DECISIONS

COMMISSION DECISION

of 26 January 2011

on State aid C 50/07 (ex N 894/06) which France plans to implement to promote the development of sickness insurance policies (contrats solidaires et responsables) and supplementary group insurance policies providing cover for death, incapacity and invalidity

(notified under document C(2011) 267)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/319/EU)

THE EUROPEAN COMMISSION,

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

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

Whereas:

I. PROCEDURE

(1) By letter of 28 December 2006, France notified to the Commission aid schemes to promote the development of sickness insurance policies (*contrats solidaires et responsables*) as planned in a Finance (Amendment) Act for 2006. The provisions governing these schemes are set out in Article 88 of the Finance (Amendment) Act for 2006 (Law No 2006-1771 of 30 December 2006) [3]. France communicated additional information to the Commission by letters of 26 February, 11 May and 18 September 2007.

(2) By letter dated 13 November 2007, the Commission informed France of its decision to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty (TFEU) concerning this aid.

(3) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* [4]. The Commission invited interested parties to submit their comments on the aid measures in question.

(4) France transmitted its comments on the decision to initiate the formal investigation procedure by letter of 21 December 2007.

(5) The Commission received comments on this subject from several interested third parties. It communicated them to France, giving it the opportunity to comment on them, and received its comments by letter of 8 May 2008.

(6) France communicated additional information to the Commission by letter of 31 October 2008.

(7) Certain interested third parties sent additional information to the Commission during February 2009.

(8) Following a meeting between the Commission and the French authorities on 2 June 2009, the latter undertook to examine the possibility of making certain amendments to the schemes notified and to forward their analysis to the Commission as soon as possible.

[1] From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 respectively of the Treaty on the Functioning of the European Union (TFEU). In both cases, the provisions are identical in substance. For the purposes of this Decision, the references made to Articles 107 and 108 of the TFEU are to be understood, where appropriate, as made to Articles 87 and 88 respectively of the EC Treaty. A number of changes in terminology have also been made by the TFEU, such as the change of 'Community' to 'Union' and 'common market' to 'internal market'.

[2] OJ C 38, 12.2.2008, p. 10.

[3] Official Gazette of the French Republic No 303 of 31 December 2006, p. 20228, text No 2 (source: http://www.legifrance.gouv.fr).

[4] See footnote 2.

(9) By letter dated 22 September 2009, the Commission granted a time limit of 20 working days to France to communicate its analysis.

(10) By letter dated 3 November 2009, the French authorities requested a suspension of the formal investigation procedure until 1 April 2010.

(11) On 17 November 2009, the Commission agreed to suspend the formal investigation procedure until 1 April 2010, under the Code of Best Practice for the conduct of State aid control procedures ([5]), in order to enable France to adapt its draft legislation and to undertake the necessary consultations.

(12) By letter dated 26 April 2010, the French authorities informed the Commission that any amended draft scheme would reach it on 17 May 2010.

(13) By letter dated 27 May 2010, the French authorities forwarded the information to the Commission, although without planning amendments to the schemes notified.

II. **DETAILED DESCRIPTION OF THE AID**

(14) Two separate tax measures were the subject of the decision to open the formal investigation procedure:

Exemption from corporation tax and local business tax for management operations connected with certain sickness insurance policies (contrats solidaires et responsables)

(15) The first measure notified consists of exemptions from corporation tax, introduced by Article 207-2 of the General Tax Code (CGI), and from local business tax ([6]) (Article 1461-1 of the CGI) for management operations connected with certain sickness insurance policies (*contrats solidaires et responsables*). These exemptions would benefit all institutions issuing such policies: mutual societies and unions subject to the Mutual Society Code, provident societies subject to Title III of Book IX of the Social Security Code or to Book VII of the Rural Code, and all insurance undertakings subject to the Insurance Code.

(16) The main objective of this measure is, by developing this type of policy, to extend the supplementary sickness insurance cover of the French population. In this capacity, the measure would complement the tax-exemption scheme for insurance conventions which applies to the same type of policy and which the Commission authorised by its Decisions of 2 June 2004 ([7]) and 29 October 2010 ([8]).

(17) The sickness insurance policies concerned by this exemption scheme were introduced in France in 2001 ([9]). They are, firstly, policies covering group operations with compulsory affiliation and, secondly, policies relating to individual and group operations with optional affiliation.

(18) More specifically, to be eligible, these policies must meet the following conditions:

— no medical information on the insured person will be required from the insurer for affiliation to optional policies,

— the amount of the contributions or premiums will not be established according to the state of health of the insured person,

— the cover granted will compulsorily include benefits linked to prevention and to consultations of the treating doctor and his prescriptions,

— the cover granted will not have to include the contributions to medical costs which the insured person may incur either on account of fees exceeding the rate for certain treatments or certain consultations, or on account of the lack of designation of a treating doctor.

(19) To qualify for the preferential scheme, insurers will also have to respect thresholds relating to the number of sickness insurance policies (*contrats solidaires et responsables*) in their portfolio of sickness insurance policies as a whole. These thresholds vary according to the type of policy:

— policies relating to individual and group operations with optional affiliation:

([5]) OJ C 136, 16.6.2009, p. 13, point 41.

([6]) The notification refers to the exemption from business tax. This tax has in the meantime been superseded by the local business tax (*contribution économique territoriale*), comprising a levy on the real estate of businesses and a levy on the added value of businesses.

([7]) See Commission Decision of 2 June 2004, France, State aid E 46/2001, Exemption from tax on sickness insurance policies, http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_e2001_0030.html#46

([8]) See Commission Decision of 29 October 2010, France, State aid N 401/2010, amendment to the scheme for exemption from the special tax on insurance conventions of sickness insurance policies (*contrats solidaires et responsables*).

([9]) The provisions relating to the characteristic of responsibility of the policy (no cover of excess on fees for certain treatments and financing of certain benefits linked to prevention) were introduced in 2006.

Their share must represent 150 000 persons or a minimum proportion (fixed by decree) of between 80 % and 90 % of all subscribers and affiliated members under policies relating to individual and group operations with optional affiliation subscribed to with the insurer ([10]).

— policies relating to group operations with compulsory affiliation:

Their share must represent 120 000 persons or a minimum proportion (fixed by decree) of between 90 % and 95 % of all subscribers and affiliated members under policies relating to individual and group operations with compulsory affiliation subscribed to with the insurer ([11]).

(20) Finally, beneficiary insurers will also have to fulfil at least one of the following conditions:

— implement gradation of premium rates or meet the costs of contributions depending on the social situation of subscribers and affiliated members,

— affiliated members and subscribers in receipt of aid for the acquisition of supplementary health insurance ([12]) represent between 3 % and 6 % at least of members or subscribers to sickness insurance policies relating to individual and group operations with optional affiliation taken out with the insurer ([13]),

— persons at least 65 years of age represent between 15 % and 20 % at least of affiliated members or subscribers to sickness insurance policies taken out with the insurer ([14]),

— persons under 25 years of age represent between 28 % and 35 % at least of beneficiaries of sickness insurance policies taken out with the insurer ([15]).

(21) According to the French authorities, these last conditions impose mutualisation in terms of premiums or generations and the achievement of a minimum level of effective solidarity. They aim to encourage the dissemination of *contrats solidaires et responsables* and cover for the entire population, especially by accepting a significant proportion of young or elderly people, two categories encountering the greatest difficulties in obtaining (supplementary) sickness insurance on account of their low resources (the young) or the potential cost they represent (the elderly).

(22) The scheme also requires these conditions to be assessed at group level, in respect of their activities which are taxable in France. The object of this provision is apparently to avoid circumvention of the scheme or set-ups leading to concentration of this type of risk in a few ad hoc structures, in contradiction with the objective of mutualisation.

(23) According to the French authorities, the aim of all these conditions is to encourage insurers to develop the dissemination of these policies, to participate in the implementation of basic and supplementary universal sickness cover and to offer supplementary sickness cover to the entire population under controlled premium conditions. Persons who are targeted in particular are those whose state of health or financial situation does not allow them to take out individual cover.

(24) The entry into force of this tax measure, initially planned for 1 January 2008 as regards the exemption from corporation tax and the financial year 2010 with regard to the exemption from local business tax, has been postponed until 1 January 2012 and the financial year 2013 respectively, pending Commission approval of the relevant schemes.

Tax deduction for equalisation provisions relating to certain supplementary group insurance policies

(25) This second tax measure aims to enable insurers to benefit from the tax deduction for equalisation provisions relating to certain supplementary group insurance policies (Article 39 quinquies GD of the General Tax Code (CGI)) beyond that which is permitted under ordinary law (Article 39 quinquies GB) for such provisions.

([10]) A draft decree sets this proportion at 85 %.
([11]) A draft decree sets this proportion at 93 %.
([12]) Aid granted by the State in the form of reduction in insurance premiums for persons with financial resources below a ceiling determined by the family situation. The amount of aid varies from EUR 100 to EUR 500 depending on the age of the beneficiary.
([13]) The minimum proportion would be 3 % according to the draft decree.
([14]) The minimum proportion for this age group would be 16 % according to the draft decree.
([15]) The minimum proportion for this age group would be 31 % according to the draft decree.

