre National de la Recherche Scientifique which brings out an annual report on these questions.
  
  \item\textsuperscript{118} Study No 351 carried out by the Direction de la Recherche, de l’Evaluation, des Etudes et des Statistiques (DRESS) of the Ministry of Employment and Solidarity, November 2004, G. Gloukoviezoff and M. Monrose.
  
  \item\textsuperscript{119} The authors of the study also stressed the importance of having access to means of payment if a person is to be considered as being included in the banking network, and the \textit{livret A} does not include these. Not having means available for non-cash payments (cheque book or payment card) penalises people in their day-to-day life, so much so that the authors consider that savings book accounts are not sufficient to allow their holders to "lead a normal social life". However, it should be noted that 45\% of recipients of minimum income support who hold a current account do not have any means of non-cash payment available on such account either.
  
  \item\textsuperscript{120} The French authorities stress, however, that this study covers only four minimum social security benefit categories and may therefore underestimate the number of persons accessing banking services through the \textit{livret A}, in particular by not taking account of benefits paid to the elderly.
  
  \item\textsuperscript{121} According to this study, 62\% of social security benefit recipients have only a current account.
\end{itemize}
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December 2004\(^\text{122}\), the Commission acknowledges that the *livret A* plays a role in bringing people into the banking system, but it is difficult to give a precise assessment of the number and type of persons concerned.

(157) The Commission therefore considers that the *livret A* can, in view of its characteristics, be seen as a "universal" product. However, quantifying the net additional costs involved in performing the SGEI relating to banking accessibility may include only the additional costs involved in providing a savings book to persons having particular difficulties in obtaining access to basic banking services. Subject to this proviso, the Commission considers that the third condition for the application of the derogation provided for in Article 86(2) of the Treaty is met.

9.4. Second condition

(158) With regard to the requirement that the service must be assigned by an act of public authority, the French authorities cite Articles L518-25 and L518-85 of the Monetary and Financial Code, which concern La Banque Postale and Caisses d’Epargne respectively.

(159) It should be noted firstly that it is not apparent that a social role has been officially assigned to the *livret A*\(^\text{123}\). The Commission takes the view that only La Banque Postale has been clearly entrusted by the State with a task of promoting access to basic banking services.

(160) La Banque Postale is, firstly, required, under Article L221-9 of the Monetary and Financial Code, to open a *livret A* for anyone requesting it. Secondly, under a tripartite agreement between the CDC, La Poste and the State, the social obligations incumbent on La Banque Postale are spelled out clearly: obligation to carry out free of charge deposits and withdrawals at all counters of La Poste’s network organised to do so as from EUR 1.5, issue free of charge of bank cheques for an amount not exceeding EUR 1 000 and transfers to the current account of the holder of the *livret A*, regardless of the establishment at which the account is held.

(161) The French authorities and Caisses d’Epargne state that Caisses d'Epargne has had the same requirements imposed on it as La Banque Postale. Although the principle that the *livret A* of Caisses d’Epargne is intended to combat social

\(^{122}\) The 22 November 2006 edition of the newspaper *Les Echos* lists the main measures taken over the previous two years, including in particular the provision of greater information on the right to hold an account and the provision of certain new transactions free of charge (closure, cash withdrawals at the holder's local branch, systematic authorisation of a payment card) (p. 34). The Ministry of Finance's website indicates that the number of accounts opened under the right-to-an-account arrangements has grown steadily since 1984 (for example, 31% more in 2004 than in 2003).

\(^{123}\) In its Opinion No°96-A-12, the French Competition Council states that "no provision has entrusted La Poste or Caisses d'Epargne with the accomplishment, through distribution of the *livret A*, of a general-interest task relating to social cohesion" (p. 10). In a more recent Opinion (No°05-A-08 of 31 March 2005), the Competition Council states that "although the right to hold an account is intended to solve the difficulties of access to banking services, this task is also fulfilled *de facto* by the *livret A*, principally the *livret A* of La Poste" (p. 7, emphasis added).
exclusion is clearly stated in the provisions, which also lay down a number of requirements regarding direct debit and credit arrangements or the processing of payments as from EUR 1.5, it is also apparent, on the basis of the information available to the Commission, that the requirements incumbent on Caisses d’Epargne are not as extensive as those incumbent on La Banque Postale.  

(162) The French authorities and Caisses d’Epargne state that, by law, Caisses d’Epargne is required to open a livret A for anyone requesting it, which is not apparent from the articles of the Law cited. Caisses d’Epargne also refers to amendment No 1 of 12 June 2006 to the agreement concluded on 21 October 1994 with the CDC, which is explicit on this point. Although the case law of the Court of Justice has become less strict on the nature of the act required in order to meet the second condition, the fact remains that the State must necessarily be a party to the agreement if the undertaking is to have been properly entrusted with the performance of an SGEI. In this instance, the State was not a party to the agreement, and the CDC was acting on the basis of its task of centralising livret A funds for the purpose of financing social housing. The CDC cannot therefore be regarded as having acted in the name and on behalf of the State as the public authority. The difference in the drafting of the Monetary and Financial Code between the texts relating to La Banque Postale and those relating to Caisses d’Epargne is telling in this respect. The absence of any legal obligation to open a savings account as far as Caisses d’Epargne is concerned constitutes a very significant difference that calls into question the very existence of a task of ensuring banking accessibility imposed on Caisses d’Epargne. The fact that the livret A of Caisses d’Epargne allows a number of transactions to be carried out free of charge is not of much help if those who are excluded from the banking system are refused a livret A when they apply for one.

(163) Furthermore, the requirement that withdrawals be allowed free of charge at counters as from EUR 1.5 applies only to the Caisse d’Epargne branch of the holder of the livret A, whereas La Banque Postale is required, under Article L221-10 of the Monetary and Financial Code, to perform this type of costly operation in all its establishments. Consequently, the specific requirements imposed by the State on Caisses d’Epargne in order to ensure that the livret A is distributed to persons having difficulty in gaining access to basic banking services appear to be

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124 These differences were explained to the Commission by […]. In the Senate's weekly bulletin of 27 March 2006, Mr Jean-Paul Bailly, the Chairman of La Poste, also "pointed out that the livret A distributed by La Poste had characteristics which distinguished it from the other savings books". In the same context, Mr Patrick Werner, chairman of La Banque Postale, "once again stressed that it was somewhat different, notably compared with the livret A of Caisses d’Epargne”.

