



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.2.2009  
C(2009) 685 final

**COMMISSION DECISION**

**of 11.2.2009**

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**concerning the State aid N° C 55/2007 (ex NN 63/2007, CP 106/2006)  
implemented by the United Kingdom of Great Britain and Northern Ireland**

*Crown guarantee to BT*

**(Only the English version is authentic)**

**(Text with EEA relevance)**

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to those provisions<sup>1</sup> and having regard to their comments,

Whereas:

- (1) This case concerns State aid put into effect by the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") in favour of BT plc (hereinafter "BT" unless otherwise stated). BT is a public limited company registered in England and Wales. British Telecommunications plc is a wholly owned subsidiary of BT Group plc and encompasses virtually all the businesses and assets of the BT group. The successor to the statutory corporation British Telecommunications, it was incorporated

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<sup>1</sup> OJ C 15, 22.1.2008, p.8.

- (2) in England and Wales as a public limited company, wholly owned by the Government of the United Kingdom, as a result of the Telecommunications Act 1984. Between November 1984 and July 1993, the Government of the United Kingdom sold all of its shareholding in British Telecommunications plc in three public offerings.

## **1. PROCEDURAL ASPECTS**

- (3) On 26 April 2006, one of BT's competitors, which requested confidentiality, lodged a complaint against a guarantee granted to BT by the Minister of the Crown ("Crown guarantee"). By e-mails dated 24 May 2006 and 22 June 2006, this competitor provided further information on the scheme to the Commission.
- (4) On 18 May 2006, the Commission sent a request for information to the authorities of the United Kingdom, who replied by letter dated 18 July 2006.
- (5) On 21 December 2006, the Commission sent a further request for information. After an extension of the deadline, the authorities of the United Kingdom responded by letter dated 27 February 2007.
- (6) On 26 March 2007, a meeting was held with the lawyers representing the Trustees of the BT Pension Scheme ("BTPS") at the request of the United Kingdom authorities. Further information was submitted by e-mail dated 10 May 2007.
- (7) On 10 May 2007, the Commission sent a request for information to the authorities of the United Kingdom. After an extension of the deadline and a meeting which took place on 11 June 2007, the authorities of the United Kingdom responded by letter dated 19 June 2007.
- (8) By letter dated 3 August 2007, the Commission requested further information. After an extension of the deadline, the authorities of the United Kingdom responded by letter dated 3 October 2007.
- (9) On 28 November 2007, the Commission adopted and notified to the United Kingdom a decision concluding that the Crown guarantee, as far as it concerns BT pension liabilities in case of insolvency, did not constitute State aid within the meaning of Article 87(1) of the EC Treaty, and at the same opened the formal investigation procedure on certain measures linked to the Crown guarantee granted to BTPS.
- (10) By e-mail dated 30 January 2008, the authorities of the United Kingdom sent their comments on that decision.
- (11) Following the publication of the decision of 28 November 2007, the Commission received comments from the following interested parties: UK Competitive Telecommunications Association ("UKCTA"), a trade association representing telecommunication operators competing with BT, the original anonymous complainant, BT and BTPS. Their observations were sent to the authorities of the United Kingdom on 25 March 2008.
- (12) By e-mail dated 25 April 2008, the authorities of the United Kingdom sought authorisation to submit the third parties' comments to BT. After consultation and agreement of the parties concerned, the Commission authorised disclosure of non-confidential versions of these documents to BT.

- (13) By e-mail dated 30 May 2008, the Commission received the comments of the authorities of the United Kingdom on the third parties' submissions. By e-mail dated 3 June 2008, the Commission received BT's comments on the third parties' observations.
- (14) On 22 July 2008, the Commission held a meeting with the authorities of the United Kingdom, which was followed by new clarifications provided by e-mail on 19 September 2009.
- (15) The lawyers of BT and BTPS, at their request, met with the Commission on 6 August 2008 and 28 October 2008.

## **2. DESCRIPTION OF THE MEASURES**

- (16) The relevant measures under examination concern the provisions by which the Government of the United Kingdom guarantees the payment of certain liabilities, in particular pension liabilities, of BT under the Crown guarantee, and relieves BT from obligations laid down in the legal framework which applies to pension schemes in the United Kingdom.

### **2.1. The Crown guarantee**

- (17) By virtue of the Telecommunications Act 1981, the telecommunications operation which had formerly formed part of the Post Office was transferred to a new public corporation, British Telecommunications. The Telecommunications Act 1984 provided for the privatisation of British Telecommunications.
- (18) Under section 60 of the Telecommunications Act 1984, the property, rights and liabilities of the public corporation were transferred to the privatised successor company, British Telecommunications plc. Included in the transfer were any liabilities of the public corporation in respect of its employees' pension scheme, which at the time was showing a deficit of GBP 626 million revealed by the 1983 actuarial valuation of the scheme.
- (19) Section 68 of the Telecommunications Act 1984 laid down the Crown guarantee:
  - (1) *This section applies where*
    - (a) *a resolution has been passed, in accordance with the [Insolvency Act 1986], for the voluntary winding up of the successor company, otherwise than merely for the purpose of reconstruction or amalgamation with another company; or*
    - (b) *without any such resolution having been passed beforehand, an order has been made for the winding up of the successor company by the court under that Act.*
  - (2) *The Secretary of State shall become liable on the commencement of the winding up to discharge any outstanding liability of the successor company which vested in that company by virtue of section 60 above.*
  - (...)
  - (4) *Where the Secretary of State makes a payment to any person in discharge of what appears to him to be a liability imposed on him by this section, he shall thereupon become a creditor of the successor company to the extent of the amount paid, his claim*

*being treated for the purposes of the winding up as a claim in respect of the original liability.*