(26) The constitution of a technical equalisation provision ([16]) is provided for in the accounting and prudential regulations governing insurers. Article 30 of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings ([17]) defines the equalisation provision as follows: 'The equalisation provision shall comprise any amounts set aside in compliance with legal or administrative requirements to equalise fluctuations in loss ratios in future years or to provide for special risks.'.

(27) In this particular case, the equalisation provision is intended to cushion fluctuations in loss relating to the group operations providing cover for death or physical injury (incapacity and invalidity). These fluctuations in results (from 1 financial year to another) would be linked to the actual calls on the cover provided by the insurance policies taken out in relation to the hypotheses regarding pay-outs under the cover used to draw up the insurance premium rates. The provision allows the technical results relating to the operations concerned to be smoothed, with a view to cushioning significant fluctuations in loss likely to be recorded subsequently.

(28) According to the French authorities, the new equalisation provision referred to in Article 39 quinquies GD contributes to the general objective to develop and improve the supply, by insurers, of personal protection cover subscribed to under a so-called 'designation' procedure. This refers to the supplementary group cover resulting from occupational or inter-occupational conventions or collective agreements, company agreements or employer decisions taken, under which the insurer is designated by the social partners (designation procedure). This designation entails the obligation for the designated insurer to respect the contractual conditions negotiated by the social partners ([18]) (including the clauses concerning the readjustment of rates). The designation is assumed for a maximum period of 5 years, at the end of which a compulsory review of the designated insurer must be carried out. The policies with designation clause introduced at the level of occupational groups by agreement between the social partners are always the subject of an extension decree by the Minister for Social Security. They are consequently automatically applicable to all employees and former employees of the group and to their dependants (whatever their state of health and age), and their employers are obliged to subscribe to them and join the designated insurer ([19]).

(29) According to the French authorities, designation makes it possible to obtain a more advantageous contribution/cover ratio from the designated insurer and to obtain access for all employees of an economic sector to the same cover, whatever the size of the undertaking to which they belong. It also implies a periodical review of the terms and conditions of organisation and mutualisation of the risks and the designation of the insurer considered.

(30) This measure also allows improvement, to the benefit of the individual consumer, of the control of rates and the quality of the benefits provided on the occurrence of serious events such as invalidity, incapacity or death, which have significant social and financial consequences for the insured person or his family (additional expenses, loss of income, exclusion, etc.).

(31) More precisely, the mechanism of the provision of cover for death, invalidity and incapacity subscribed to under a designation procedure aims to enable designated insurers:

— to defray shortfalls from this type of policy, in relation to the average provided for originally, which could result from risks of loss (amounts and numbers) or shift in the risk (changes in data on which the original rates were based),

— to improve the capital and the solvency margin of the insurers which offer these operations through the constitution of the special provision.

(32) In practice, the annual allocation to the provision is eligible for deduction within the limit of the technical profit ([20]) from the operations concerned. The total amount of the provision may not exceed 130 % of the total amount of the contributions relating to these operations as a whole carried out during the financial year. The provision is assigned to offsetting technical losses for the financial year in the order of seniority of the annual allocations.

([16]) A provision 'for risks and charges' is an amount recorded on the liabilities side of the balance sheet to cover charges with a maturity date or amount which is not fixed precisely. Constitution of a provision implies on the one hand the entry into the accounts of allocations to the provisions (charge account) and on the other hand a provision under the liabilities (balance sheet account). The technical equalisation provision is a type of provision for risks and charges.

([17]) OJ L 374, 31.12.1991, p. 7.

([18]) See Article L912-1 of the French Social Security Code.

([19]) Under the designation scheme, the insurer designated cannot decide unilaterally on a change to the cover scheme, such as for example an increase in contributions. It is the social partners who decide on changes to the scheme (improvement of the benefits, adjustment of the contribution rates, etc.).

([20]) Difference between the amount of premiums or contributions, minus allocations to the provisions legally constituted, and the amount of charges for losses, plus costs attributable to the policies concerned.

(33) The annual allocations not used within a period of 10 years are transferred to a special tax-exempt reserve. The amount of this special reserve may not exceed 70 % of the total amount of the contributions relating to the operations concerned as a whole carried out during the financial year. The surplus from these allocations is carried forward to the taxable profit after a period of 10 years from their entry in the accounts.

(34) Under ordinary law, insurance and reinsurance undertakings (Article 39 quinquies GB) may currently constitute tax-free equalisation provisions relating to the group insurance operations covering death, incapacity or invalidity subject to the following limits:

— the annual allocation to the provision is limited to 75 % of the technical profit from the policies concerned,

— in relation to the amount of the contributions relating to the policies concerned acquired during the financial year, the total amount of the provision may not exceed a proportion of between 23 % and 100 % depending on the number of insured persons.

Each provision is allocated to offsetting technical losses of the financial year in the order of seniority of the annual allocations. Moreover, the allocations which could not be used within a period of 10 years are carried forward to the taxable profit.

III. **REASONS HAVING TRIGGERED THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE**

(35) In its decision to initiate the formal investigation procedure of 13 November 2007, the Commission expressed doubts about the application of Article 107(2)(a) TFEU concerning the two tax measures concerned ([21]).

(36) As regards the first measure (exemptions from corporation tax and local business tax for management operations connected with *contrats solidaires et responsables*), the Commission considered that France had not provided evidence of the advantage being passed on in full to consumers.

(37) The Commission also questioned whether the condition of absence of discrimination related to the origin of the product was complied with on account of the existence of thresholds relating to the number (120 000/150 000) or proportion (80 %/90 %) of *contrats solidaires et responsables* in the sickness insurance policy portfolio of the insurers concerned.

(38) As regards the second measure (tax deduction for equalisation provisions), the Commission was of the opinion that none of the three conditions for the application of Article 107(2)(a) TFEU seemed to be met.

(39) Firstly, in the Commission's opinion, the social character of the measure at the time the insurance policies are taken out, namely before the serious events they cover actually occur, did not seem to be established clearly.

(40) Secondly, passing on the aid in full to the consumer/insured person seemed even more hypothetical and uncertain than for the first measure. Passing on the advantage also seemed to be potentially beneficial to employers in so far as they too contribute to financing the policy.

(41) Thirdly, the high degree of concentration of the market for designation policies in the hands of provident societies in the present context seemed to have the potential to amount to de facto discrimination in their favour.

IV. **COMMENTS BY INTERESTED PARTIES**

(42) Following publication of the decision to initiate the procedure, comments were received from the Fédération Nationale de la Mutualité Française (FNMF), the Fédération française des Sociétés d'Assurance (FFSA), the Centre technique des Institutions de prévoyance (CTIP), the Union Nationale Interfédérale des Œuvres et Organismes Privés Sanitaires et Sociaux (UNIOPSS), the Fédération nationale des Comités féminins pour le Dépistage des Cancers, the Union Fédérale des Consommateurs — Que choisir (UFC — Que choisir) and an anonymous third party.

(43) The majority of the interested parties view the two tax measures in question in a positive light and their comments largely tie in with the arguments advanced by the French authorities. They stress the existence of strong competition in the market for supplementary health insurance and the excellent liquidity of the market. They also emphasise that the cover concerned by the two measures compensates for the deficiencies of social security. By creating tax incentives which are easily accessible by all supplementary health insurance operators, the French authorities are creating the conditions to transform the segment of persons of little interest a priori in terms of risk profile or solvency into a segment with new economic appeal.

([21]) Since France accepted classification of the notified measures as State aid at the notification stage, the Commission has confined itself to a brief analysis of this classification.

(44) As regards the first measure (exemption for *contrats solidaires et responsables*), the FFSA is nevertheless concerned about the existence of excessively high thresholds which constitute an obvious advantage for operators already having a strong presence in the market. Although the FFSA understands the principle of a threshold to avoid situations which are too complex to manage, it considers on the other hand that it is essential for this threshold not to constitute an obstacle to the granting of aid on account of its level. It considers, too, that the criteria associated with the structure of the population covered (percentage of under-25s, pensioners, etc.) lead to selecting the beneficiaries of the aid without real justification in relation to the stated aim. These criteria benefit homogeneous mutual associations access to which is subject to status or occupational criteria, to the detriment of mutual associations open to all areas of the public. These criteria also introduce a potential difference in treatment between insured persons.

(45) The CTIP, for its part, states that, to ensure their quality, the services proposed by insurers require significant investments which it must be possible to amortise among groups of sufficiently numerous insured persons. This objective explained the thresholds.

(46) The CTIP also refers to the obligation for insurance undertakings within the European Union to set aside a solvency margin. If all technical profits were to revert to insured persons, solvency would not be met. It would therefore be perfectly natural for at least part of the advantage to serve to cover, in whole or in part, the increase each year in the solvency requirement.