125 The French authorities cited Article L221-1 of the Monetary and Financial Code, but this provides only that it is prohibited to hold more than one livret A or livret bleu per person. Caisses d’Epargne also cited Article R221-21 of the Monetary and Financial Code, but the Commission considers that that Article relates only to the issue of actual savings books for holders of livrets who request such issue.


127 In its report on "the accounts and management of La Poste 1991-2002", the French Court of Auditors states that "contrary to Caisses d’Epargne, La Poste has never been selective in the sections of the population to which it issues the livret A".
few in number and are not such as to allow the view to be taken that this activity is different in nature from other economic activities. It may be noted here that all banks are required to perform a number of operations free of charge on savings books or on bank accounts\textsuperscript{128} without these requirements amounting to public service requirements.

(164) As far as Crédit Mutuel is concerned, the French authorities merely state that the task "of ensuring access to banking services is in fact shared by the livret bleu of Crédit Mutuel, as may be seen from its analytical accounting and the structure of its costs". In the absence of any legislative or contractual provisions specifying SGEI requirements which the State imposes on Crédit Mutuel, the Commission cannot take the view that \textit{de facto} elements are sufficient to meet the second condition of the derogation provided for in Article 86(2) of the Treaty.

(165) It follows from the above that the Commission considers that only the livret A of La Banque Postale constitutes an SGEI designed to promote inclusion in the banking system for persons having difficulty in gaining access to basic banking services. It must therefore be examined whether the special rights are necessary and proportionate for the purpose of performing this service under viable financial conditions.

\textbf{9.5. Fourth condition: necessity of the special rights and risk of creaming-off}

\textit{Position of the French authorities}

(166) The French authorities argue that the special rights are necessary in order to ensure balanced financing of the SGEI relating to banking accessibility without imposing additional costs on public finances. The analysis will focus on the impact of any withdrawal of the special rights on the financial equilibrium of La Banque Postale, this network being the only one which, in the Commission's view, has properly been entrusted with an SGEI of ensuring the accessibility of banking services.

(167) In examining a case under Article 86(2) of the Treaty, the Court of Justice accepted considerations of a budgetary nature as justification for certain derogations from the rules laid down in the Treaty. It took the view that special rights may be justified in order to allow the performance of a task of general interest under "economically acceptable conditions"\textsuperscript{129}. In other words, the off-setting of unprofitable activities against profitable ones is allowed in order to ensure the financial viability of the operator entrusted with the SGEI.

(168) It should be noted at the outset that the service of distributing the livret A and livret bleu is covered by a direct remuneration paid to the distributing networks by the CBC. Thus, the special rights granted are in addition to a payment, the brokerage commission based on the funds collected, which in principle already allows the distributing networks to obtain sufficient remuneration. In the state aid

\textsuperscript{128} For example, credit institutions have been required, since 2004, to allow their customers to make free cash withdrawals over the counter at the customer's local branch.

\textsuperscript{129} Corbeau, cited above, paragraphs 16 and 17.
proceedings relating to Crédit Mutuel\textsuperscript{130}, the special right granted was indeed never presented by the French authorities as representing a means of additional remuneration for the service provided\textsuperscript{131}, only the intermediation commission being supposed to allow the operator to cover its operating costs and, possibly, to make a reasonable profit.

(169) The special rights in question are not therefore intended to provide remuneration of the service provided, but they are intended, according to the French authorities, to prevent any selection of customers ("creaming-off"). They thus, it is argued, ensure the financial equilibrium of the system.

(170) The cost of managing the \textit{livret A} and \textit{livret bleu} for the distributing networks can vary widely depending on how the savings books are used by their holders. For example, some savers place very modest sums in their savings books and carry out very frequent transactions, free of charge, which means considerable operating costs for the distributing networks and little remuneration, which is based on the funds collected (these are "bad" savings books, from the point of view of the distributing networks). Conversely, some savers place large amounts for long periods in their \textit{livret A} or \textit{livret bleu}, which means significant remuneration of the distributing networks and low operating costs (these are "good" savings books).

(171) The special rights granted allow the "bad" savings books to be offset by the "good" ones, while opening up distribution of the \textit{livret A} and \textit{livret bleu} to competition would pose the risk of creaming-off of customers, with the other credit institutions attracting the "good" savings books, which would disrupt the operating equilibrium of La Banque Postale. If the State had to offset this deficit, abolishing the special rights would result in additional costs being imposed on public finances. The French authorities conclude from this that the present system of financing the SGEI, on the basis of the special distribution rights, constitutes a "virtuous circle" resulting in savings for public finances.

\textit{Commission assessment}

(172) Following its market survey, the Commission considers that a risk of creaming-off cannot be denied and must be taken into account. It is clearly apparent, firstly, that the distribution of the costs of managing the \textit{livret A} in terms of type of savings book is highly imbalanced: some savings books with low deposits involve a large volume of transactions that are costly to carry out\textsuperscript{132}

\textsuperscript{130} Commission Decision C88/97 of 7 June 2006 concerning Crédit Mutuel (\textit{livret bleu}). Invitation to submit comments pursuant to Article 88(2) of the Treaty (OJ C 210, 1.9.2006, p.12).

\textsuperscript{131} On the contrary, both Crédit Mutuel and the French authorities were at pains to emphasise that the special rights at issue did not confer any advantage on their holder (in particular, they dispute the existence of any loss-leader effect).

\textsuperscript{132} According to La Banque Postale, [a significant portion] of all transactions are carried out via savings books whose funds amount to less than EUR 150.
whereas many savings with large deposits involve few if any movements. There appear therefore to be grounds for believing that, in the event of universalisation, it would be in the interests of the other credit institutions to attract the "good" savings books, while the holders of the "bad" savings books, who are often persons having difficulty in gaining access to basic banking services, would not a priori have any reason to change bank. From the point of view of consumers, it should be noted that what the distributing networks term the "risk of creaming-off" is merely the result of the customers being held captive, since they are not able to choose freely the institution at which their livret A is held.