- (20) The Crown guarantee covered all outstanding liabilities of the corporation transferred to BT in 1984. Although the authorities of the United Kingdom state that they do not have complete information on the total amount of liabilities that were covered other than pension liabilities, they note that the 1983/4 "financial statements of British Telecom provide some information as to the position on 31 March 1984:
- short term liabilities falling due within one year totalled GBP 1 909 million. They comprised short term borrowings, trade creditors, value added tax and payroll taxes, other creditors, accruals and deferred income.
  - long term liabilities totalled GBP 458 million in foreign loans, which were reimbursed ten years later.
- (21) The Communication Act 2003 repealed section 60 and amended section 68(2) of the Telecommunications Act 1984, which now provides that "*the Secretary of State shall become liable on the commencement of the winding up to discharge any outstanding liability of the successor company for the payment of pensions which vested in that company by virtue of section 60 above*" (emphasis added).
- (22) The Crown guarantee requires the Government of the United Kingdom to discharge any liability of the public corporation for payments of pensions transferred to BT in respect of employees who were members of the public corporation's employee pension scheme before 6 August 1984, provided BT is insolvent and is being wound up and only if the liability is wholly or partly outstanding at the beginning of the winding up. This presupposes that the assets of BT's pension scheme are insufficient to cover its liabilities regarding the rights accrued to those employees. Although the Telecommunications Act 1984 is not clear on this point, the authorities of the United Kingdom are of the opinion that the Crown guarantee covers not only the pension rights acquired by these employees before the privatisation but also those acquired after it.
- (23) Prior to the privatisation and given its status as public corporation, BT could not be wound up except by an Act of Parliament. As far as pension liabilities are concerned, the Crown guarantee was allegedly provided to allay the concerns of the public corporation's employees who would no longer enjoy State protection for their pensions. They were particularly worried about what would happen if the privatised successor company were to become insolvent leaving the pension scheme with a deficit. According to the authorities of the United Kingdom, the Crown guarantee issued in 1984 responded to these concerns, which were exacerbated by the actuarial deficit of the pension scheme revealed in 1983.
- (24) According to the explanations provided by the authorities of the United Kingdom, if BT became insolvent, the Government of the United Kingdom would become liable immediately - on commencement of liquidation - for any of BT's outstanding liabilities relating to the pension scheme for staff transferred to BT at privatisation. The Secretary of State would make payment to BTPS in respect of these outstanding liabilities and would become an unsecured creditor of BT for that amount. BTPS would also be an unsecured creditor of the insolvent BT for any liabilities related to staff not covered by

the Crown guarantee since the law does not give any special preference to pension scheme trustees.

- (25) The authorities of the United Kingdom indicate that they are unable to specify the value of the liabilities that would be covered by the guarantee. Indeed, the outstanding liabilities would depend on the number of members to be covered and on the assets of the BT pension scheme if and when BT became insolvent and was wound up.

## **2.2. BT Pension Scheme**

- (26) Until 1969, employees of the Post Office were civil servants. In that year, they became employees of the Post Office public corporation, which ended their status as members of the civil service. The Post Office was assigned general responsibility for the payment of staff pensions, with the establishment of the Post Office Staff Superannuation Scheme ("POSSS"), to which the accrued pension rights of Post Office employees were transferred.
- (27) In 1983, the British Telecommunications Staff Superannuation Scheme ("BTSSS"), the terms of which were closely modelled on those of the POSSS, was established. As of 31 March 1986, BT established a further pension scheme for new employees called the British Telecommunications plc. New Pension Scheme ("BTNPS"). The BTSSS was closed to new members from that date. Both these schemes were merged and renamed the BT Pension Scheme ("BTPS") in 1993.
- (28) The objective of BTPS is to ensure that over the long term, the scheme will always have enough money to meet the cost of the pension benefits to be paid. Under the Rules of the BTPS, BT must contribute regular employment contributions to the Scheme, as determined by the Scheme Actuary, to meet the benefits under and the costs and expenses of the Scheme. BT's regular employer contributions amounted to GBP 395 million in the financial year 2006/2007. The Scheme Actuary is also required to make an actuarial valuation of the assets and the liabilities (namely, future pension benefits and other costs and expenses) of the scheme at intervals not exceeding 3 years and report the position to BTPS' Trustees and to BT. BT must also make further contributions as required to repair any deficit between the Scheme assets and liabilities reported on the actuarial valuation under a recovery plan to return the BTPS to full funding [confidential text deleted, indicated hereinafter by [...]].
- (29) For instance, the triennial valuation of the BTPS as at 31 December 2002 concluded that there was a funding deficit, which BT agreed to repay at GBP 232 million per annum over fifteen years, in addition to regular employer contributions. The results of the most recent valuation were announced in December 2006 and disclosed liabilities of GBP 37.8 billion and assets of GBP 34.4 billion, which resulted in a deficit of GBP 3.4 billion. According to the recovery plan, the scheme should return to full funding by 2015. BT agreed to pay GBP 280 million per annum for ten years, which, combined with investment returns, is anticipated to fully pay off the deficit. Should the next actuarial valuation reveal that the scheme will not return to full funding as planned, a new recovery plan and amended additional contributions will have to be agreed.

## **2.3. Main developments of pension legislation in the United Kingdom since 1984**

- (30) Pension law in the United Kingdom has undergone several changes since 1984. According to the information available, the Pensions Acts 1995 and the Pensions Acts 2004 introduced the main modifications to the general pension regulatory framework.

### 2.3.1. *The Pensions Act 1995: minimum funding requirements*

- (31) Section 56 of the Pensions Act 1995 introduced a Minimum Funding requirement that the value of the assets of the scheme is not less than the amount of the liabilities of the scheme. However, the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996 provide that:

*"Section 56 (minimum funding requirement) does not apply to [...] any occupational pension scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities. [...] Where such a guarantee has been given in respect of part only of a scheme, sections 56 to 60 and these Regulations shall apply as if that part and the other part of the scheme were separate schemes"*(emphasis added).

- (32) Furthermore, section 75 of the Pensions Act 1995 provides that if at the time of insolvency the value of the assets of the scheme is less than the amount of the liabilities of the scheme, an amount equal to the difference shall be treated as a debt due from the employer to the trustees or managers of the scheme. However, the Occupational Pension Schemes (Deficiency on Winding up) Regulations 1996 provide that:

*"Section 75 does not apply [...] to any occupational pension scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities"* (emphasis added).

### 2.3.2. *The Pensions Act 2004: Pension Protection Fund and Statutory Funding Objectives*

- (33) Part 2 of the Pensions Act 2004 introduced the Pension Protection Fund as a result of intense political pressure at the time, after thousands of workers lost large amounts of their pension benefits following the bankruptcy of their sponsoring companies. The Pension Protection Fund was created in April 2005. Its function is to pay compensation to members of eligible pension schemes whose sponsor employers have suffered insolvency leaving insufficient assets in the scheme to provide their members with protection equivalent to the level of compensation payable by the Pension Protection Fund.
- (34) The Pension Protection Fund is financed partly by the assets transferred from schemes from which it has assumed responsibility and partly by an annual levy raised on eligible pension schemes. This levy includes an administration levy and a risk levy which incorporates two elements: a risk-based element that takes into account the scheme's underfunding risk and the employer insolvency risk (80% of the levy) and a scheme-based element on the basis of the size of the scheme's liabilities (20% of the levy). The amount of the initial levy for 2005/2006 was set without taking into consideration the risk-based element.
- (35) The Pension Protection Fund (Entry Rules) Regulations 2005 specify that "a scheme in respect of which a relevant public authority has given a guarantee or made any other arrangements for the purposes of securing that the assets of the scheme are sufficient to meet its liabilities" is exempted from the Pension Protection Fund. Where part of a scheme is guaranteed by the Crown, the guaranteed and non-guaranteed parts of the scheme should be considered as separate schemes.