(47) The CTIP states, moreover, that, according to Court of Justice case law, occupational schemes of a contractual nature, on account of their nature and their object, are not covered by the provisions of European Union competition law ([22]). Such schemes also cannot be subject to business taxes since they provide cover which remedies the deficiencies of social security and which is based on conventions and collective agreements.

(48) The FNMF also invokes the compatibility of the first measure on the basis of Article 107(3)(c) TFEU. Firstly, the aid is intended to facilitate the development of supplementary health cover which respects solidarity and a sense of responsibility under conditions which do not adversely affect trading conditions to an extent contrary to the common interest. The measure aims to remedy a market failure which tends to produce segmentation of populations, since the market does not allow the overall welfare of non-profitable populations to be ensured efficiently. Secondly, the aid is necessary and proportionate, since the measures put in place previously did not enable the objective pursued to be attained.

([22]) See judgment in Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

(49) An anonymous third party stresses the French Government's lack of knowledge and statistical data on the economic and financial situation of undertakings operating in the supplementary sickness insurance market. This rendered any objective analysis of the situation impossible.

(50) The same anonymous third party also refers to the trend between 2001 and 2007 in profit margins achieved by undertakings in the sector. Whereas the turnover of the undertakings concerned apparently rose by 50 % during that period, expenditure on benefits by the same insurers rose by only 35 %. Gross operating margins therefore increased by a further 15 % in the space of 6 years.

(51) Concerning the second measure (equalisation provision), the FFSA is of the opinion that there is nothing to justify a more advantageous tax scheme for policies with a designation clause than for company group policies covering the same risks. The logic of constituting the provision and the risks are the same, with greater mutualisation which limits the intensity in the case of policies with a designation clause. In addition, the measure is in fact reserved for provident societies. Although the choice of insurer by the social partners is legally open, almost all policies of this type in practice designate the provident society set up on the initiative of the social partners.

(52) The CTIP, for its part, considers that it is natural that the social partners should prefer to opt for setting up a provident society which they can then manage.

(53) Furthermore, the CTIP recalls the constraints which would be imposed on insurers in the event of designation:

— strict application of the provisions laid down in the agreement or collective agreement (cover, rates, revaluation clauses, maintenance of rights in the case of precarious situations, etc.),

— prohibition on suspending cover even in the event of non-payment,

— obligation to provide insurance for all undertakings covered by the scope of the agreement or convention,

— need to smooth the rate over the duration of the cycle of the economic sector covered in order to correlate rate increases with economic crises affecting an occupational sector.

(54) The CTIP also considers that contractual schemes for supplementary social protection constitute remuneration for employees and, in this capacity, cannot be subject to business taxes. Consequently, the scheme for the supplementary deduction of equalisation provisions should not be considered classifiable as State aid.

(55) The CTIP, like the FNMF, also invokes the compatibility of the second measure on the basis of Article 107(3)(c) TFEU, stating that it is intended to facilitate the development of the personal protection market without adversely affecting trading conditions to an extent contrary to the common interest.

(56) In addition, the CTIP refers to the *Albany* judgment ([23]), stating that contractual social protection schemes with compulsory affiliation perform a task of general economic interest. To subject the operations associated with contractual social protection schemes implemented by an insurer to business taxes would be in contradiction with performing the task of general economic interest conferred on insurers.

V. **COMMENTS BY FRANCE**

Exemption from corporation tax and local business tax for management operations connected with contrats solidaires et responsables

(57) Concerning the passing on of the aid to individual consumers, the French authorities maintain that this will be ensured through the competitive nature of the supplementary sickness insurance market and the very structure of the measure.

(58) Not only are there a large number of operators in the market ([24]), but also the distribution channels are numerous and varied (general insurance agents, brokers, employees of insurers, direct sales via the Internet, etc.). The competitive nature of this sector is also guaranteed by the insurance and mutual society supervisory authority (ACAM).

(59) Market mechanisms should therefore ensure that the advantage is passed on to consumers in the form of a reduction in the financial contribution of the insured person, without it being necessary to introduce a mechanism for the compulsory redistribution of the tax saving. In addition, the measure is structured in such a way that the advantage benefits those categories of consumers who are excluded from supplementary health cover on account of their age or financial resources.

(60) As regards the question of possible discrimination in favour of certain undertakings, France states that the thresholds create an incentive for insurers to mutualise the 'bad risk', characterised by the age or level of resources of the persons concerned, in their portfolio.

(61) An insufficient proportion or number of *contrats solidaires et responsables* would not allow this objective of mutualisation to be achieved and, in the absence of such thresholds, the exemptions provided for would have the effect of a windfall for the undertakings concerned. Competition alone (without establishing a threshold) would have the sole effect of the tax advantage being passed on to the end consumer and of enabling the insurers to retain their market shares, without ensuring an increase in the rate of cover. The dual threshold mechanism (percentage or absolute value) is therefore an essential element to increase the rate of cover of the categories of the population not covered at present.

(62) In a context of the steadily rising price of supplementary health insurance, proposing a tax incentive for these categories of the population meets the real challenge of achieving national solidarity.

Tax deduction for equalisation provisions relating to certain supplementary group insurance policies

(63) The French authorities firstly point out that the tax scheme should not be considered in its entirety as aid. Classification as State aid should be reserved solely for that part of the scheme which is not justified by the specific nature of the insurance activity concerned having regard to prudential standards.

(64) The specific characteristics of designation policies, deriving from the strong constraints in terms of rates, risk selection and management, make these policies particularly sensitive to the risk of claims experience deviating from original estimates and therefore fully justify a particularly prudent allocation scheme.

(65) Firstly, the risks covered by designation policies concluded under sectoral collective agreements concern a population specifically linked to an economic sector and therefore particularly sensitive to cyclical reversals affecting that sector. Anticipating these cycles over the long term therefore requires smoothing the results of designation over the long term.

([23]) Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds*, cited in footnote 22 above.

([24]) According to a 2006 annual report of the insurance and mutual society supervisory authority, 263 insurance undertakings and 66 provident societies and 1 201 mutual societies operate in the supplementary health insurance market.

(66) Secondly, designation policies resulting from company agreements concern a population which is necessarily limited and therefore justifies higher provisioning rates on account of significant fluctuations in loss.

(67) The tax deduction of the allocations to such provisions under adapted and reinforced conditions, beyond the tax regime under ordinary law provided for in Article 39 quinquies GB of the CGI, is therefore justified from a regulatory and prudential point of view.

(68) The French authorities nevertheless indicate that it is very difficult to justify precisely the rates of allocations which are acceptable for these operations on account of the technical difficulty of assessing a 'normal' level of provisioning for such specific risks. The French authorities nevertheless specify that the ceilings for deductibility of the allocations to the provisions have been fixed in consultation with the profession.

(69) As regards the compatibility of the aid in relation to Article 107(2)(a) TFEU, France maintains that the three conditions of this provision are duly met. As regards the social character of the aid, it states that the group policies negotiated under sectoral agreements ensure a high degree of mutualisation of the risks and a lower level of premiums than on the individual policies market, whilst enabling employed workers and their families to have access to a high level of cover.

(70) In response to the Commission's argument that the social character of the measure is not clearly established at the time insurance policies are taken out, France points out that the granting of aid before the insured event occurs is the only means of attaining the social objective pursued.

(71) Concerning passing the aid on to the end consumer, France firstly draws a distinction between sectoral collective agreements and company agreements. Although the first group can in fact be characterised by the predominance of provident societies, this market will be the subject of new dynamism and other insurance operators will henceforth take an interest in this market. Competition between provident societies will in any case be real and will already enable maximum passing on in favour of the insured person to be ensured. As for the second group (company agreements), there is very strong competition between agreements and no discernible monopoly situation in favour of provident societies.

(72) According to the French authorities, the same reasoning can be applied when reduction or moderation of rates is undertaken in favour of the undertaking. The contribution of the employer to financing the cover corresponds to a salary supplement for the employee/insured person and therefore to an advantage for the latter.

(73) Concerning the existence of de facto discrimination in favour of provident societies, France states that the measure deals in an egalitarian fashion with all operators, whatever their status. The personal protection market is not therefore in a monopoly situation in favour of provident societies and is already characterised by strong competition between the principal operators.

(74) France also recalls that the choice of insurer (designation procedure) is the responsibility of the employer and the staff representatives. The transparency and tendering procedure for this process is ensured under the usual conditions of a market open to competition. The tendering procedure is undertaken by invitation to tender to several insurers on the basis of specifications drawn up by the social partners.

(75) France considers, moreover, that the measure assessed could in any case be considered aid to facilitate the development of certain economic activities which does not adversely affect trading conditions to an extent contrary to the common interest in accordance with Article 107(3)(c) TFEU. The proven social objective of the measure is indicative of the importance of the development of the personal protection market in the future.