(173) However, although the Commission can acknowledge that there is a risk of creaming-off, it does not consider that the French authorities have provided sufficient information to assess the scale of such risk. The French authorities describe the matter in very general terms, stating that "the networks which at present collect these funds would keep the unprofitable customers, whereas the other credit institutions would capture the most profitable customers".

(174) The French authorities' argument is based on the lack of interest which they say the credit institutions have in less well-off customers and the products intended for them. This assertion is based on the activity reports of several banks, which focus on strategies for winning premium customers, on the low uptake of the LEP in those banks and on the differences in income between livret A and livret bleu holders and the customers of other credit institutions.

(175) The Commission considers that this presentation needs to be put into perspective. It is true that some banks pursue an up-market business strategy, while others, including La Banque Postale, have a market position which is geared more to middle-income or low-income customers. However, trying to build up a wealthy clientele does not rule out the presence of other types of customers. Indeed, many credit institutions are at genuine pains to cater for less well-off customers. According to an OPERBAC survey carried out in 2006, [15-25]% of banks customers as a whole have incomes of less than EUR 1 000, and [a higher proportion] % in the case of Crédit Agricole and [a higher proportion] % in the case of La Banque Postale. There is therefore a difference in clientele between La Banque Postale and the other banks, but it does not appear to be very significant.

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133 Of the inactive savings books of La Banque Postale, [...]% have funds of more than EUR 15 000 ([...]% of Caisses d’Epargne’s livrets A containing more than EUR 15 000 have not involved any financial transaction for more than one year).

134 There is, for example, keen competition between banks in offering consumer credit, which focuses mainly on customers on middle or low incomes.

135 This figure relates to La Banque Postale’s overall clientele and not to livret A holders. Since no precise figure was given by the French authorities for the incomes of livret A holders, the Commission considers that the figure cited represents a fair approximation, since livret A holders are over-represented in both the low-income and high-income categories. Only [...]% of Caisses d’Epargne customers have an income of less than EUR 1 000, according to the 2006 OPERBAC survey. See also (Section 8.2) the market share of Crédit Agricole and a group of banks in LEP and Codevi savings books.
(176) Nor can the Commission see any significant difference in assets between livret A holders and the average for the French population as a whole. In terms of socio-professional categories, livret A holders appear over-represented amongst business executives and retirees and under-represented amongst manual workers. Even amongst the holders of "small" livrets A, it may be seen that three-quarters of them are home owners and have financial assets comparable to non-holders. These figures must be interpreted with caution, since the surveys may inadequately represent those in difficulty. At all events, the French authorities did not provide any precise figures from which it could be concluded that the profile of livret A holders differs significantly from that of bank customers in general and from the average for the French population as a whole.

(177) Furthermore, creaming-off presupposes that savings book holders with large savings deposits would wish to change their savings book account to another bank. However, the TNS-Sofres survey suggests that livret A holders would not a priori be very eager to make such a switch, and the Commission's sectoral investigation into retail banking indicates consumer inertia in this area. There should not therefore be any major creaming-off in the short term. In the case of savings books whose deposits have reached the ceiling, i.e. those which are the most remunerative and which are therefore those which La Banque Postale would most like to keep in the event of universalisation in order to maintain its financial equilibrium, it has already been noted (see Section 8.2) that the current rules did not prompt their holders to switch their account to another bank.

(178) Overall, the Commission considers that it cannot rule out the possibility that, amongst La Banque Postale's livret A holders, individuals on low incomes are over-represented compared with the average for the French population as a whole, as is suggested by the distribution costs of the livret A by tranche of savings and as indicated by qualitative studies. On the basis of the information available, however, this imbalance does not appear to be very marked. The risk of creaming-off should not be on such a scale that the bulk of low-income livret A holders would ultimately end up with La Banque Postale or that the bulk of La Banque Postale's "good" savings books would in the short or medium term be lost to competitors.

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136 At most, there is an above-average number of home owners and owners of substantial financial assets amongst livret A holders. Source: TNS-Sofres survey.

137 Total savings deposit of less than EUR 1 500.

138 There are […] million Banque Postale livrets A with savings deposits of more than EUR 15 000. They represent EUR [15-25] billion in funds, giving a remuneration of around EUR […] million on the basis of a 1.3% commission (EUR […] million if the commission were reduced to 0.8%).

139 See, for example, an article by G. Gloukoviezoff on "The banking and financial exclusion of individuals" in: Les Travaux de l'Observatoire National de la Pauvreté, 2003-2004, p. 167.

140 Given the not inconsiderable role played by the banks as a whole in providing banking services to those on low incomes, the view may be taken that, in the long run, livret A holders belonging to this category will be spread amongst the banks.

141 Only a small proportion of them would probably in the short or medium term switch to another bank.
9.6. Fifth condition: proportionality of the special rights and risk of additional costs for public finances

(179) In addition to the considerations of a general nature regarding the existence of a risk of creaming-off, the scale of any loss of revenue which this would entail must be examined to see whether it would be such that La Banque Postale would no longer be able to perform under viable economic conditions the two SGEIs with which it has been entrusted. Consideration should be given to the question of whether other means which are less restrictive for freedom of establishment than the granting of special rights are available for ensuring balanced financing of the two SGEIs.

(180) In the present system, a single intermediation commission allows financing of the two general-interest tasks, namely the financing of social housing, to which the three distributing networks contribute, and the objective of ensuring banking accessibility, which is performed by La Banque Postale. In the Commission's view, abolishing these special rights would not be such, a priori, as to jeopardise the proper operation of the first task. On the other hand, it may be accepted that there is a risk of creaming-off, whose impact on the financing of the SGEI must be examined.

(181) The French authorities have not quantified La Banque Postale's probable revenue losses if the special rights were abolished. It is therefore difficult to determine whether the risk of creaming-off would really obstruct the performance, in law or in fact, of the particular task entrusted to La Banque Postale. However, as the relevant provision is one which permits, in certain circumstances, derogation from other rules of the Treaty, it must be interpreted strictly. The French authorities do, however, put forward an alternative approach which can be followed in this case: determining, on the basis of the accounting data provided by La Banque Postale, what the total cost of the two SGEIs would be to public finances, regardless of the actual division of these tasks between the credit institutions. This method does not allow La Banque Postale's revenue losses to be determined, but it does make it possible to estimate the financial impact of universalisation on public finances.