- (36) Finally, Part 3 of the Pensions Act 2004 introduced new scheme funding requirements ("Statutory funding objectives") which replaced the 1995 minimum funding requirements. Section 222 of the Act provides that schemes are subject to a requirement to hold sufficient and appropriate assets to cover their technical provisions. The Occupational Pension Schemes (Scheme Funding) Regulations 2005 exempt a scheme which is guaranteed by a public authority. Again, if a part of a scheme is guaranteed by the Crown, the guaranteed and non-guaranteed parts of the scheme should be considered as separate schemes.

### **3. COMMISSION DECISION ON THE FORMAL INVESTIGATION PROCEDURE**

- (37) In its decision of 28 November 2007 initiating the formal investigation, the Commission set out its preliminary assessment and doubts as to the compatibility of the measures at hand with the common market. The measures in question were:
- The Crown guarantee to BT on BT's pension liabilities in 1984.
  - The exemption of BTPS from the application of the minimum funding requirements introduced by the Pensions Act 1995 and the Pensions Act 2004 to the BTPS' pension liabilities covered by the Crown guarantee.
  - The exemption of BTPS under the Pension Protection Fund (Entry Rules) Regulations 2005 from the requirement laid down in Part 2 of the Pensions Act 2004 to contribute an annual levy to the Pension Protection Fund corresponding to its pension liabilities covered by the Crown guarantee.
- (38) In that decision, the Commission held the view that, on its own, the Crown guarantee on BT's pension liabilities in case of BT's insolvency after being wound up is of benefit only to employees and therefore does not confer any advantage to BT since it does not affect the credit rating, investment, or employment policy of BT. The Commission therefore concluded that the Crown guarantee, as far as it concerns BT pension liabilities in case of insolvency, did not confer any specific additional advantage to BT, viewed in isolation from the changes in the legal framework introduced in 1995 and 2004, and therefore did not constitute State aid within the meaning of Article 87(1) EC<sup>2</sup>.
- (39) However, the Commission reached a different conclusion with regard to the pension legal framework introduced in 1995 and 2004 in connection with the Crown guarantee. Whilst expressing its preliminary doubts on the compatibility of possible State aid with the common market, the Commission called on the United Kingdom to provide explanations, in particular, as to the following:
- Clear evidence that BTPS did not avail itself of the exemption from the minimum funding requirements provided for in the 1995 and 2004 Pension Acts, and reasons for this decision. In this connection, the Commission noted that the BTPS still had a GBP 3.4 billion deficit in 2006, despite the requirements of the 1995 Pension Act that the assets of the scheme had to match its liabilities.
  - Full explanations as to why the exemption from the contribution to the Pension Protection Fund does not constitute State aid within the meaning of Article 87 (1) EC;

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<sup>2</sup> See Commission decision of 28 November 2007, §§ 42-60.



- Full explanations as to why these measures can be found to be compatible with State aid rules, and in particular under Article 87(3)(c) EC, should the Commission conclude that they constitute State aid.

#### 4. COMMENTS FROM THE PARTIES INVOLVED

##### 4.1. Position of the Authorities of the United Kingdom

- (40) The observations of the United Kingdom relate to the issues raised in the decision of 28 November 2007 as concerns minimum funding requirement and the exemption from payment of levies to the Pension Protection Fund.

##### 4.1.1. Minimum Funding Requirement

- (41) The United Kingdom claims that BT and the BTPS did not avail themselves of the exemption from the application of the minimum funding requirements.
- (42) The minimum funding requirement provided for in section 56 of the Pensions Act 1995, which was in force until 2004, imposed a requirement that the value of the assets of the pension fund should not be less than the amount of liabilities. The United Kingdom stresses that the basis for calculations of pension liabilities pursuant to section 56(3) of the Pensions Act 1995 differed from those generally used by pension schemes in the course of their regular ongoing valuations. As a result, the different methodology produced different values for liabilities.
- (43) The differences between the valuations under the methodology of the minimum funding requirement ("MFR") and the BTPS ongoing valuations are detailed in the table below:

Date of valuation	Assets	Liabilities (MFR basis)	Ratio assets/liabilities (MFR basis)	Liabilities (ongoing basis)	Ratio assets/liabilities (on going basis)
31/12/2002	GBP 22.8bn	GBP 22.5bn	101.1%	GBP 24.9bn	91.6%
31/12/1999	GBP 29.9bn	GBP 26.5bn	112.7%	GBP 30.9bn	96.8%

- (44) These figures show that, in the case of the two valuations of BTPS carried out during the period in which the 1995 minimum funding requirement was in force, namely, the 1999 and 2002 valuation, its funding position calculated on the basis of the minimum funding requirement methodology exceeded 100% even though its ongoing valuation under a different methodology showed a deficit. In that respect, the United Kingdom stresses that the minimum funding requirement imposed no requirement on schemes for their assets to exceed the liabilities calculated in the course of their ongoing valuations. Moreover, even a deficit under minimum funding requirement did not need to be corrected immediately but within a prescribed period of no more than 10 years to reach a funding position of 100% ratio assets/liabilities.
- (45) The Pensions Act 2004 replaced the 1995 minimum funding requirement with a new scheme funding regime, which obliges pension funds' trustees to agree with the sponsor company on a plan to restore any funding deficit. The authorities of the United Kingdom underlined that under the Occupational Pension Schemes Regulations, only

pension schemes that benefit from a Crown Guarantee and that are established by enactment (by law) can be exempted from the application of the mandatory funding requirement. In this respect, it should be noted that BTPS was not established by enactment.

- (46) The authorities of the United Kingdom further underlined that this mandatory funding requirement has been fully respected by the BTPS, as illustrated by the statements prepared by the BTPS Trustees indicating that the 2004 funding requirement had been fully applied in respect of the recovery plan associated with the 2005 valuation. The authorities of the United Kingdom also indicated that the Pensions Regulator was satisfied that the guarantee was not used to extend the recovery period or affect the key assumptions in the actuarial valuation or recovery plan.