(76) According to the French authorities, the development of personal protection policies including a designation procedure aims to develop the introduction of supplementary social protection schemes which are more favourable and offer greater protection to employees, while promoting social dialogue and worker participation.

(77) Finally, France adds that the supplementary insurance benefits in the personal protection field under the designation procedure can be considered to constitute a service of general economic interest within the meaning of Article 106(2) TFEU, in particular where affiliation to the benefit scheme is obligatory and it is managed under a joint framework.

(78) The collective agreement providing for cover and designating the insurer can be made compulsory for all employees, former employees and dependants according to an extension procedure (Articles L 911-3 and 911-4 of the Social Security Code) by decree of the competent minister. It is this decree which should be considered the act by which a Member State assigns public service obligations to an undertaking.

(79) France accepts that the amount of compensation (tax saving) for the service of general economic interest does not comply with the conditions laid down by the Community framework for State aid in the form of public service compensation ([25]). Nevertheless, it considers that these conditions are not adapted to the particularities of the operations concerned. According to France, the tax deductibility mechanism is better adapted and more flexible than a subsidy based on a precise assessment of the additional costs resulting from operation of the service.

VI. **REACTION OF FRANCE TO THE COMMENTS BY THIRD PARTIES**

(80) The French authorities note the comments made by third parties and respond more specifically to the comments of the Fédération Française des Sociétés d'Assurance (FFSA).

(81) As regards the tax exemption in favour of *contrats solidaires et responsables*, the French authorities point out that the composition of the insurers' portfolios is homogeneous so that the proportion of *contrats solidaires et responsables* in relation to the other types of sickness insurance policies would now be equivalent in the three main categories of insurers operating in this market (undertakings coming under the Insurance Code, mutual societies coming under the Mutual Society Code and provident societies coming under the Social Security Code).

(82) Concerning the new equalisation provision, France stresses that the possibility to conclude occupational designation policies is open to all operators, both French and foreign, operating in the supplementary personal protection market.

(83) Finally, France adds that provident societies do not benefit from a monopoly position and that, consequently, there is no discriminatory advantage. The fact that the opening of the market to competition is slow and gradual is attributable to a historical factor, but does not call into question the competition existing between provident societies. The fact that provident societies are more specialised in this sector is insufficient to establish any form of discrimination.

VII. **SUPPLEMENTARY INFORMATION SUBMITTED BY FRANCE FOLLOWING THE SUSPENSION OF THE PROCEDURE**

(84) During the investigation procedure, the Commission suggested to France certain ways in which to make the aid schemes compatible with the internal market on the basis of Article 107(2) TFEU.

(85) As regards the first measure (exemptions from corporation tax and local business tax for management operations connected with *contrats solidaires et responsables*), the following suggestions were made:

— in order to comply with the second criterion (effective passing on of the advantage), it was proposed to France that it should draw inspiration from the subsidy scheme as previously approved by the Commission for supplementary health cover for French civil servants (N 911/06), a tax credit scheme in favour of individual consumers or any scheme enabling effective passing on of the aid to be ensured,

— in order to avoid any discrimination, the French authorities were invited to review the threshold mechanism.

(86) In its letter dated 27 May 2010, France nevertheless indicated that it had decided to maintain unchanged the aid scheme it had notified and confirmed its analysis that the schemes notified were compatible with the internal market within the meaning of Article 107(2)(a) TFEU.

(87) In this same letter, France added that supplementary health insurance policies constitute a product for securing the loyalty of insured persons which then enables subsequent offers of more remunerative products to be made to the same insured persons, such as life assurance policies. To secure customer loyalty, market operators are therefore encouraged to practise an attractive rates policy. Under these conditions, the tax advantage granted by an undertaking and passed on by it in the contributions of insured persons will have the direct effect of adaptation of the rates of its competitors, thereby ensuring that the advantage is passed on to all insured persons.

(88) As regards the second measure (additional tax deduction for equalisation provisions), the Commission made the following suggestions to France:

— in order to respect the second criterion (effective passing on of the advantage), it was proposed to France that it should draw inspiration from the subsidy scheme as previously approved by the Commission for supplementary health cover for French civil servants (N 911/06), a tax credit scheme in favour of individual consumers or any scheme enabling effective passing on of the aid to be ensured;

— in order to avoid any discrimination, the French authorities were invited to consider introducing a compulsory, transparent tendering mechanism for the award of designation policies.

([25]) OJ C 297, 29.11.2005, p. 4.

(89) As with the first measure, France nevertheless decided to maintain unchanged the aid scheme it had notified to promote the development of group personal protection.

(90) In its letter dated 27 May 2010, France reaffirmed the particularly restrictive nature of the designation which justified a particularly prudent allocation scheme. It was only therefore to a very limited extent that the equalisation provision could be considered State aid and that its compatibility with the internal market should be examined.

VIII. ASSESSMENT OF THE AID

VIII.1. Exemption from corporation tax and local business tax for management operations connected with *contrats solidaires et responsables*

Preliminary comment

(91) With reference to the Court of Justice's judgment in *Albany* ([26]), the CTIP maintains that, on account of their nature and their object, occupational schemes of a contractual nature are not subject to the competition rules of Community law.

(92) The Commission notes, however, that the measure referred to by the above-mentioned judgment relates primarily to compulsory legal affiliation by industrial undertakings to a sectoral pension fund benefiting from an exclusive right. In this respect, it should be pointed out that the exemption scheme relating to the first measure also refers to individual policies and group policies with optional affiliation. In addition, the group policies with compulsory affiliation referred to by the measure are subject to the free choice of the social partners as to whether or not to conclude such collective agreements and not to a statutory obligation to enter into such agreements or to affiliate to a sectoral or inter-sectoral fund, as in the *Albany* case.

(93) The Court judgment then confirms that risk cover schemes supplementing the statutory social security scheme, as notified in this case by the French authorities, are subject to the competition rules and the funds constituting such schemes are in fact undertakings with the meaning of Articles 101 et seq. TFEU ([27]).

(94) The Commission therefore considers that the cover scheme referred to in the first measure is not exempt from the Treaty competition rules and in particular the rules prohibiting State aid.

Description of the supplementary health insurance market in France

(95) The Social Security (compulsory sickness insurance) scheme reimburses only part of the health care costs of persons insured under the scheme. Supplementary health insurance schemes therefore cover the part of the benefits that is not financed by the compulsory sickness insurance scheme.

(96) The market for supplementary health insurance consists mainly of the following three groups of operators:

— mutual societies and mutual unions subject to the Mutual Society Code,

— provident societies subject to the Social Security Code,

— insurance undertakings subject to the Insurance Code.

(97) According to a letter from the French authorities dated 21 December 2007, 263 insurance undertakings, 66 provident societies and 1 201 mutual societies operate in the supplementary health insurance market. The French authorities also point out that in 2006, the 20 leading market operators represented only 35 % of the market, without any of them exceeding 4 %, and, in addition, that 65 % of the market consisted of operators with market shares of less than 1 % ([28]).

(98) However, according to official statistics published in 2009, the number of operators in this market nevertheless came to only 876 at the end of 2008 and had been falling continually since 2001 (48 % reduction in 2008 compared with 2001) ([29]). There were 748 mutual societies, 92 insurance undertakings and 36 provident societies.

(99) According to a recent analysis by the French competition authority, the largest market shares in the individual supplementary health insurance market were held by Mutuelle Générale de l'Education Nationale — MGEN (7,7 % market share), the mutual insurance company Groupama ([30]) (6,7 % market share) and the insurance company Swiss Life (4 % market share) ([31]).

([26]) Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie,* cited in footnote 22 above.

([27]) See paragraphs 71 et seq. of the judgment cited in footnote 22.

([28]) 2006 Annual Report of Fonds CMU, http://www.cmu.fr/userdocs/Rapport%202006.pdf, Annex 13 – list of the 100 largest supplementary insurers.

([29]) 2008 Annual Report of Fonds CMU of 13.5.2009, p. 33.

([30]) This is not a mutual society covered by the Mutual Society Code, but a mutual insurance company coming under the Insurance Code.

([31]) See decision No 09-DCC-61 of 4 November 2009 of the French competition authority concerning acquisitions of exclusive control of the mutual society Altéis and the mutual society Releya by the mutual society Prévadiès, p. 4.

(100) Regarding the group supplementary insurance market, the largest market shares were held by the insurance undertaking Axa (17,51 % market share), the provident society group Malakoff-Médéric (8,7 % market share) and the group AG2R-La Mondiale-Prémalliance ([32]) (6,9 % market share) ([33]).