**Position of the French authorities**

(182) La Banque Postale estimates the gross cost of its accessibility task at EUR [...] million, equivalent to [a very high proportion]% of the total costs to La Banque Postale of distributing the *livret A*. This cost is made up of three components:

- the cost of general-interest transactions; these are transactions carried out free of charge and without limit as to quantity, whereas the same transactions are either not allowed in the case of other savings products, or are charged for: withdrawal transactions for amounts of less that EUR 10,

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deposit transactions for amounts of less than EUR 15, and transactions involving bank cheques amounting to less than EUR 1,000. The cost of this component is put at EUR […] million;

- the cost of general-interest savings books; this means the cost of savings books having a total savings amount of less than EUR [600-1,100], which are therefore necessarily loss-making since the commission based on such a total amount is less than the fixed cost of EUR [10-13] per savings book. The cost of this component is put at EUR […] million;

- the cost of savings books whose holders use them in a way which prevents any return for the bank. This means the cost of savings books whose total savings amount is slightly more than EUR [600-1,100], but which are loss-making because of the large number of transactions carried out free of charge, apart from the general-interest transactions already accounted for. This cost is put at EUR […] million.

(183) The French authorities and La Banque Postale deduce from this that the collection of savings, which is essentially carried out through savings books that do not form part of the abovementioned categories\textsuperscript{144}, can be carried out at a cost corresponding to the remainder, i.e. only [a small proportion]% of distribution costs. In other words, the real cost of collecting savings, if "bad" savings books are excluded, would amount to [less than 0.4]% of total savings deposits.

(184) The French authorities conclude that, whatever the system adopted in the event of universalisation, reform would inevitably result in an increase in the cost to the public purse of financing these SGEIs. They estimate that the net cost of the accessibility task would in all probability remain unchanged (whether the task remained with La Banque Postale or was shared amongst the operators), while the cost of the "financing of social housing" component would increase, the commercial banks having offered to distribute the \textit{livret A} for a 0.8% commission\textsuperscript{145}, compared with the figure of [less than 0.4]% calculated by La Banque Postale.

(185) Completing this analysis, the French authorities examined two scenarios for making the savings books more widely available: in the first scenario, the banking accessibility SGEI would be restricted to a few institutions, while in the second participation in the two SGEIs would be extended to all credit institutions. Each scenario is subdivided into two methods of financing: maintaining a single commission based on the total amount of savings, or introducing a separate remuneration for each SGEI.

(186) Under the first scenario, only one or a few institutions would be entrusted with the SGEI of providing access to banking services, while all institutions would participate in the objective of financing social housing. Given the risk of creaming-off, the French authorities consider that it would be impossible to

\textsuperscript{144} i.e. EUR […] billion out of a total savings amount of EUR […] billion.

\textsuperscript{145} Letter dated 16 September 2005 to the Ministry of Economic Affairs and Finance from Crédit Agricole, BNPP, Société Générale and Banques Populaires.
maintain the present method of providing remuneration in proportion to the funds collected. If two separate methods of remuneration had to be applied, an additional cost would be imposed on public finances. The cost of the banking accessibility SGEI would remain constant, whereas the cost of financing social housing would increase, since the intermediation commission would have to be set at 0.8% in order to avoid any risk of a drop in the funds collected (as compared with the present cost of this task, estimated at [less than 0.4]% by La Banque Postale).

(187) Under the second scenario, the task of performing the two SGEIs would be extended to all credit institutions. All banks would then be subject to the same requirements as La Banque Postale is at present. The two methods of financing envisaged would result in additional costs for public finances:

- if a single commission based on total savings deposits were adopted, as in the current system, it would have to be differentiated between the banks so as to take account of their relative contribution to the accessibility objective. This system would be complicated to manage, would entail additional costs for public finances and would result in instability in funds that would adversely affect the financing of social housing. More precisely, either the commission would have to be set at a minimum of 0.8% for all banks, which would result in extra costs for public finances according the French authorities, or it could be set below that level, which would create a risk of a drop in the funds collected.

- If separate remuneration were to be provided for each SGEI, the cost of the banking accessibility SGEI would remain constant, whereas the cost of the financing of social housing would increase.

Commission assessment

(188) The Commission considers that the conclusions drawn by the French authorities are wrong, since they are based on an over-estimate of the net cost of the task of providing accessibility and, consequently, an under-estimate of the cost of the "financing of social housing" component.

(189) It should be noted firstly that reservations were expressed concerning the precise definition of the SGEI of providing access to banking services (see Section 9.3). The Commission considers that the banking accessibility SGEI can be offset only in so far as it relates to persons actually facing difficulties in having access to banking services. However, so as not to stigmatise this section of the population and so as to keep matters simple, there is no need to itemise the costs entailed through use of the *livret A* by this group. It is therefore acceptable, as proposed in the approach put forward by La Banque Postale, to determine categories of costs essentially caused by use of the *livret A* by this section of the population. However, for this approach to be endorsed by the Commission, a sufficiently close link should be established between the costs taken into account and the actual performance of the SGEI. In the case in point, the aim of the SGEI is to provide a basic banking service for those who need it. Specifically, an estimate

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146 By way of comparison, the Commission applies the same type of analysis in assessing a universal service covering the whole of a country (i.e. calculation of the net cost of supplying the service in...
should be made of the net cost of managing savings books with low deposits on which small transactions are frequently carried out.

(190) In the light of these aspects, an assessment can be made of the calculation of costs carried out by La Banque Postale. It should be emphasised at the outset that the calculation carried out by the Commission is necessarily going to be approximate given the figures available to it and, more broadly, the lack of any accounting system designed to assess the additional costs imposed by using the *livret A* as a means of providing access to basic banking services. Nevertheless, the calculation provides an order of magnitude on the basis of which it may be determined whether universalisation of the system would risk imposing additional costs on public finances.

(191) As far as general-interest transactions are concerned, it cannot be ruled out that *livret A* holders who are not persons having difficulty in obtaining access to banking services carry out this type of transaction. It is clear, however, that such transactions are, by their very nature, overwhelmingly of more particular relevance to such persons. Consequently, so as to keep matters simple, the cost of these transactions as estimated by La Banque Postale may be accepted in its entirety, i.e. EUR [...] million.