#### *4.1.2. Exemption of the payment of the levy to the Pension Protection Fund*

- (47) With regard to the exemption of the payment of the levy to the Pension Protection Fund, the authorities of the United Kingdom recall that the Pension Protection Fund was part of a package introduced under the Pensions Act 2004 with a view to improving the protection offered to members of pension schemes in case of employer insolvency. The Pension Protection Fund was specifically created to strengthen the protection for members in the event of schemes' winding-up where they were under-funded, and where appropriate arrangements were not yet in place. In the view of the authorities of the United Kingdom, since the obligation to pay levies is directly linked to the receipt of protection from the Pension Protection Fund, schemes with appropriate arrangements such as a Crown guarantee are not eligible for the Pension Protection Fund under the regulations, since the protection afforded by the Pension Protection Fund is not relevant.
- (48) Therefore, the BTPS is outside the scope of the Pension Protection Fund system for employees covered by a Crown guarantee. Indeed, for these employees, the BTPS does not need or gain any protection from the Pension Protection Fund and therefore a levy is not paid. To categorise this as an exemption is, in the view of the authorities of the United Kingdom, inconsistent with the whole logic of the Pension Protection Fund system. On the contrary, the payment of a full Pension Protection Fund levy by the BTPS would deliver a windfall gain to schemes that are eligible for and benefit from the protection of the Pension Protection Fund.

#### **4.2. Position of BT and BTPS' trustees**

- (49) In their joint submission to the decision of 28 November 2007, BT and BTPS underline that the Crown guarantee is only part of a package that was introduced at the time of privatisation of BT in 1984 and was intended to protect the civil service-style pension rights of the pre-privatisation employees of BT. In contrast to the benefit of the Crown guarantee for pre-privatisation employees, this package included a series of additional burdens which are not normally included in the budget of an undertaking :

- civil service-style enhanced benefits, such as retirement age at 60;
- enhanced early retirement terms on redundancy;
- restrictions on BT's ability to amend these obligations, cease employer contribution [...]; and
- inheritance by BT of the net deficit of the scheme at privatisation.

- (50) BT further notes that the non-applicability of the Pension Protection Fund levy is the logical consequence of the Crown guarantee since the latter already offers separate pension protection. It argues that these two measures (Crown guarantee and the resulting exemption from the Pension Protection Fund levy) are intrinsically linked to the 1984 pension package. This package has imposed a considerable financial burden on BT. An expert actuary has determined the net present value of the additional pension liabilities transferred to BT to be GBP [...], a sum not normally borne by companies in the private sector. Since that burden far outweighs any amount that would be due to the Pension Protection Fund in the absence of the Crown Guarantee, allegedly, there is no overall advantage granted to BT, and therefore no State aid.
- (51) BT also argues that it would be contrary to State aid law to characterise as State aid a measure such as the Crown guarantee that was not aid at the time it was granted as a result of an exogenous event such as the creation of the Pension Protection Fund twenty years later which has not altered the provisions of the initial measure. In any event, there is allegedly no transfer of State resources involved.

#### **4.3. The complainant and other interested parties**

- (52) To the extent that the comments of third parties challenge the Commission conclusion set out in the Commission decision of 28 November 2007 opening the procedure that the Crown guarantee did not, in itself, confer any specific additional advantage on BT, such comments are not related to the object of the present decision and shall not be addressed in this decision.
- (53) The complainant points out that, to the extent that the guarantee has an effect on the funding of the pension liabilities, this effect on BT is very substantial since the size of the BTPS' deficit - GBP 3.4 billion in 2006 - is material in comparison to BT's net worth of GBP 1.55 billion at the same time. If the scheme deficit were taken to the balance sheet, this would have affected BT's ratios, ability to borrow and the terms on which it could do so. The different funding requirements of the BTPS allowed by the Crown guarantee would thus procure benefits to BT alone without any need to resort to actual insolvency, on the top of the benefits of protection to beneficiaries of the BTPS.
- (54) UKCTA holds the view that the exemption from the minimum funding requirements and the payment of the Pension Protection Fund levy give BT an advantage, which is not justified by the logic of the system. Whilst no protection to beneficiaries of pension schemes under the general regulatory provisions governing occupational pension schemes such as BTPS was available in 1984 when the guarantee was issued, the object of the 1995 and 2004 reforms was to provide efficient protection to beneficiaries which made the Crown Guarantee redundant. To exempt a specific company of the general obligation that companies are themselves responsible to set up or participate in arrangements for protection is openly contradictory to the logic of the system.
- (55) In particular, as to minimum funding requirements, UKCTA stresses that, by exempting schemes which are covered by the Crown guarantee from the 1995 and 2004 regulatory requirements, the United Kingdom deliberately renounced the possibility to reduce its exposure under the Crown guarantee. Moreover, in that respect, the unilateral decision of BT to contribute to the BTPS beyond what would be required does not have any effect on the liability of the State. A measure does not cease being State aid because it has not yet been used.

## 5. ASSESSMENT

### 5.1. Qualification of the measures as State aid

(56) Article 87(1) of the EC Treaty states:

*Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.*

(57) In order for Article 87(1) EC to be applicable, there needs to be an aid measure imputable to the State which is granted by State resources, affects trade between Member States and distorts competition in the common market by conferring a selective economic advantage to certain undertakings.

#### 5.1.1. Aid granted by a Member State or through State resources

(58) The exemption from the minimum funding requirements laid down in the Pensions Act 1995 and the Pensions Act 2004 and the exemption from the payment of levy to the Pension Protection Fund corresponding to the pension liabilities covered by the Crown guarantee set out in the Pensions Act 2004 result from provisions adopted by the legislative bodies of the United Kingdom. It should be noted that the same is also true with respect to the Crown guarantee. As a result, any aid contained in those measures is granted by the United Kingdom. Furthermore, the exemptions involve State resources because they are the consequence of the Crown guarantee, which involves State resources of the United Kingdom.

(59) Pursuant to the Telecommunications Act 1984, the United Kingdom will discharge any outstanding liability of the successor company which vested in the public corporation BT if BT is wound up. This liability has been limited since 2003 to any outstanding liability for the payment of pensions. If BT is wound up and insolvent that commitment imposes an obligation to pay the relevant part of pension liabilities in relation to the BTPS. In that case, the resources of the United Kingdom would be called to make good any outstanding liability that BT would have otherwise had to pay.

(60) Not only are the financial resources of the United Kingdom committed if BT becomes insolvent, but that commitment is granted for free since it does not concomitantly trigger the regular or deferred payment by BT to the public budget of competent financial bodies of the United Kingdom of any fee or financial compensation whatsoever. It follows that the United Kingdom foregoes the possible revenues and, hence, the State resources which it could obtain from granting the benefit of the Crown guarantee.