(101) Despite requests to that effect to the French authorities, the Commission is not in possession of more precise information on the structure of the supplementary health insurance market, such as that relating to groupings of mutual societies, mutual associations, unions of mutual societies and provident societies. Furthermore, despite being requested to do so by the Commission, the French authorities were unable to forward statistics specific to *contrats solidaires et responsables* (either at aggregate level or at the level of each category of market operator). The statistics in the tables in recitals 102 and 103 therefore refer to the entire supplementary health insurance market, including policies which do not fulfil the conditions of eligibility for the measure notified. A report published by the French Court of Auditors in 2008 ([34]) stresses the significant statistical deficiencies with regard to supplementary insurance, concerning the number of insured persons, their distribution between the various categories of insurer and the various types of policy (individual policy, optional group policy and compulsory group policy), and the amount of expenditure refunded by category of household and income. On the basis of analyses carried out by the national competition authority, this market nevertheless appears to be fragmented, and even very fragmented, as regards individual policies ([35]), which, however, is only one of the submarkets concerned by the first measure notified.

(102) Between 2001 and 2007, this sector developed strongly, as shown in the table at the end of this recital ([36]). The aggregate turnover of these undertakings came to EUR 27,4 billion in 2007, up 55,8 % compared with 2001, i.e. average annual growth of 7.6 %. The turnover for 2008 is thought to exceed EUR 29 billion, up 6 % on 2007 ([37]).

Trend in turnover of supplementary insurers 2001-2007

(billion EUR)

	Mutual societies	Provident societies	Insurance undertakings	Total
2001	10,6	3,3	3,7	17,6
2007	16,0	4,7	6,7	27,4
2001-2007	+ 50,5 %	+ 43,15 %	+ 82,13 %	+ 55,8 %

(103) According to the statistics forwarded by the French authorities, the breakdown between individual and group policies is as follows (2004 figures):

	Provident societies	Mutual societies	Insurance undertakings
Group policies	38 %	33 %	29 %
Individual policies	6 %	67 %	27 %
Group + individual policies	18 %	54 %	28 %

(104) Whereas mutual societies and mutual unions mainly issue individual policies, provident societies essentially issue group policies (company or sectoral policies). The portfolio of insurance undertakings is more balanced.

(105) The population coverage rate has increased significantly, rising from 84 % in 1996 to 92,8 % in 2006. There are between 32 million and 38 million beneficiaries under mutual schemes, 13 million with insurance undertakings and 11 million in provident societies, to which must be added over 4 million beneficiaries of the CMU-C fund (universal sickness cover), which offers supplementary health cover free of charge to the poorest. This means that today, 7 % to 8 % of the French population do not have supplementary cover ([38]).

Aid character of the measure

(106) Under Article 107 TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

([32]) This group comprises, among others, provident societies, mutual insurance companies, mutual societies and unions of mutual societies.

([33]) See the decision cited in footnote 31, p. 5.

([34]) Survey on the distribution of the funding of sickness expenditure since 1996 and on the transfers made between compulsory sickness insurance, supplementary insurance and households, Court of Auditors, April 2008.

([35]) See Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes n° 7bis of 15 September 2006, p. 2 (publication of the letter from the Minister for the Economy, Finance and Industry of 9 August 2006 to the boards of Mutuelle Préviade-Mutouest, concerning concerted action in the supplementary health insurance sector.

([36]) See Senate information report No 385 of 8 June 2008 on the distribution of financing of sickness insurance since 1996 and the transfer of charges between compulsory sickness insurance, supplementary insurance and households, p. 11.

([37]) 2008 annual report of Fonds CMU of 13.5.2009, p. 33.

([38]) idem, p. 13.

(107) The classification of a measure as State aid therefore presupposes that the following cumulative conditions are fulfilled, i.e.: 1) the measure in question confers an advantage, 2) through state resources, 3) this advantage is selective and 4) the measure in question distorts or threatens to distort competition and is liable to affect trade between Member States.

(108) There is no doubt that the exemptions from or reductions in corporation tax and local business tax consisting in abolishing or reducing a charge which the undertakings concerned would normally have to bear constitute an advantage for their beneficiary ([39]). In this respect, these tax exemptions or reductions therefore constitute economic advantages.

(109) In the light of the references made by the CTIP to a possible public service mission, the Commission notes that the conditions identified in the *Altmark* ([40]) case (to exclude the classification as aid in certain cases of services of general economic interest) are not fulfilled in the present case (see in particular paragraph 144, the third Altmark condition consisting in absence of overcompensation). One is therefore indeed in the presence of an economic advantage.

(110) These advantages are granted by the French State, which, in so doing, waives the collection of tax revenue. It therefore confers this advantage through state resources.

(111) The measure is also of a selective nature. The selectiveness results firstly from the restriction of the measure in question to a single economic sector, i.e. the insurance sector, and secondly from its restriction within this sector to a particular type of policy (subsector). In this respect, it should first be noted that corporation tax is a tax whose scope covers all companies, whatever the sector in which they operate. An exemption from this tax benefiting the insurance sector exclusively therefore constitutes a derogation from the general corporation tax regime which thus specifically favours certain undertakings. The same applies to the exemption from local business tax. Moreover, the exemption in question also favours the production within the insurance sector of certain sickness insurance policies, in this case *contrats solidaires et responsables*. The measure therefore favours operators entering into *contrats solidaires*, to the detriment of operators issuing 'traditional' policies.

([39]) See Court of Justice judgment in Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL* [2006] ECR I-5479, paragraph 86 and case law cited.

([40]) Court of Justice judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

(112) Finally, apart from the fact that the insurance sector is the subject of trade within the European Union, it should be recalled that, where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of penetrating the market in that Member State ([41]).

(113) The position of the undertakings concerned will consequently be strengthened in trade within the European Union. This measure is therefore liable to create distortions of competition and to affect trade within the European Union.

(114) It must therefore be concluded that the first measure does in fact constitute State aid within the meaning of Article 107(1) TFEU. France does not challenge this classification.

Analysis of the compatibility of the measure under Article 107(2)(a) TFEU

(115) Since the measure notified constitutes State aid, an analysis must be carried out of its compatibility with the internal market. The French authorities consider that the measure in question constitutes compatible State aid under Article 107(2)(a) TFEU.

(116) Article 107(2)(a) TFEU reads: 'The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned'.

(117) A State aid measure is compatible on the basis of this provision where the following three conditions are met:

1. the aid must have a social character;
2. it must be granted to individual consumers;
3. it must be granted without discrimination related to the origin of the product.

(118) It should be pointed out firstly that Article 107(2) TFEU derogates from the principle of the prohibition of State aid, as set out in Article 107(1) TFEU, and must therefore be interpreted restrictively ([42]).

([41]) See in particular Court of Justice judgment in Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 84.

([42]) As regards the restrictive interpretation of Article 107(2) TFEU, see Court of Justice judgment in Case C-278/00 *Greece* v *Commission* [2000] ECR I-3997, paragraphs 81-82, and Court of First Instance judgment in Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] ECR II-2123, paragraphs 165-166.

(119) As regards more specifically the application of Article 107(2)(a) TFEU, it must be pointed out, however, that the Commission's decision-making practice does not rule out the aid being granted to an intermediary which undertakes to pass it on to individual consumers ([43]), Nevertheless, in such a case, it is necessary for the mechanism put in place to guarantee that the aid is effectively passed on to the end consumer.

(120) The Commission considers that the social character (first condition) of the measure is well established in so far as the objective is to open up access to supplementary health insurance to people who have difficulties in accessing such insurance owing to their age, state of health or resources. Article 207 of the CGI provides for criteria of a social nature to be respected by insurers to qualify for the measure ([44]), These criteria introduce minimum proportions of certain vulnerable populations, such as persons on low income or the elderly, in the insurance portfolio of the undertakings concerned. The preliminary draft decree forwarded by the French authorities, which specifies certain terms and conditions for the gradation of rates according to the social situation of insured persons ([45]), confirms the social character of the measure in favour of vulnerable populations.

(121) On the other hand, the Commission's examination of the measure did not allow the conclusion to be drawn that the aid in fact benefits individual consumers (second condition).

(122) According to the French authorities, the aid granted to insurers will indirectly benefit individual consumers. The strong competition in the supplementary health insurance market ensures that the aid received is passed on by insurers to consumers in the amount of premiums set.

(123) In this respect, it should be noted that the tax exemption of sickness insurance policies (*contrats solidaires*) applied by France has been considered by the Commission to be aid compatible under Article 107(2)(a) TFEU ([46]). There was in fact no doubt in this case that the tax exemption first and foremost benefited individual consumers who in fact had to pay the tax. The amount of the tax constituted a component of the premium and the tax exemption in favour of *contrats solidaires* reduced the amount of the premium accordingly.

(124) In the present case, the aid is granted, not through an indirect tax exemption proportional to the amount of the premium payable by insured persons, but through an exemption from corporation tax which is calculated on the basis of the profits made by the insurer from all insured persons who have taken out *contrats solidaires et responsables*.

(125) The actual passing on of the exemption from corporation tax to the end consumer is uncertain to say the least. Firstly, the Commission is not in possession of any information enabling it to establish that the corporation tax (and the exemption from such tax) is in fact passed on to individual consumers in the market concerned. Moreover, a recent report by the French Court of Auditors showed the existence of very significant increases in profit margins in the health insurance sector in recent years (from 12 % in 2003 to 23 % in 2007) ([47]). In this context of a significant increase in profit margins, it can hardly be concluded that a market mechanism exists guaranteeing that the exemption from corporation tax is in fact passed on to end consumers.