(192) The Commission notes that many general-interest savings books are inactive. By definition, these savings books are not a means of providing access to banking services, since no financial transaction has been recorded on them for more than two years. It is of course the case that all banks have accounts which have fallen into a state of disuse. More specifically, all banks may be confronted by the same type of problem relating to products whose funds are partially centralised, like the LEP and the Codevi. These generate costs, though the costs are in fact very limited. The assignment of a fixed unit cost of EUR [10-13] to these savings books by La Banque Postale is an accounting convention that does not necessarily correspond to the real costs incurred. In dealing with this type of accounts, banks can adopt two types of strategy: either keeping their costs to the minimum, or seeking to win back the customers and develop the relationship. What is involved here is therefore a reserve of customers and not a section of the population that faces problems in having access to banking services. The cost of this component of the SGEI must therefore be recalculated by eliminating the fixed costs attributed to inactive savings books, giving an amount of EUR [...] million.

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147 [A very high proportion]% of the [...] million *livrets A* with deposits of less than EUR [600-1100] are inactive.

148 It should be noted that, under the current legislation, these savings books cannot be closed on the initiative of La Banque Postale alone. However, this situation is not such as to justify the offsetting of these costs as part of an SGEI relating to access to banking services. If this were deemed critical by the French authorities, La Banque Postale could be authorised to close inactive savings books subject to certain conditions, without any adverse effect on the banking accessibility objective.

149 Details of the Commission's calculation: [A very high proportion]% of savings books with funds of less than EUR 800 are inactive, i.e. [...] million savings books. The total fixed cost attributed to such savings books by La Banque Postale is EUR [...] million (i.e. the fixed cost of EUR [10-13] per savings book, multiplied by the number of inactive savings books). La Banque Postale having
With regard to savings books whose holders use them in a way which prevents any return for the bank, the approach proposed by La Banque Postale is open to challenge since, as the French authorities themselves point out, a customer's profitability to a bank must be looked at in overall terms and not by individual product. In other words, a customer from whom La Banque Postale does not make any profit via the *livret A* because of the large number of transactions which the customer carries out (leaving aside general-interest transactions, already accounted for) may nevertheless be a profitable customer if he holds other products at the bank. The French Court of Auditors also takes the view that "managing the *livret A*, 60% of which have a balance of less than €150, does certainly under present conditions entail a cost for La Poste, but it also helps to attract and keep a clientele which is not necessarily a source of losses". All banks can accept some customers being unprofitable in certain products: they endeavour to make the relationship profitable by selling other services or by altering the customer's behaviour to as to reduce the cost. For example, the banks also have a significant number of savings books with small amounts of savings deposits in them without this inducing them to request compensation from the State ("A significant portion"% of ING's *livret orange* have deposits of less than EUR 500, and 50% of Codevi savings books of one of the intervening banks have savings deposits of less than EUR 1 000). Consequently, the estimate given of this component of the SGEI appears too high.

Part of the cost of this component can nevertheless be taken into account, since it is probable that savings books with low deposits on which numerous transactions are carried out are held mainly by persons having particular difficulties in accessing basic banking services. It may be more difficult to achieve a profit in the banking relationship with this type of customer, nor is La Banque Postale able to change their behaviour very significantly because of the existing rules on free transactions for the *livret A*. In view of the above, and in the absence of any more estimated the cost of general-interest savings books at EUR [...] million, the EUR [...] million should be deducted from that amount, leaving an additional cost of EUR [...] million. It should be noted that the fixed cost of EUR [10-13], which incidentally appears high, would not *a priori* be affected by a reduction in the intermediation commission. The relevant tranche of savings would simply be broader (with a commission of 0.8% rather than 1.3%, the "general-interest savings books" would be those with less than some EUR [1000-1500] rather than EUR [600-1100]). The Commission does not have any information to indicate that the proportion of inactive savings books in a broader tranche of savings would be any smaller. The calculation therefore remains valid whatever level the intermediation commission is set at.

Report of the French Court of Auditors on "the accounts and management of La Poste 1991-2002", cited above. On a broader note, the Court of Auditors questions the necessity and desirability of compensating La Poste for its social role (p. 154).

What is involved here is savings books which are unprofitable because of transactions which are not general-interest transactions (which are taken into account elsewhere). They are therefore transactions which are generally also carried out by the other banks. For example, 33% of the Codevi savings books of one of the intervening banks with savings deposits of between EUR 100 and EUR 1 000 involved more than ten financial transactions during the first eight months of 2006. 60% of the transactions carried out via Codevi savings books of that same bank having savings deposits of between EUR 16 and EUR 100 involved amounts of less than EUR 50 (which is not surprising since the amounts of the deposits held in the savings books are small).
precise information, the Commission considers that the estimate provided, EUR [...] million, should be lowered.

(195) Overall, the gross cost of the accessibility task is, according to the Commission's calculations, EUR [...] million, without applying the appropriate lowering of the cost of savings books whose pattern of use makes them unprofitable for the bank. This amount represents [a very significant portion]% of the total cost of distributing the livret A borne by La Banque Postale, which is a very significant amount. By way of comparison, it may be noted that the total cost of transactions over the counter, which represents the greatest variable cost in distributing the savings book, is much lower, i.e. EUR [...] million.

(196) The hypothesis put forward by the French authorities that the cost of the accessibility task, whether carried out by La Banque Postale or shared among the institutions, would remain more or less constant if the special rights were withdrawn can be accepted. However, it should be emphasised that, in the medium term, such cost could be gradually reduced through efforts to improve productivity and modernisation.\(^\text{152}\) La Banque Postale estimated at EUR [...] billion the funds collected on general-interest savings books and savings books with unprofitable patterns of use.\(^\text{153}\) Assuming an intermediation commission of 0.8%, such savings books would thus bring in a remuneration of some EUR [...] million. This remuneration is over-estimated since the Commission's correction of the figure for inactive savings books (savings books which La Banque Postale terms "general-interest" savings books, but which do not in fact play any role in the task of providing access to banking) should reduce the overall amount of the funds collected via these savings books. However, on the basis of the data available and though the Commission has not lowered the cost of savings books whose pattern of use is not profitable, the Commission considers that these figures provide a reliable order of magnitude. The net cost of the SGEI relating to access to banking services may thus be estimated at EUR [400-500] million.