(61) The exemption from the minimum funding requirements laid down in the Pensions Act 1995 and the Pensions Act 2005 by virtue of the Crown guarantee and the exemption from the payment of levy to the Pension Protection Fund corresponding to the pension liabilities covered by the Crown guarantee set out in the Pensions Act 2004 are triggered by the existence of a Crown guarantee which involves resources of the United Kingdom. It follows that these exemptions are dependent on and thus involve resources of the United Kingdom within the meaning of Article 87(1) EC.

5.1.2. *(Selective) Economic advantage to BT*

(62) Following the comments of the parties on the opening decision, it is necessary to examine whether the exemption from the minimum funding requirements laid down in the Pensions Acts 1995 and the Pensions Act 2004 or the exemption from the payment for a levy to the Pension Protection Fund set out in the Pensions Act 2004 corresponding to the pension liabilities covered by the Crown guarantee have procured an economic advantage to BT.

5.1.2.1. The exemption from the minimum funding requirements laid down in the Pensions Act 1995 and the Pensions Act 2004.

(63) The Pensions Act 1995 introduced a minimum funding requirement that the value of the assets of the scheme must not be less than the amounts of the liabilities of the scheme based on a prescribed actuarial methodology for valuation. Pension funds which enjoy a Crown guarantee were exempted from that funding requirement. Part 3 of the Pensions Act 2004 modified the 1995 Act in that it introduced a new scheme of funding requirements and actuarial valuations, from which pension funds with a Crown guarantee are also exempted, provided that they are established by enactment.

(64) Concerning compliance with the minimum funding requirements introduced by the Pensions Act 2004, it follows from the information submitted by the authorities of the United Kingdom that BTPS does not fulfil one of the conditions for exemption, since it was not established by enactment. It follows that BTPS is subject to the minimum funding requirements laid down in the Pensions Act 2004 notwithstanding the existence of the benefit of the Crown guarantee. As a result, BT cannot avail itself from any exemption therein and must meet the requirements of that Act as long as they are in force.

(65) In that respect, the content of the latest BTPS recovery plan, agreed between BT and BTPS Trustee in December 2005, was subject to the Pension Regulator's scrutiny. The Pension Regulator is an independent authority set by the Pensions Act 2004 and is in charge of the regulation of pension schemes. The authorities of the United Kingdom formally confirmed that the Pension Regulator was satisfied that the Crown guarantee was not being used to extend the recovery period or affect any of the key assumptions in the actuarial valuation or recovery plan of BTPS.

(66) However, it is necessary to assess whether, by virtue of the Crown guarantee, the exemption from the funding requirements contained in the Pensions Act 1995, which was not subject to the condition of the pension scheme in question having been established by enactment, procured an economic advantage to BT or to BTPS. Any possible advantage would have been present between 1995 and 2004, when those requirements were in force.

(67) Those requirements were defined in particular as to the methodology to be followed for the actuarial valuation of the schemes' position and as to the ten year period within which any reported deficit had to be made good. The exemption could have, in principle, provided an economic advantage to employer companies like BT whose liabilities in relation to their pension fund are covered by the Crown guarantee. Those companies could have followed more lenient requirements, if at all, as to (i) the obligation to correct any deficit, (ii) the methodology followed to assess the schemes' position as to assets and liabilities and (iii) the conditions and period for doing so.

Indeed, the funds released from not following those requirements could have been used for other economic activities.

- (68) In respect of the funding obligation, the rules of BTPS between 1995 and 2004 placed BT under an obligation to correct any deficit identified by the Scheme actuary. Although BT could have availed itself of the exemption from the Pensions Act 1995, it did not do so as concerns the obligation of return to full funding.
- (69) In respect of the methodology, the authorities of the United Kingdom provided all BTPS' Statement of Investment Principles since 1996 to the Commission. They always state that the investment policy of BTPS had regard to the minimum funding requirements laid down in the Pensions Act 1995. The authorities of the United Kingdom claim that, in effect, BT funded BTPS as if the minimum funding requirements laid down in the Pensions Act 1995 and the Pensions Act 2004 fully applied to it. The authorities of the United Kingdom have also shown that those requirements were complied with in the valuations carried out in 1999 and 2002, notwithstanding the deficit established according to a different, ongoing valuation, basis. As a matter of fact, BTPS's funding position resulting from the valuations carried out in 1999 and 2002, when the minimum funding requirements of the Pensions Act 1995 were in force, does not disclose any deficit which BT would have been forced to make good in application of those requirements. Although BT could have availed itself of the exemption from the Pensions Act 1995 as concerns the prescribed methodology, it did not do so and actually applied a methodology which placed more stringent obligations on the funding of BTPS' deficit.
- (70) In respect of the prescribed period for return to full funding, had a deficit existed under the minimum funding requirements set out in the Pensions Act 1995, the correction needed not to be immediate but could be carried forward within prescribed periods of ten years or less. It is true that BT was, and still is, obliged under the rules of BTPS to repair any deficit between the scheme assets and liabilities reported on an actuarial valuation, [...]. However, in the absence of any deficit of the BTPS under the methodology prescribed by the Pensions Act 1995, the longer period within which BT could have corrected it as compared with the Act does not appear to have provided an actual economic advantage to BT.
- (71) The Commission notes the argument made by third parties that a measure does not cease being State aid because it has not yet been used. However, in the current circumstances, the measure in question is no longer in force and there is no evidence of an economic benefit having accrued to BP between 1995 and 2004.
- (72) In these circumstances, the Commission considers that it is not established that the exemption from the minimum funding requirements laid down in the Pensions Act 1995 and, even less so, the rules contained in the Pensions Act 2004 have procured or still procure an economic advantage to BT. There is therefore no State aid in this respect since the cumulative conditions laid down by Article 87(1) of the EC Treaty are not fulfilled.

5.1.2.2. The exemption from the payment of levy to the Pension Protection Fund corresponding to the pension liabilities covered by the Crown Guarantee set out in the Pensions Act 2004.