(126) The CTIP points out that part of profits must be allocated to the constitution of reserves in order to comply with solvency requirements and that it is therefore perfectly natural for at least part of the advantage to serve to cover, in whole or in part, the increase each year in the solvency requirement. This argument tends to show that the measure will give rise to an increase in profits for insurers rather than a reduction in the price of covering the risks concerned for consumers.

(127) Finally, the Commission's assessment is by no means called into question by France's argument that supplementary health insurance policies are a product which secures loyalty for insurers, which are encouraged to practise an attractive rates policy. It should be recalled that Article 107(2)(a) TFEU requires that the advantage be in fact passed on to individual consumers. Consequently, the existence of a mere incentive to pass on part of the advantage to end consumers cannot satisfy the requirement of an actual passing on of this advantage.

(128) The Commission therefore considers that the measure does not guarantee that the advantage is in fact passed on to individual consumers, as required by Article 107(2)(a) TFEU.

([43]) See Commission Decision of 30 May 2007, France, Supplementary social protection for civil servants, N 911/2006, recitals 34-36.

([44]) See description of these criteria in recital 20 of this Decision.

([45]) According to the draft Decree, at least 75 % of eligible policies must provide for: (1) either continuation free of charge and at least at the rate of social security, of all the cover provided for by the policy for the insured person and, where appropriate, for dependants, for 6 months from the time the insured person loses his job, the confirmation of his invalidity or the date of his death; (2) or the payment by the undertaking for 1 year of 30 % of the contributions of insured persons who lose their job, of apprentices under 26 years of age and persons in a situation of partial or total dependence.

([46]) See Commission Decision of 2 June 2004, cited in footnote 7.

([47]) Survey on the distribution of funding of sickness expenditure since 1996 and on the transfers made between compulsory sickness insurance, supplementary insurance and households, Court of Auditors, April 2008.

(129) The Commission's examination also concludes that there is non-compliance with the condition concerning the absence of discrimination related to the origin of the product (third condition). For this to be the case, consumers would have to benefit from the aid irrespective of the economic operator supplying the product or service capable of fulfilling the social objective referred to by the Member State concerned and there would have to be no barrier to entry for insurers established in the European Union ([48]). However, besides the conditions relating to the type of policy eligible, companies wishing to benefit from the measure must respect the thresholds of a minimum number (120 000/150 000) or proportion (80 %/90 %) of *contrats solidaires et responsables* in their supplementary health insurance policy portfolio.

(130) The French authorities consider that these thresholds constitute an incentive to develop this type of policy on a massive scale through the mutualisation of the 'bad risk' characterised by the age or level of financial resources of the insured person in their portfolio and are also necessary to prevent the tax advantage from relating to too low a fraction of the business of the undertakings and in this way to attain the objectives of solidarity and mutualisation. Pursuit of the social objective of the measure can be ensured only by a mechanism requiring insurers to hold in their sickness insurance policy portfolio a minimum number or a significant proportion of *contrats solidaires et responsables*. In the absence of this threshold mechanism, no provision would have allowed an increase to be ensured in the rate of cover of the populations currently not covered and the tax exemptions would be reflected simply in a windfall for insurers. The threshold reflected as a percentage allowed small undertakings operating almost exclusively in these policies to benefit from the measure without reaching a purely quantitative threshold, whereas the thresholds in absolute terms allowed undertakings offering a significant number of this type of policy (without it being exclusive) to benefit from the measure.

(131) The Commission notes firstly that no precise information could be supplied by the French authorities concerning the current breakdown of *contrats solidaires et responsables* among the various market operators or concerning the number and proportion of these policies in their portfolios. According to the Commission's analysis, it nevertheless emerges that mutual societies and unions of mutual societies are legally bound to offer only *contrats solidaires* ([49]). In practice, it also appears that provident societies are subject to the same obligation. Mutual societies and provident societies should therefore always fulfil the condition of the threshold expressed as a percentage, whereas insurance undertakings with a limited presence in the market for *contrats solidaires* and wishing to invest in it could have difficulties in meeting the threshold conditions (either in terms of proportion or in absolute terms) and therefore in benefiting from the tax exemptions. This would be the case more specifically for insurance undertakings with a large existing portfolio of 'traditional' supplementary health policies which do not meet the conditions for being considered *contrats solidaires*.

(132) In this context, the thresholds would not therefore lead to an equivalent effort, whoever the insurer, and would not have the effect of an incentive for insurers already meeting the threshold criteria (in particular mutual societies, unions of mutual societies and provident societies). Contrary to France's assertions, the introduction of the thresholds is therefore unlikely to avoid a possible windfall effect.

(133) In the Commission's view, these thresholds will quite simply have the effect of causing discrimination related to the origin of the product. In this way, the thresholds seem likely to exclude a number of insurers from benefiting from the exemption, even if they were to offer the *contrats solidaires et responsables* that the French authorities wish to promote. The existence of these thresholds could also place at an advantage undertakings already present in the market and constitute a barrier to entry to the relevant market for certain operators which could not or which feared that they might not be able to meet them.

(134) Finally, it is likely that the amount of aid will vary from one insurer to another depending on the profits made from the operations concerned, and this would not comply with the requirement that consumers must benefit from the aid in question irrespective of the economic operator supplying the product or service capable of fulfilling the social objective invoked by the Member State concerned ([50]).

(135) It therefore has to be concluded that the aid scheme notified by France to promote the development of *contrats solidaires et responsables* is not compatible with the internal market on the basis of Article 107(2)(a) TFEU.

Analysis of the compatibility of the measure under other provisions of Article 107 TFEU

(136) Although France does not explicitly invoke any other provision relating to the compatibility of the State aid, it must be noted that none of the conditions for compatibility provided for in Article 107(2) and (3) TFEU apply to the case in point.

([48]) See the Commission guidelines on application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 11.

([49]) Mutual Society Code, Article L112-1, second subparagraph.

([50]) See Court of First Instance judgment in Joined Cases T-116/01 and T-118/01 *P&O European Ferries* [2003] ECR II-2957, paragraph 163.

(137) As regards the provisions of Article 107(2) TFEU, other than point (a), it must be noted that the conditions for compatibility provided for in points (b) and (c) obviously do not apply to the case in point.

(138) Under Article 107(3)(c) TFEU, 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 compatible.

(139) According to the FNMF, the aid is intended to facilitate the development of supplementary health cover which respects the characteristics of solidarity and sense of responsibility under conditions which do not adversely affect trading conditions to an extent contrary to the common interest. Nevertheless, in spite of its requests, the Commission has not obtained any data from the French authorities allowing support to be given to the applicability of the condition for compatibility mentioned in the previous recital or concerning the effect of the existing tax measures on the distribution of *contrats solidaires et responsables*, or concerning the relationship between the additional advantage envisaged and the additional costs or requirements associated with the management of this type of policy. The Commission is therefore unable to ascertain the necessity and proportionality of the new exemptions envisaged to achieve the objective described. In any case, it must be noted that the exemption from corporation tax is not linked to carrying out investments or creating jobs or specific projects. It therefore constitutes a continuous reduction in charges which constitutes operating aid which, according to established practice, is not liable to be declared compatible under Article 107(3) TFEU.

(140) Finally, no other condition for compatibility provided for in Article 107(3) TFEU was invoked by France.

Existence of a service of general economic interest compatible on the basis of Article 106(2) TFEU

(141) According to the CTIP, measures based on conventions and collective agreements, like the measure in question, have the objective of remedying the deficiencies of social security. The Commission observes that the CTIP does not explicitly invoke the existence of a service of general economic interest and France, whose duty it would be to establish that the aid in question is compatible with the Treaty, does not invoke Article 106(2) TFEU. Under these circumstances, the Commission is unable to assess the compatibility of the aid in question in the light of Article 106(2) TFEU. Furthermore, the Commission makes the following comments.

(142) Article 106(2) TFEU provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

(143) It follows from the case law of the Court of Justice that, with the exception of the sectors in which this question has already been regulated by the European Union, Member States have a wide-ranging discretion regarding the nature of the services which may be classified as being of general economic interest. However, even supposing that in the present case a service of general economic interest is concerned (which has not been argued by France), it has to be verified that, for the purposes of Article 106(2) TFEU, the compensation paid to the undertakings assigned a public service mission does not exceed the costs of providing the public service, taking account of the income relating to it and a reasonable profit for the performance of these obligations.

(144) In this respect, if suffices to point out that the tax measure in question does not contain any mechanism allowing overcompensation to be ruled out in relation to the costs of the burden incurred by the operators concerned. It must be noted in fact that the amount of aid in question (tax exemptions regarding the operations concerned) is in no way linked to the additional costs borne by insurers. It is not linked either to the premiums paid by insured persons or to the number of policies.