(197) As regards the task of collecting funds for the financing of social housing, it has already been indicated (see Section 8.2) that in the Commission's view this task could be carried out under satisfactory conditions in a universalised system. This task could continue to be based on the amount of funds collected. The level of remuneration must be sufficient to act as an incentive for the distributor to place the product, but the setting of the level must also reflect generally the difficulty of promoting the product (complexity, popularity, familiarity to the public). The view may be taken here that the intermediation commission could be set at a level of between [0.6 and 0.8]%\(^\text{154}\). The upper limit corresponds to the figure which many credit institutions proposed to the French authorities for providing the service. The lower limit corresponds to the rate of the commission paid to all the institutions for the LEP, increased by the collection bonus of 0.1%. It should be noted that this level of remuneration would only cover the cost of the task of

\(^{152}\) For example, development of ATM cards and the replacement of physical savings books by computerised versions, which is already part of the policy pursued by La Banque Postale.

\(^{153}\) This figure does not of course take into account the funds collected on savings books for which compensation is granted for operations in the general interest.
collecting funds for the financing of social housing, and the SGEI relating to access to banking services has to be compensated by other means.

(198) The net cost of the SGEI relating to banking accessibility, i.e. EUR [400-500] million, must be set against the savings to public finances allowed by the reduction in the intermediation commission. On the basis of commission levels of [0.6 to 0.8]%, the saving to public finances resulting from universalisation of the system would be between EUR 638 and 686 million. It may be seen from these calculations that universalisation of the system would allow financing of the net cost of the banking accessibility SGEI, estimated at EUR [400-500] million, while at the same time achieving a significant saving for public finances, of between EUR [200-500] million.

(199) Overall, it may thus be concluded that abolishing the special rights for the distribution of the *livret A* and *livret bleu* would not jeopardise the balanced financing of the two SGEIs at issue. In the first place, lowering the commission payable on the collection of savings deposits for the financing of social housing would allow substantial savings for public finances. Secondly, part of this sum could be used to offset entirely the net cost of the banking accessibility task. Lastly, the remainder would constitute a net saving for public finances.

(200) If necessary, this remainder could be used to provide greater compensation for the banking accessibility SGEI. The French authorities have provided an estimate of the cost of the accessibility task that would be performed by Caisses d’Epargne, namely EUR […] million. If the State did formally entrust Caisses d’Epargne with a banking accessibility task that created additional costs for it, compensation could be granted. On the basis of the estimate provided by the French authorities, limited though its usefulness may be because of its lack of precision, and following correction by the Commission of the additional costs associated with inactive savings books, by analogy with what was done in the case of La Banque Postale, the net cost of this task can be put at some EUR […] million. This cost falls within the range of the abovementioned remaining sum (EUR [200-500] million).

(201) The proportionality of the special rights can also be discussed in terms of their duration. As pointed out on a number of occasions by the Commission, the Court of Justice and the French Competition Council, the assignment of special rights for an unlimited period entails a risk of competition being adversely affected154. The principle of proportionality requires, amongst other things, that the duration of concessions must be limited155. In his conclusions in the Mutualité Fonction Publique case, the Government Commissioner before the Council of State, J.-H. Stahl, stated that "assigning special rights to an undertaking amounts to prohibiting, by law, any other undertaking from having access to the market concerned, or to the relevant market share. It inevitably affects the rights of competitors to operate on that market. The longer the period for which the

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155 Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 2).
exclusive rights are assigned, the worse the adverse effects created; this effect seems acceptable to us only if it is justified by service requirements. Accordingly, assigning exclusive rights in perpetuity is by its very nature and automatically excessive”. In the case in point, special rights are of course not granted in perpetuity, but they are not limited in duration and have never been open to competition. Nor is there any indication that they have been periodically reviewed by the French authorities, to take account of changing circumstances. The offers which various banks or associations of banks have made to the French Government in the past twenty years or so for performing the service of distributing the *livret A* at a lower cost have apparently not given rise to any such review. The assignment of special rights for the distribution of the *livret A* and *livret bleu* without any limit as to their duration and without any periodic checks as to their necessity is thus also contrary to the principle of proportionality.

**Methods of financing SGEIs**

(202) On the issue of possible financing methods, the Commission shares the French authorities’ analysis concerning the impossibility of maintaining a single commission for financing the two SGEIs at issue. In view of the risk of creaming-off, a single commission would no longer be able to finance satisfactorily costs as different as those generated by the two-general interest tasks in question. Such a system would be unsatisfactory, moreover, in the light of the objective of transparency of the costs and revenues of each SGEI.

(203) Separate remuneration methods ought therefore to be applied for each SGEI. As regards the financing of social housing, the type of commission that might be envisaged and its level have already been specified. As far as the banking accessibility SGEI is concerned, the French authorities could choose either to extend that task to all institutions or to reserve it for one or several institutions. It is not for the Commission to express an opinion on that choice. Apart from the questions of total cost to the public purse that have already been dealt with in this section, the French authorities have voiced objections based on the practicability of the two scenarios put forward which need to be examined.

(204) As to the first scenario, which consists in limiting the banking accessibility SGEI to one or several operators, clearly an allocation to La Banque Postale alone would enable a relatively simple system to be introduced. All banks, including La Banque Postale, would receive an identical collection commission of [0.6 to 0.8]% of the funds involved, whereas La Banque Postale would be compensated for the banking accessibility task on the basis of the net additional costs shown in the analytical accounts. It has already been demonstrated in the present section that this approach would make it possible to finance both general interest tasks while at the same time delivering a net saving to the public purse.

(205) If the accessibility task were to be entrusted to several operators or to all of them (second scenario), it would then be necessary to lay down simple, objective and transparent criteria making it possible to evaluate the net additional cost attributable to that task in order to compensate each institution in proportion to its contribution towards the objective. In a letter to the Commission dated 13
October 2006, which was forwarded to the French authorities, the complainants intimated that they were prepared to issue the *livret A* under those conditions. Thus all networks wishing to issue the *livret A* would be given responsibility for both general interest tasks without distinction.