- (73) The Pensions Act 2004 created the Pension Protection Fund, to which pension funds generally have to contribute by paying an annual levy, unless they benefit from a Crown guarantee and are as a result exempted from this payment. As from 2004, the Pension Protection Fund general system has been established and occupational pension schemes, and indirectly employers, have to make contributions to the Pension Protection Fund, which guarantees the employees of any contributor scheme. In other words, the general system is that additional protection must be paid by the employers in the form of the payment of a full levy.
- (74) Under the Pension Protection Fund entry rules regulations, the section of BTPS for the part of its employees' pension rights guaranteed by the Crown is exempted. Therefore, BTPS levy is calculated by the Pension Protection Fund excluding all members of the scheme who joined before privatisation on the understanding that section 68 of the 1984 Act guarantees the liability of BT to make contributions to BTPS in respect of these members. As a result, there is a difference between the Pension Protection Fund levy which the BTPS actually paid since 2005 and the levy which the BTPS would have paid had the existence of the Crown guarantee been ignored.
- (75) For instance, the levy which BTPS paid in 2005/6 was GBP [...] whilst the putative levy payable without the Crown guarantee would have been GBP [...] In other words, the fee actually paid amounted to less than [...] of the amount which the BTPS would have had to pay without the Crown guarantee. For subsequent years, the fee payable if the existence of the Crown guarantee had been ignored would have been GBP [...] in 2006/2007 and GBP [...] in 2007/2008.
- (76) The Commission does not consider that the reduction of the levy to be paid to the Pension Protection Fund is justified "by the logic of the system". The Commission considers that the "system" set out in the United Kingdom for the protection of pension rights cannot be regarded as constituted by the Pension Protection Fund alone. Rather, all measures established in order to achieve protection of pensions must be taken into consideration. In case BT becomes insolvent and its pension fund is in deficit, the pensions of the pre-privatisation employees concerned will be paid by the State, rather than by the privately funded Pension Protection Fund, as would be the case if the normal rules had applied. As indicated above, the BTPS obtains the protection of the Crown guarantee without any payment. The only "logic" apparent in this case is that where State resources are made available for the protection of an undertaking's pension scheme, private provision becomes superfluous.
- (77) The argument put forward by the authorities of the United Kingdom to the effect that the protection system set out by the Pension Protection Fund only applies in the absence of other adequate protection arrangements being put in place, such as a Crown guarantee, disregards the fact that the protective arrangements from which the BTPS benefits are made available at no cost to BT. Even if one were to admit that the Pension Protection Fund is as a "safety net" intended only for pension schemes not benefitting from adequate protection in case of insolvency of the employer, the fact remains that BT does not pay for such protection as concerns the pension rights of pre-privatisation employees and has been supplemented by the State for the provision of the adequate protection which the United Kingdom deems it necessary to put in place for other

employees of occupational pension schemes. Indeed, as concerns its post-privatisation employees whose rights are not covered by the Crown guarantee, BTPS benefits from and contributes to the Pension Protection Fund.

- (78) Nor does the Commission share the view put forward by BT and BTPS that a measure which was allegedly not aid in 1984 when it was granted cannot be characterised as aid twenty years later as a result of exogenous events. The Commission firstly points out that it does not find the guarantee to be, in itself, an aid to BT. As the Commission noted in its decision of 28 November 2007, the Crown guarantee on pension liabilities was made for the benefit of the said employees and did not confer an economic advantage directly to BT. The guarantee does however now constitute the underlying reason why BT receives an advantage in the form of the derogation from the full levy to finance the Pension Protection Fund which was introduced by the Pensions Act 2004, which BT pays only as far as its post-privatisation employees are concerned. That derogation could not exist at the time when the Crown guarantee was issued because there was no obligation to contribute to the same or a similar fund, but the guarantee is recognised by the Pensions Act 2004 as justification for the derogation.
- (79) The allegation by BT and BTPS that the creation of the obligation to contribute is exogenous to the Crown guarantee disregards the fact that the nature of the benefit and the beneficiary are not the same in 1984 and in 2004. The coverage of pension rights in case of BT insolvency is a benefit for pre-privatisation employees in that it guarantees the payment of the rights which accrue to them. However, the exemption from the Pension Protection Fund and the payment of the full levy is a benefit for BT insofar as it diminishes the levy which would otherwise be due and that exemption owes to the existence of the Crown Guarantee.
- (80) The Commission also rejects the argument that no advantage is present on the grounds that this guarantee has already been paid by BT's shareholders in the overall price that they paid for the company in 1984. As explained in the decision of 28 November 2007, the Commission concluded on the basis of the information available that the Crown guarantee in itself, as far as it covers BT's pension liabilities, did not confer any advantage to BT at the time it was granted and there is therefore no reason to assume that BT's shareholders paid a premium for an advantage for certain employees that would only materialise in the event of BT's insolvency. It did not imply any advantage until 2004, when its implications were substantially changed by the legislation. At the time of the privatisation, the Crown guarantee on pension liabilities had no discernible value for BT's shareholders in view of subsequent and unforeseeable modifications to pension legislation. In 1984, it was not possible to anticipate any obligation for BT to contribute to the Pension Protection Fund established in 2004, nor the potential economic advantage resulting from the exemption from these obligations by virtue of a Crown guarantee.
- (81) BTPS also argues that the potential advantage deriving from the lower levies to the Pension Protection Fund is more than compensated by extra liabilities and financial burdens of GBP [...] borne by BT and BTPS because of the special nature of BTPS. The Commission does not consider that the alleged disadvantages could be used to offset this advantage:
- First, the benefit secured to employees in case of BT bankruptcy was of little interest, if any, to BT shareholders.



- Secondly, there is no temporal link between these alleged disadvantages and the advantage resulting from a reduced contribution to the Pension Protection Fund, which materialised 20 years later and for which there is no indication in the law that it was intended to offset the alleged disadvantages. Nor is there a discernable substantive link between the alleged burdens placed on BT and the liabilities covered by the Crown guarantee which in 1984 also included, *inter alia*, short term borrowings, trade creditors, value added tax and payroll taxes and foreign long term loans.
  - Thirdly, BT refers to the burdens of extra liabilities of civil servant-like rights. One cannot, however, exclude that those rights have, in turn, triggered benefits for BT such as increased loyalty or acceptance of different salary and working conditions by the employees concerned than if those rights had not existed.
- (82) Contrary to other undertakings in the electronic communications and other sectors which are not given the benefit of the exemption from the payment of levy to the Pension Protection Fund set out in the 2004 Pension Act and corresponding to the pension liabilities covered by the Crown guarantee, BT obtains an economic advantage in that it pays a greatly reduced levy to the Pension Protection Fund. As a result, BT can use these financial resources to finance its economic activities on the markets where it is active.
- (83) In conclusion, an economic advantage financed by the State appears to have been granted to BT from the entry into force of the Pension Protection Fund (Entry Rules) Regulations 2005.