(145) In this context, the Commission concludes that in any case the measure concerned could not be declared compatible with the internal market on the basis of Article 106(2) TFEU.

VIII.2. **Tax deduction for equalisation provisions relating to certain supplementary group insurance policies**

Description of the personal protection market in France

(146) The 'personal protection' market groups together the operations designed to prevent and cover the risk of death, risks relating to personal physical injury or associated with maternity or risks of incapacity for work or invalidity or risk of unemployment ([51]), as a supplement to the statutory social security system.

([51]) Article 1 of Law No 89-1009 of 31 December 1989 enhancing the cover offered to insured persons against certain risks.

(147) Personal protection cover allows:

— access to medical care to be facilitated by providing supplementary reimbursement of health expenses in the case of illness, maternity, accident, etc.

— total or partial maintenance of salary in case of work absence, invalidity or incapacity,

— guaranteeing of capital and annuities for the spouse and children in the event of the death of the insured person,

— a financial supplement to be provided for in case of dependence.

(148) Three categories of undertaking are present in this market: companies subject to the Insurance Code (insurance undertakings, mutual insurance companies and subsidiaries of banks), mutual societies subject to the Mutual Society Code, and provident societies subject to the Social Security Code.

(149) Personal protection insurance may be taken out either as a group policy, by subscribing to a group policy through the employer, an occupational or inter-occupational sector, or in an individual capacity by approaching an insurance undertaking or mutual society directly.

(150) Nowadays, a very large majority of employees are covered by a group personal protection policy. Affiliation can be either obligatory or optional.

(151) A group personal protection scheme involves a triangular relationship:

— the employer enters into a commitment to the employees and, in this capacity, takes out an insurance policy ([52]),

— the insurer covers the risk, in exchange for collection of premiums,

— the employees are the beneficiaries.

([52]) From the time that the employer contributes to the premiums (in whole or in part), all the employees concerned must be affiliated to the personal protection policy put in place in the undertaking or occupational sector.

(152) According to the estimates communicated by the French authorities for 2005, the personal protection market accounted for annual turnover of EUR 20 billion (group and individual policies). Insurance undertakings accounted for the bulk of this market with 71 % of the premium income, whilst provident societies and mutual societies accounted for 21 % and 8 % of the market respectively. It must nevertheless be pointed out that these last figures relate to all categories of policies in this sector: individual policy, group policy with optional affiliation and group policy with compulsory affiliation.

(153) Moreover, the French authorities consider that the occupational designation market ([53]) providing cover for death, incapacity and invalidity exceeds EUR 4 billion and covers almost all personal protection operations undertaken by provident societies (EUR 4,2 billion) and part of the group policies of insurance undertakings and mutual societies. However, no precise figures were communicated concerning the share of the latter in the designation market.

Aid character of the measure

(154) Although France accepted the classification as State aid of the measure in its notification, it subsequently pointed out that at least part of the scheme should not be considered aid within the meaning of Article 107(1) TFEU on account of the specific characteristics of designation policies (strong constraints in terms of rates, risk selection and management) which made these policies particularly sensitive to the risks of shifts in loss expectancy compared with original estimates and therefore fully justified a particularly prudent allocation scheme and therefore a higher tax deductibility of allocations to provisions without this giving rise to the existence of an advantage.

(155) France therefore considers that part of the tax deduction of the allocations under adapted and strengthened conditions, extending beyond the tax regime under ordinary law existing in Article 39 quinquies GB of the CGI, is justified at regulatory and prudential level and does not constitute an advantage.

(156) It is therefore appropriate to examine first of all whether the measure gives rise to the existence of an advantage for the insurers concerned.

([53]) At the end of 2006, there were over 100 collective agreements providing employees with cover for death, incapacity and invalidity and designating a provident society.

(157) Article 39(1)(5) of the above-mentioned Code provides for the deductibility of 'provisions constituted with a view to offsetting losses or clearly specified charges which events in progress render probable, provided that they were in fact recorded in the accounts for the financial year'. The Code provides in certain cases for flat-rate deductibility for certain types of operation. This is more particularly the case in the field of insurance and reinsurance for which Articles 39 quinquies G to 39 quinquies GD of the Code lay down specific rules for the deductibility of provisions in order to take account of the specific characteristics of the insurance sector, the principal activity of which consists precisely in covering risks. To determine whether any advantage exists, it is therefore appropriate to verify whether the operations covered by the measure do in fact entail loses or additional charges within the meaning of Article 39(1)(5) of the above-mentioned Code to the extent provided for by Article 39 quinquies GD.

(158) First of all, it is appropriate to accept the principle that the nature and intensity of the risks of loss in the supplementary insurance sector providing cover for death, incapacity and invalidity are liable to vary according to the types of population covered and the terms and conditions of cover (individual/group policies, optional/compulsory).

(159) The policies arising from company agreements, including the designation policies arising from such agreements, relate to a limited population. They entail a 'specific' risk (risk of loss in the undertaking concerned) without always offering the possibility of mutualisation within a large population. The group policies covering a sector (economic activity) concern a wider population and therefore a priori entail greater mutualisation. For this latter type of policy, there would nevertheless seem to be a strong correlation between loss expectancy and the periods of crisis which may affect an entire economic sector. According to the CTIP, the periods of crisis would amplify the volatility of losses at sector level.

(160) As regards designation group policies resulting from a company agreement, the Commission considers that there is no reason to think that the nature and intensity (and consequently the fluctuation) of the risk of loss is significantly different from the situation in which this same type of policy is concluded outside joint negotiations between trade unions and employers (and therefore outside the designation process).

(161) Moreover, in the absence of precise information on the frequency of losses in this sector, it cannot be concluded that the fluctuations in risks specific to sector designation policies (policies characterised by greater sensitivity to the economic climate but also by greater mutualisation) would be of a greater order of magnitude than the same risks relating to company policies (policies characterised by a specific risk and by lesser mutualisation).

(162) In addition, should the constraints of the designation invoked by France in fact have the effect of leading to supplementary pressure at the level of the premiums received by insurers, it has to be noted that this is a circumstance which could affect income and not the expenditure from losses. This type of risk (loss of income) is not therefore covered by Article 39(1)(5) of the CGI and is not therefore eligible to benefit from allocations to the deductible provisions.

(163) No difference in risk has therefore been established between policies with designation clause and group policies within companies covering the same risks. Consequently, the supplementary tax deductibility provided for in Article 39 quinquies GD has the effect of reducing or abolishing a corporation tax charge which the undertakings concerned should normally have to pay. In this capacity, the supplementary deduction therefore constitutes an economic advantage.

(164) In the light of the references made by France and the CTIP to a possible public service mission, the Commission notes that the conditions identified in the *Altmark* case (to exclude classification as aid in certain cases of services of general economic interest) are not met in the present case (see in particular recital 189 — the third condition of the *Altmark* case law is in fact the absence of overcompensation). This is therefore undoubtedly an economic advantage.

(165) The advantages under the measure are granted by the French State, which, in so doing, waives the collection of tax revenue. It therefore grants this advantage through state resources.

(166) For the reasons already set out with regard to the first measure, the second measure is also selective in character. The selectiveness results firstly from the restriction of the measure in question to a single economic sector, i.e. the insurance sector, and secondly from its restriction within this sector to a specific type of policy (sub-sector). The measure benefits certain undertakings of the insurance sector which conclude group policies covering the risks of death and physical injury in the context of the procedure of designation by the social partners. The measure does not therefore apply to policies covering the same risks outside the designation procedure. It is also appropriate to note that the measure does not apply to reinsurance undertakings exposed to the same type of risk.

(167) It is nevertheless appropriate to verify whether this selectiveness is not justified by the nature and logic of the reference tax system. Although, in respect of the deduction of provisions, the CGI provides for flat-rate deductibility for certain types of provisions, it has to be noted that, for the reasons set out above (see recitals 156 to 163), deductibility exceeding the amount provided for in Article 39 quinquies GB is not justified by the logic of the system which provides for provisioning up to the losses or charges which events in progress render probable.

(168) Finally, apart from the fact that the insurance sector is the subject of trade within the European Union, it should be recalled that, where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of penetrating the market in that Member State. The position of the undertakings concerned will be strengthened in trade within the European Union. It should also be added that the obligatory nature of designation policies reinforces the distortion of competition. This measure is therefore likely to create distortions of competition and to affect trade within the European Union.

(169) It must therefore be concluded that the second measure does in fact constitute aid within the meaning of Article 107(1) TFEU, in so far as it provides for a level of deductibility in excess of that provided for in Article 39 quinquies GB of the CGI.

Analysis of the compatibility of the measure under Article 107(2)(a) TFEU

(170) Since the measure constitutes State aid, an analysis must be carried out of its compatibility with the internal market. The French authorities consider that the measure in question constitutes compatible State aid under Article 107(2)(a) TFEU.