(206) The French authorities consider that this option would be difficult to implement, *de jure* and *de facto*, for the following reasons:

− banking institutions could easily in actuality sideline the least profitable customers;
− the geographic coverage, essential in terms of accessibility, is not the same for all banks;
− the least well-off are used to having recourse to the services of the three distributing networks and would continue to do so;
− the French authorities conclude from this that the distribution of “bad” savings books would be very uneven as between institutions and hence that the advantage to be gained from extending the banking accessibility objective to all institutions would be limited.

(207) It seems in fact likely that in the short term La Banque Postale will continue to bear a disproportionate share of “bad” savings books, as the creaming-off of “good” savings books will outpace the redistribution among banks of the “bad” ones. However, in the medium to long term, the obligation to open a savings account for anyone who asks for one should have the effect of distributing the “bad” savings books among the various credit institutions, probably in the same proportions as the distribution of customers of modest means. All things being otherwise equal, in view of the different customer profile depending on the credit institution, the upshot would be an over-representation of “bad” savings books at La Banque Postale in particular.

(208) Be that as it may, the Commission considers that the objections raised by the French authorities are of no practical import as long as the remuneration for the banking accessibility SGEI is based on one or more relevant criteria for purposes of determining the net additional cost attributable to that activity. In other words, an institution which, *de facto*, did not have any “bad” savings books in its portfolio of customers - whether due to a deliberate policy on its part, to a limited geographic coverage or to a lack of interest in it on the part of less well-off customers - would receive no compensation for that task. Conversely, an institution which assumed responsibility for a large share of that task would be compensated accordingly.

(209) It is not for the Commission to define precisely the optimum manner of compensating for the cost of the banking accessibility SGEI. The French authorities have for their part not proposed any method of financing this SGEI, since they have chosen an approach based on calculating the overall cost to the public purse in the event of universalisation, without going into the details of sharing that cost among operators. Consequently, the Commission’s role is limited, in the context of the present proceeding, to verifying whether there are
any practicable methods of compensation and to evaluating whether their use
would lead to any additional cost to the public purse.

(210) It needs to be examined whether one or more cost factors can be defined which
would make it possible to arrive at the cost of administering banking accessibility. Some possible lines of approach have already been mentioned in French
administrative reports. Some stakeholders have also identified a list of possible
criteria: number of sales outlets, number of savings books, number of savings
books of a social character (to be defined), number of transactions carried out, average level of funds per savings book. On the basis of the information
communicated, the Commission can cite other possible criteria, such as the
number of general-interest transactions carried out over the counter and the
number of branches in sensitive urban areas.

(211) The Commission considers that one or more of these criteria could in fact serve to
determine the amount to be compensated for per credit institution on the score of
the banking accessibility objective. This would first of all require a statistical
exercise to define the main additional cost factor or factors linked to the intensive
use made of the livret A by certain persons experiencing particular difficulties in
gaining access to basic banking services. Such a system could be both simple,
objective and transparent. It would not call for any in-depth, complex verification
of the analytical accounts of each operator, a simple mechanism of random
checks and penalties probably being sufficient.

(212) The Commission considers that it would be practicable, for example, for the
amount saved through the reduction in the amount of commission payable for
collecting funds to finance social housing to be distributed in proportion to the
general-interest transactions carried out over the counter in each institution. Thus,
a given operator could, on the basis of its analytical accounts, inform the CDC
that it had performed, say, ten million general-interest transactions over the
counter. If all institutions had carried out fifty million such transactions, the
operator in question would receive 20% of the total amount saved as a result of
the reduction in the intermediation commission. Such a mechanism, which would
have the advantage, moreover, of not requiring the average cost of this type of
transaction to be established, would make it possible to be entirely neutral from a
public finance point of view. This would not penalise the operators with the least
good savings books since the total kitty available would be between 638 and 886
million euros, or, according to the Commission’s estimates, approximately twice
the net cost of the task of ensuring banking accessibility incurred by La Banque
Postale, the only operator to which the State currently entrusts such a task. With
an eye to dynamic efficiency, the State could also decide to gradually reduce the
amount of the kitty so as to induce credit institutions to modernise their relations
with the persons concerned, without calling into question the banking

\[156\] The report on the balance of savings funds by Nasse and Noyer envisages a remuneration method
more closely reflecting the costs of administering savings books and based inter alia on the number of
physical savings books and the number of physical transactions carried out by each network (report of
29 January 2003, p. 60). The Competition Council also considers that the State could financially
compensate for the existence of specific constraints on certain networks (Opinion No 96-A-12 of 17
September 1996, p. 11).
accessibility objective. In so doing, a net saving to the public purse might be achieved in the medium term.

9.7. Conclusion on the risk of creaming-off

For want of reliable statistical data, it is not possible to assess the likely scale of the risk of creaming-off. However, whatever the distribution as between operators of “bad” savings books in the event of universalisation, it is possible to assess the cost of the banking accessibility SGEI, which the French authorities say is constant, and to compare it with the savings made on the commission based on the funds involved. It follows from this analysis that a universalisation which called into question the present system of equalisation between “good” and “bad” savings books would necessitate an overhaul of the method of remunerating general interest tasks by moving away from a single remuneration based on the funds involved, without, however, leading to any overall additional cost to the public purse. The French authorities would have to choose, moreover, between allocating the banking accessibility SGEI to one, several or all credit institutions and to determine how to measure the level of compensation to be awarded. At all events, these choices could be made without calling into question the proper functioning of the banking accessibility SGEI and at a constant cost to the public purse.

In the light of the conditions set out by Mr Advocate-General Léger for applying the derogation provided for in Article 86(2) of the Treaty, the Commission considers that the French authorities have not proved sufficiently that the second condition was fulfilled by operators other than La Banque Postale, and that the fifth condition is not satisfied.

Under the circumstances, there is no point in examining the sixth condition relating to the development of trade.