### 5.1.3. *Undertaking benefitting from selective measures*

- (84) As concerns the beneficiary of the measures at hand, it must be underlined that BTPS and BT are two different legal entities. The exemption from payment of an adequate Pension Protection Fund levy directly concerns BTPS, whose Trustees have responsibility for the payment. For instance, the 2005/2006 fee payable by BTPS was allegedly funded from the assets of the scheme. However, BT must contribute to cover any deficit and administrative costs of its pension scheme as long as it is solvent. Even if BT is not itself invoiced and does not disburse the amount of the pension protection levy when it becomes due, a lower levy decreases the costs of BTPS and is to the benefit of the assets of BTPS, thus diminishing BT's own liabilities towards BTPS. It follows that any economic advantage for BTPS resulting from the measure at hand is entirely transferred to BT.
- (85) Moreover, the measure is selective in that the provision in the Pension Protection Fund (Entry Rules) Regulations 2005 implementing the Pensions Act 2004 granting an exemption from the Pension Protection Fund levy is selective because it resulted from having the benefit of the Crown guarantee, laid down in the 1984 Act which addressed liabilities vested on BT only. Those measures, when read together, introduced derogations from the general obligations imposed by the Pension Acts on other undertakings not having such a benefit and are therefore selective.

#### *5.1.4. Distortion of competition affecting trade between Member States*

- (86) BT, through various subsidiaries, is significantly active in the provision of electronic communication services in several Member States including Germany, Italy, Spain, The Netherlands, France and, not least, in the United Kingdom<sup>3</sup>. The provision of electronic communication services inherently entails communication of content between networks across borders within the common market, whether such services are supplied on a local, national or cross-border basis.
- (87) Particularly in the United Kingdom, the regulatory authority for electronic communications OFCOM has identified BT as holding significant market power within the meaning of the EU regulatory framework on electronic communication services and networks on a number of retail and wholesale service markets. Those markets include all or parts of the markets for fixed narrowband retail services, fixed narrowband wholesale exchange lines, call origination and conveyance, wholesale broadband access, wholesale local access and leased lines<sup>4</sup>. On all these service markets in the United Kingdom, BT competes with significantly weaker competitors, which do not enjoy the economic advantage to their contribution to the Pension Protection Fund which the Crown guarantee confers on BT. Competition between those undertakings and BT, which is weakened as a result of the significant market power which BT holds, is thereby further distorted by the measure at stake.
- (88) Given BT's activities and position in national and international markets for electronic communications, this advantage may affect competition and trade between Member States within the meaning of Article 87(1) of the EC Treaty.
- (89) In conclusion, the exemption from the payment of a levy to the Pension Protection Fund corresponding to the pension liabilities covered by the Crown guarantee conferred on BT's pension liabilities confers an economic advantage on BT through the use of State resources imputable to the United Kingdom. This advantage is liable to affect competition and trade between Member States within the meaning of Article 87(1) of the EC Treaty.

#### *5.1.5. Lawfulness of the measure*

- (90) Since the enactment of the Pensions Act 2004 and the Pension Protection Fund (Entry Rules) Regulations 2005, an advantage is granted to BT in the form of an exemption from the full contribution to the Pension Protection Fund.
- (91) This exemption constitutes State aid within the meaning of Article 87(1) of the EC Treaty and has not been notified to the Commission pursuant to Article 88(3) of the EC Treaty. As a result, this measure is unlawful.

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<sup>3</sup> See <http://www.btplc.com/Report/Report08/pdf/AnnualReport2008.pdf>

<sup>4</sup> See <http://www.btplc.com/Report/Report08/pdf/AnnualReport2008.pdf>. See also, OFCOM Notice under section 155(1) of the Enterprise Act 2002 of 30 June 2005, at <http://www.ofcom.org.uk/consult/condocs/sec155/sec155.pdf> and Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002, 22 September 2005 at: [http://www.ofcom.org.uk/consult/condocs/statement\\_tsr/statement.pdf](http://www.ofcom.org.uk/consult/condocs/statement_tsr/statement.pdf)

## 5.2. Assessment of compatibility of the measures

- (92) Since the presence of State aid in the form of an exemption from full contribution to the Pension Protection Fund levy is confirmed, it is necessary to consider the compatibility of such State aid under Community rules. In that respect, neither the United Kingdom nor BT or BTPS have argued that the measures at hand can be found to be compatible with the common market.

### 5.2.1. Article 86 (2) EC

- (93) Although BT is entrusted with certain obligations of general economic interest, within the meaning of Article 86(2) EC, the aid is not confined or otherwise connected to the fulfilment of those obligations and, therefore, benefits the entirety of its activities. Nor do the authorities of the United Kingdom or BT argue that the payment of a full levy to the Pension Protection Fund would obstruct the performance of the tasks of general interest assigned to BT. In those circumstances, the derogation provided for Article 86(2) of the EC Treaty is not applicable.

### 5.2.2. Article 87 (2) and 87 (3) EC

- (94) The measure involved does not appear to be compatible under Article 87(2) of the EC Treaty either. In particular, Article 87(2)(a) of the EC Treaty concerns aid with a social character granted to individual consumers. The State aid discussed benefits BT itself. Consequently, such aid would not fall within the scope of Article 87(2)(a) of the EC Treaty.
- (95) Furthermore, the Commission considers that Article 87(3)(a), 87(3)(b) and 87(3)(d) of the EC Treaty are manifestly not applicable and neither the authorities of the United Kingdom nor BT or the BTPS have put forward arguments in this respect.
- (96) The only possible basis for compatibility for the measure at stake would at this stage appear to be Article 87(3)(c) of the EC Treaty. However, the measure involved does not appear to comply with any of the rules concerning the application of that sub-paragraph that the Commission has promulgated to date in the form of guidelines and communications. Consequently, the compatibility of this measure, would have to be assessed directly on the basis of Article 87(3)(c) of the EC Treaty, which states that:

*“aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”*

may be considered to be compatible with the common market.

- (97) In order to be compatible under Article 87(3)(c) of the EC Treaty, an aid must pursue an objective of common interest in a necessary and proportionate way. In this regard, the Commission considers it appropriate to assess the following questions:

(1) Is the aid measure aimed at a well-defined objective of common interest (namely, does the proposed aid address a market failure or other objective)?

(2) Is the aid well designed to deliver the objective of common interest? In particular:

- Is the aid measure an appropriate instrument?