(171) The Commission considers first of all that the social character (first condition) of the measure is established in so far as, as invoked by the French authorities, the operations managed under a designation clause aim to promote the widest possible cover of employees against risks for which social security cover is weak (death, incapacity, invalidity). The social character is defined by the considerable mutualisation between generations and between categories of employees, the single premium (no discrimination according to age, sex, state of health), and the implementation of measures of a social nature (rights free of charge in the case of unemployment, for dependent children, etc.). In an optional and purely individual framework, it is also to be expected that populations of employees on low incomes will opt not to subscribe to cover for serious, but exceptional, risks.

(172) In its decision to initiate the procedure, the Commission considered that the social character of the measure was not clearly established at the time the insurance policies are taken out (before the occurrence of the serious events referred to). It nevertheless has to be noted, as France points out, that the allocation of aid before the risk materialises, through an insurance covering the risks in question, is in fact the only means of achieving the social objective pursued.

(173) On the other hand, for the reasons already set out when examining the first measure, the Commission's examination of the measure has not allowed it to be established that the aid would ensure that the advantage is effectively passed on to individual consumers (second condition). The supplementary deductibility of the equalisation provisions has the effect of reducing or abolishing the corporation tax burden and therefore has an effect equivalent to the exemption scheme specific to the first measure.

(174) As regards the argument invoked by the Commission in its decision to initiate the procedure that the possible passing on of the advantage granted to insurers should be able to benefit not only insured persons/employees, but also employers (who contribute to the payment of part of the premiums), France and the CTIP consider that the employer's contribution to financing contractual supplementary social protection schemes constitutes remuneration for employees and an advantage for the latter. The Commission is nevertheless of the opinion that, even if the financing of a cover scheme in favour of employees by the employer is in fact an advantage for the employees, it is undeniable that any reduction in premiums will also constitute a reduction in the charges payable by the employer and therefore an advantage for him.

(175) As regards the existence of possible discrimination related to the origin of the products (third condition), the Commission confirms its assessment that the high degree of concentration between provident societies, which currently characterises activities relating to designation policies, is reflected in de facto discrimination in favour of these institutions. Although France has not been able to supply precise information concerning the breakdown of the designation market between the various market operators, the Commission observes that, on the basis of the information in its possession, the vast majority of designation policies are currently managed by provident societies.

(176) Although, as the French authorities state, the insurer designated by the social partners is chosen solely by the latter, it has to be noted that no legal provision obliges the social partners to invite competing bids from all market operators when designating the undertaking. The FFSA maintains, without being contradicted in this respect by the French authorities, that the social partners prefer to opt for the constitution of a provident society which they can subsequently manage.

(177) Although it follows from the *Albany* judgment cited above that agreements concluded under collective bargaining between the social partners and pursuing social objectives do not come under Article 101(1) TFEU on the prohibition of agreements, decisions and concerted practices, it has to be noted that this case law in no way implies, as indicated above, that aid granted to an insurer under a designation procedure is compatible with Article 107(2)(a) TFEU.

(178) Insurers other than provident societies, and especially insurance undertakings operating in the market for group personal protection at company level, are therefore liable to be the subject of discrimination on account of the absence of obligation for the social partners to issue invitations to tender with the aim of allowing any market operator interested to submit a bid to cover the benefits agreed between the social partners and to be chosen on account of the superior quality of its services and/or their lower price. By way of comparison, some French supplementary health insurance schemes provide for a mechanism for the selection of the insurer(s) on the basis of a transparent tendering procedure ([54]).

(179) It must therefore be concluded that two of the three conditions for compatibility are not met and that the aid scheme notified by France to promote designation policies in the field of personal protection are not compatible with the internal market on the basis of Article 107(2)(a) TFEU.

Analysis of the compatibility of the measure under other provisions of Article 107(2) and (3) TFEU

(180) The compatibility criteria provided for in Article 107(2)(b) and (c) TFEU are obviously not applicable to the present case.

(181) Regarding the compatibility of the measure on the basis of Article 107(3)(c) TFEU, France states that the established social objective of the measure proves the importance for the future of developing the personal protection market. This development is said to be part of an objective in favour of public health, combating insecurity, economic and social cohesion, the development of social dialogue, and the protection of workers, which are European Union objectives in the common interest. The Commission nevertheless considers that the need for and proportionality of the measure have not been proven. As it has already stated in its examination of the existence of an advantage, the Commission is of the opinion that there is nothing to justify the exclusion from the benefit of the measure for group policies at company level covering the same risks but not concluded under designation. The measure is therefore disproportionate in so far as it does not include policies outside designation. Moreover, it should be noted, as the Commission has already done for the first measure, that the measure constitutes a continuous reduction in charges which constitutes operating aid which is not, according to established practice, capable of being declared compatible under Article 107(3) TFEU.

(182) Finally, no other condition for compatibility provided for Article 107(3) TFEU was invoked by France.

Existence of a service of general economic interest compatible under Article 106(2) TFEU

(183) According to France and the CTIP, the supplementary insurance benefits in the field of personal protection under the designation procedure can be considered as constituting a service of general economic interest within the meaning of Article 106(2) TFEU, in particular where affiliation to the benefit scheme is compulsory and its management is undertaken under a joint framework. The CTIP also refers to the judgment of the Court of Justice in *Albany* ([55]), stating that contractual social protection schemes with compulsory affiliation fulfil a mission of general economic interest.

(184) Under this provision, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Furthermore, the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

(185) Therefore, as already pointed out in the context of the examination of the first measure ([56]), Member States have wide discretion regarding the nature of services capable of being classified as being of general economic interest.

([54]) See Commission Decision of 30 May 2007, N 911/2006, France, Supplementary social protection for civil servants, recitals 39 et seq.

([55]) Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie,* cited in footnote 22 above.

([56]) See recital 143 of this Decision.

(186) The Commission also observes that, in the *Albany* case cited above, the Court concludes that the allocation of an exclusive right to manage a supplementary pension scheme in a specific sector can be considered a service of general economic interest, stressing the importance of the social function allotted to supplementary pensions.

(187) In this context, it is not ruled out that services provided by insurers in the context of designation by the social partners can be considered a service of general economic interest in so far as the agreement between the social partners in the context of designation is made obligatory for all undertakings in the sector concerned (or the undertaking concerned) and covers risks which are not covered or are insufficiently covered by the public social security system. However, as already mentioned in connection with the examination of the first measure ([57]), the financial measures supporting such a mechanism must be limited to that which is necessary to offset the additional costs for insurers arising from the public service obligations.

(188) The Community framework for State aid in the form of public service compensation ([58]) defines the conditions under which the Commission considers such compensation to be compatible under Article 106(2) TFEU. In particular, the compensation paid may not exceed the costs of providing the public service, taking into account the revenue relating to it and a reasonable profit for performing these obligations.

(189) In this respect, it must nevertheless be noted that the tax saving resulting from the supplementary deductibility of allocations to the equalisation provisions does not fulfil this condition. It is not possible to establish any link at all between the amount of the tax saving and the costs relating to providing the public service.

(190) In its letter dated 31 October 2008, France accepts that the amount of compensation (tax saving) for the service of general economic interest does not comply with the conditions laid down by the Community framework. Nevertheless, it considers that these conditions are not suited to the particularities of the operations concerned. According to France, the mechanism of tax deductibility is better suited and more flexible than a subsidy on the basis of a precise evaluation of the supplementary costs arising from management of the service.

(191) The Commission is nevertheless of the opinion that the criteria established by the Community framework must be strictly complied with as they enable the necessary equilibrium to be ensured between, on the one hand, the smooth operation of services of general economic interest and, on the other, the absence of development of trade to an extent contrary to the interests of the European Union.

(192) The Commission is therefore of the opinion that the conditions of Article 106(2) TFEU, as developed in the Community framework, are not respected and that accordingly the measure cannot be declared compatible with the internal market on the basis of that provision.

IX. **CONCLUSION**

(193) The Commission notes that the aid schemes notified by France to promote the development of *contrats solidaires et responsables*, as well as group personal protection policies, constitute State aid within the meaning of Article 107(1) TFEU. It also finds that, despite the established social objective of the aid schemes concerned, the terms and conditions of their implementation prevent the fulfilment of all the conditions provided for in Article 107(2) and (3) or in Article 106(2) TFEU. The two aid schemes must therefore be considered incompatible with the internal market,

HAS ADOPTED THIS DECISION:

Article 1

The aid schemes which France plans to implement to promote, firstly, the development of certain sickness insurance policies (‘*contrats solidaires et responsables*’) and, secondly, the development of supplementary group insurance policies providing cover for death, incapacity and invalidity, in application of Articles 207, paragraph 2, 1461, 1º and 39 quinquies GD of the General Tax Code, constitute State aid which is incompatible with the internal market.

For this reason, these aid schemes may not be implemented.

Article 2

France shall inform the Commission, within 2 months of notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels, 26 January 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

([57]) See recital 143 of this Decision.
([58]) OJ C 297, 29.11.2005, p. 4.