The Commission accordingly considers that there are other means less restrictive of the freedom of establishment than the granting of special rights to ensure a balanced financing of the two SGEIs at issue. The SGEI relating to the collection of savings with a view to the financing of social housing could be provided by all banking institutions in return for a funds-based commission which would be smaller than at present. Thanks to the savings made on the financing of the first SGEI, compensation could be granted for the banking accessibility SGEI, according to criteria still to be defined, to one, several or all operators. Even if it were limited to a single institution, the direct compensation for the banking accessibility SGEI is a means less restrictive to the freedom of establishment and

In its report on “the accounts and management of La Poste 1991-2002”, the French Court of Auditors states that “it has not been shown that all of these [socially useful] practices, which stem in part from a certain laxness on the part of management, must necessarily be retained, despite the fact that each initiative of La Poste, however technically and economically justified it may be, comes up against principled opposition from interested associations and La Poste’s staff. It has nevertheless been possible to introduce improvements gradually and cautiously (modernisation of the livret A with the Postépargne card …)”. A long-term objective of expanding the use of cash dispensers and computerising savings accounts might thus be pursued without imposing these developments on users.
competition than the granting of a special right to perform the SGEI\(^{158}\), provided there is no over-compensation of the operator responsible for the service. It should be added that abolishing the special rights would make it possible to open up to competition a new area of activity: in the present case, a distinction can be drawn between an activity which does not call for any particular protection – the collection of savings with a view to the financing of social housing – and an activity which calls for state intervention - the banking accessibility SGEI\(^{159}\). Such a system would make it possible, therefore, for any credit institution which so wished to issue \textit{livrets A} and \textit{livrets bleu}, and this would remove the barriers that have been found to exist to freedom of establishment and competition.

(217) The broad lines of this analysis are shared by several administrative and parliamentary reports. In January 2003, the Nasse-Noyer report on the balance of savings funds stated in its introduction that “it is not certain that the goals of the regulated savings policy will be attained more effectively and more cheaply than would be the case if more universal means were employed. … It is our conviction that the State should set itself a long-term objective of in-depth reconfiguration of the arrangements. On the deposits side, the universalisation of products and of their distribution is the intermediate objective to be attained”. The information report by Senator Lambert on the situation and prospects of the French banking system spoke for its part back in 1996 in favour of a universalisation of the distribution of \textit{livrets A} and \textit{livrets bleu} while taking account of the objectives of accessibility and the financing of social housing.

(218) The Commission considers that the reasons put forward by the French authorities are not of such a character as to justify legislation on the distribution of \textit{livrets A} and \textit{livrets bleu} having effects as restrictive of the freedom of establishment as that at issue. The special rights must therefore be deemed contrary to Article 86(1), read in conjunction with Article 43, of the Treaty, without the derogation provided for in Article 86(2) of the Treaty justifying an exception to those rules.

10. **Restriction on the freedom to provide services**

(219) The analysis of the restrictive effects of the national measure in the light of Article 43 of the Treaty is valid, \textit{mutatis mutandis} and \textit{a fortiori}, for the application of Article 49 of the Treaty.

(220) According to the settled case law of the Court of Justice, Article 49 requires “the abolition of any restriction, even if it applies to national providers of services and to those of other Member States alike, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services”\(^{160}\).

\(^{158}\) See the judgment of the Court of Justice in Case C-72/83 \textit{Campus Oil} [1984] ECR 2727. The French Competition Council also recently delivered an opinion on this point (Opinion No 05-A-08 of 31 March 2005, points 64 \textit{et seq.}).

\(^{159}\) Judgment in \textit{Corbeau}, cited above, paragraph 19.

\(^{160}\) See, for example, the judgment of the Court of Justice in Case C-58/98 \textit{Josef Corsten} [2000] ECR I-7919.
(221) In so far as it is unlikely that a foreign operator would be able and willing to propose, from its Member State of establishment, to French consumers the *livret A* or the *livret bleu*, the special rights at issue do not seem to constitute a restriction *per se* to the freedom to provide services. Nevertheless, they do constitute, within the meaning of the case law of the Court of Justice, a restriction on the freedom to provide services in so far as they have the effect of making less attractive to operators established in the Community outside France the exercise of the freedom to provide liquid banking savings products to private individuals in France. Owing to the special rights granted to the above-mentioned French institutions, service providers established in other Member States are confronted with the direct and indirect restrictive effects of the national measure examined in Parts 4 to 6. The collection in general of funds from the French public, and hence the penetration of the French market, is rendered more difficult by such rights.

(222) Inasmuch as the impact of the special rights on the exercise, by foreign operators, of the freedom to provide liquid banking savings products to private individuals in France, and the imperative requirements in the general interest capable of justifying the restriction at issue, are the same as those set out as part of the examination of the national measure under Article 43 of the Treaty, there is no point in carrying out a separate analysis of the implementation of Article 49 of the Treaty.

(223) On this basis, it can be concluded that the special rights granted to the distributing networks constitute an infringement of Article 49 of the Treaty, which prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.
11. Conclusion

(224) Although the Treaty can authorise the maintenance of certain special rights which would be contrary to the freedom of establishment and the freedom to provide services, this is conditional *inter alia* on those rights being essential to the performance of a general interest task. Article 86(2) of the Treaty can, moreover, authorise certain restrictions of competition which are necessary in order to preserve the financial equilibrium of an SGEI.

(225) In the present case, the granting of special rights to distribute *livrets A* and *livrets bleu* to three networks is not justified by the need to ensure the proper functioning of the SGEIs concerned.

(226) In view of the age and complexity of the mechanism at issue, the Commission considers that the implementation of the reform cannot be immediate. In the present case, a period of nine months is appropriate for the purpose of introducing such a change,

HAS ADOPTED THIS DECISION:

*Article 1*

The provisions of the French Monetary and Financial Code reserving for three credit institutions - La Banque Postale, Caisses d’Epargne et de Prévoyance and Crédit Mutuel - the distribution of *livrets A* and *livrets bleu* are incompatible with Article 86(1), read in conjunction with Articles 43 and 49, of the Treaty. Article 86(2) of the Treaty cannot justify the maintenance of the special rights at issue.

*Article 2*

France shall put an end to the infringement referred to in Article 1 within a period of nine months from the date of notification of this Decision. It shall inform the Commission of the measures taken to that end within the same period.

*Article 3*

This Decision is addressed to the French Republic.

Done at Brussels, 10 May 2007

For the Commission

Neelie KROES
Member of the Commission