- Is there an incentive effect, namely, does the aid change the behaviour of firms?
- Is the aid measure proportional, that is, could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

- (98) The United Kingdom has not indicated that the measure at stake was designed to deliver a particular objective of common interest. Furthermore, there are no discernible indications or grounds showing that the provision of the State aid at hand is an adequate and proportionate instrument which provides any suitable incentive effect for the development of the economic activities in which BT, among other competitors, is engaged. As indicated above, the measure at hand is neither related to nor confined to the fulfilment of the mission of general economic interest entrusted to BT.
- (99) Therefore, the only discernable objective of common interest which could be pursued by the relevant provisions of the pension legislation appears to be the supplementary protection of pension rights of workers in case of insolvency of their employer. The additional guarantee that retired workers will effectively enjoy financial well-being which is commensurate with their labour during their working life is in the common interest of the general and socially balanced development of economic activities. However, by establishing a derogation on the levy payable by BTPS, the aid measure does not contribute to fulfilling those objectives.
- (100) Likewise, according to the United Kingdom, the pension protection measures may offer protection only where that other alternative and adequate protection does not exist. In that case, the Pensions Act 2004 could also be seen as providing an incentive to companies putting in place on their own, and at their own cost, alternative arrangements or mechanisms that would exclude the contribution of a levy to and reliance on the general Pension Protection Fund. However, the aid measure without any countervailing payment eliminates any incentive for BT putting in place any alternative arrangements. On the contrary, if the aid was suppressed, BT would be incentivised to do so or, at the very least, would rely on the privately-funded Pension Protection Fund to guarantee the pension rights of its pre-privatisation employees.
- (101) It follows that the aid measure is not an appropriate instrument in pursuing the objective of common interest which can be identified in the pension legislation of the United Kingdom. On the contrary, the aid relieves BTPS and, hence, BT, of the operating costs which the pursuance of such objective should normally trigger for them. As a result, the negative effects of the operating aid measure in trade between Member States and competition are not outweighed by other positive effects in other respects, so that the balance is, overall, negative.
- (102) The Commission therefore concludes that the exemption from full contribution to the Pension Protection Fund levy cannot be declared compatible with the common market pursuant to Articles 86(2) of the EC Treaty or 87(3) of the EC Treaty.

## **6. CONCLUSION**

- (103) In the light of the foregoing, the Commission concludes that the exemption from the payment of a levy to the Pension Protection Fund corresponding to the pension

liabilities covered by the Crown guarantee conferred on BT's pension liabilities constitutes State aid within the meaning of Article 87(1) EC, which cannot be declared compatible with the common market.

## 7. RECOVERY

- (104) According to Article 14(1) of Council Regulation (EC) N° 659/1999<sup>5</sup>, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. Only aid which is incompatible with the common market shall be recovered.
- (105) The purpose of recovery is to restore the situation that existed prior to the granting of the aid. This is achieved once the incompatible aid is repaid by BT, which therefore forfeits the advantage which it enjoyed over its competitors in the market since BTPS has not paid a full levy to the Pension Protection Fund since 2005. The amount to be recovered should be such as to eliminate the economic advantage given to BT which, for the reasons set out above at recital (83), is the beneficiary of the measure.
- (106) Since the incompatible aid to BT is equal to the difference between the levy to the Pension Protection Fund due in the absence of the Crown guarantee since the establishment of the fund in 2005 and the fee which BTPS effectively paid, that difference constitutes the amount to be recovered, plus the recovery interest effectively accrued on that amount, which cannot be lower than as calculated pursuant to Article 9 of Commission Regulation (EC) N° 794/2004 of 21 April 2004 implementing Council Regulation (EC) N° 659/1999<sup>6</sup>.
- (107) It should be noted that according to the information supplied by the United Kingdom on 29 March 2007, the Board of the Pension Protection Fund, BT and BTPS Trustee entered into an escrow arrangement to the effect of blocking into an escrow account the difference between the sum which BTPS would have had to pay in 2005/2006 had the Crown guarantee not been taken into account, and the amount actually paid by BTPS. In subsequent years, BTPS has been due to pay into the escrow account the sum which BTPS would have had to pay had the Crown guarantee not been taken into account. Those amounts attract interest at [...], which, according to the United Kingdom, is [...].
- (108) According to the provisions of the escrow agreement, these arrangements continue until the Commission concludes its investigation into whether the reduction in the Pension Protection Fund levies constitutes an incompatible aid or decides not to pursue the matter any further. In the former case, the final amount invoiced by the Pension Protection Fund for the pension protection levies shall also include the interest accrued on the amounts paid into the escrow account. [...] shall therefore accrue to the Pension Protection Fund in case the Commission adopts an incompatible aid decision and not to the BTPS or to BT. This should ensure that the interest accrued on the escrow account does not further increase the economic advantage which BT has been granted,

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<sup>5</sup> Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty, OJ L 83, 27.03.1999, p. 1.

<sup>6</sup> OJ L 140, 30.4.2004 p.1.

## HAS ADOPTED THIS DECISION:

### *Article 1*

The State aid unlawfully put into effect by the United Kingdom of Great Britain and Northern Ireland for BT plc, the beneficiary, in the form of an exemption for the BT Pension Fund contribution to the Pension Protection Fund as concerns the beneficiary's pension liabilities covered by section 68(2) of the Telecommunications Act 1984 as amended, is incompatible with the common market within the meaning of Article 87(1) of the EC Treaty.

The United Kingdom of Great Britain and Northern Ireland shall cease the incompatible State aid to BT plc.

### *Article 2*

The United Kingdom of Great Britain and Northern Ireland shall recover the aid referred to in Article 1 from the beneficiary.

The sum to be recovered shall bear interest for the entire period running from the date it was put into effect until the date of its recovery.

The interest shall be calculated as capitalised interest in conformity with Chapter V of Commission Regulation (EC) N° 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>7</sup>.

### *Article 3*

Recovery of the aid referred to in Article 1 shall be immediate and effective.

The United Kingdom of Great Britain and Northern Ireland shall ensure that this Decision is implemented within four months of the date of its notification.

### *Article 4*

Within two months following notification of this Decision, the United Kingdom of Great Britain and Northern Ireland shall submit the following information to the Commission:

- (a) the total amount to be recovered from the beneficiary;
- (b) a detailed description of the measures already taken and planned to comply with this Decision; and
- (c) documentary evidence that the beneficiary has been ordered to repay the aid.

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<sup>7</sup> OJ L 140, 30.4.2004 p.1.

The United Kingdom of Great Britain and Northern Ireland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest recovered from the beneficiary.

*Article 5*

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 11.2.2009.

For the Commission

Neelie KROES  
Member of the Commission

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Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Director-General for Competition  
State Aid Greffe  
B-1049 Brussels  
Fax No: +322 296 95 80