DECISIONS

COMMISSION DECISION (EU) 2020/613

of 7 February 2020

on the measure SA.17653 – C36/2007 (ex NN 25/2007) implemented by Germany for Deutsche Post AG

(notified under document C(2020) 593)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

1.1. Relevant summary of State aid procedures

1.1.1. *Opening Decision*

(1) In 1994, United Parcel Service ('UPS') filed a complaint concerning the granting of unlawful State aid to Deutsche Bundespost POSTDIENST ('POSTDIENST').

(2) The Commission opened the formal investigation procedure on 23 October 1999 ('the Opening Decision') with regard to various State measures: compensations granted for the universal service obligation, a State guarantee and pension subsidies for the period from 1995 to 1999.

(3) The Opening Decision was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit comments.

(4) Germany submitted comments on 16 September 1999.

(5) Following publication, the Commission received comments from 14 interested parties, which were duly transmitted to the German Government by letter dated 15 December 1999 providing it with an opportunity to make its own observations concerning these comments.

(6) The German authorities responded by letter dated 1 February 2000, which was registered as received on 2 February 2000.

[1] OJ C 306, 23.10.1999, p. 25.
[2] OJ C 306, 23.10.1999, p. 25.

1.1.2. *2002 Decision*

(7) On 19 June 2002, the Commission adopted Decision 2002/753/EC ([3]) ('the 2002 Decision') finding that POSTDIENST and its successor Deutsche Post AG ('DPAG', while POSTDIENST and DPAG will be jointly referred to as 'Deutsche Post') priced door-to-door parcels below incremental costs and that its aggressive pricing policy did not fall within Deutsche Post's universal service obligation.

(8) The Commission considered that the resulting losses of EUR 572 million were ultimately financed, in contravention of Articles 106 and 107 of the Treaty on the Functioning of the European Union (TFEU), by State resources which were granted to Deutsche Post in various forms (e.g. public transfers from sister company Deutsche Bundespost TELEKOM ('TELEKOM'), public guarantees for loans, and public subsidies to finance the civil servants' pensions).

(9) Following the 2002 Decision, Germany recovered the incompatible State aid of EUR 572 million from DPAG. Deutsche Post challenged the decision in the Union Courts.

1.1.3. *Further complaints after the 2002 Decision*

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

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

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

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

1.1.4. *2007 Extension Decision*

(14) Following the further complaints, the Commission informed Germany by letter of 12 September 2007 ([4]) of its decision to extend the proceedings that had originally been initiated in 1999 ('the 2007 Extension Decision').

(15) The objective of the 2007 Extension Decision was to include the newly submitted information and to comprehensively address all potential distortions of competition which resulted from the public measures that were granted to Deutsche Post.

(16) Germany submitted its comments on 14 December 2007 and Deutsche Post challenged the validity of the 2007 Extension Decision ([5]). On 16 November 2007, UPS and TNT submitted their comments. After an initial request for a deadline extension on 20 December 2007, Germany eventually submitted on 12 March 2008 its comments on UPS' and TNT's observations.

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

([4]) OJ C 245, 19.10.2007, p. 21.

([5]) Judgment of the General Court of 8 December 2011, *Deutsche Post* v *Commission*, T-421/07, ECLI:EU:T:2011:720.

1.1.5. *Information request of 17 July 2008*

(17) The Commission sent an information request to Germany on 17 July 2008 on all public measures under investigation including a questionnaire on revenues and costs of Deutsche Post for the period from 1989 to 2007. On 5 August 2008, Germany asked for an undefined deadline extension because the availability of certain data would have to be checked before a reply could be provided.

(18) On 12 August 2008, the Commission explained why the investigation on the revenues and costs of Deutsche Post should be effected within the period from 1989 to 2007 and insisted on the submission of the requested information.

(19) In its submission of 14 August 2008, Germany maintained that there was no reason for examining the revenues and costs of Deutsche Post for the period after 1994. On 22 August 2008, the Commission reserved the right to adopt an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 ([6]) if Germany did not provide the requested information.

(20) On 2 October 2008, Germany presented the results of a further expert opinion to support the position that an accounting analysis after 1994 was not necessary and therefore the appropriate investigation period should be from 1990 to 1994.

(21) On 28 October 2008, Germany submitted information on the public guarantee and the pension measure.

1.1.6. *Information injunction of 30 October 2008*

(22) The Commission did not accept Germany's arguments and insisted that an analysis until 2007 was necessary to fully appreciate the competitive effects of the implemented public measures. Following the two reminders for information of 12 August 2008 and 22 August 2008, the Commission issued an information injunction on 30 October 2008 to enjoin Germany to deliver all necessary accounting information for the whole period from 1989 to 2007.

(23) Germany and Deutsche Post challenged the validity of the information injunction ([7]).

(24) On 27 November 2008, Germany submitted the requested accounting information for the period from 1989 to 1994. On 5 and 16 December 2008, Germany updated the accounting information which had been submitted on 27 November 2008.

1.1.7. *Submission of accounting information for the period from 1989 to 2007*

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

(26) On 3 March 2009, Germany submitted a first set of accounting information for the whole investigation period from 1989 to 2007

(27) Meetings between Deutsche Post and the Commission services took place on 3 March 2009 in Brussels as well as on 12 March 2009, 2 April 2009, 28 May 2009, 23 June 2009, and 18 September 2009 in Bonn. Germany submitted further information by Deutsche Post on 26 March 2009, 7 May 2009, and 22 June 2009.

(28) Following those meetings and two lists of questions which the Commission services submitted to Deutsche Post on 4 June 2009 and 30 July 2009, Germany provided updated accounting information and further clarifications on 9 July 2009, 31 July 2009, 17 August 2009, 8 September 2009, 10 September 2009 and 15 October 2009.

([6]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

([7]) Order of the General Court of 14 July 2010, *Deutsche Post* v *Commission*, T-570/08, ECLI:EU:T:2010:31, Order of the General Court of 14 July 2010, *Deutsche Post* v *Commission*, T- 571/08, ECLI:EU:T:2010:312, Judgment of the Court of Justice of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, ECLI:EU:C:2011:656, Order of the President of the General Court (Second Chamber) of 10 May 2012, *Germany* v *Commission*, T-571/08 RENV, ECLI:EU:T:2012:228 and Judgment of the General Court of 12 November 2013, *Deutsche Post* v *Commission*, T-570/08 RENV, ECLI:EU:T:2013:589.

(29) On 16 and 24 September 2009, the Commission services submitted further questions to which Germany provided the answers on 14 October 2009.

1.1.8. *2011 Extension Decision*

(30) By letter dated 10 May 2011 ([8]), the Commission notified Germany of its decision to extend the procedure laid down in Article 108(2) TFEU that had originally been initiated in 1999 and extended in 2007, in order to conduct an in-depth investigation with regard to the pension subsidies that Deutsche Post has received since 1995 ('the 2011 Extension Decision').

(31) After an initial request for a deadline extension on 23 May 2011, Germany submitted its comments on 29 July 2011.

(32) On 4 October 2011, UPS submitted its comments. They were followed by comments submitted by Free and Fair Post Initiative on 5 October 2011 and comments submitted by Bundesverband Internationaler Express und Kurierdienste ('BIEK') on 7 October 2011. On 13 October 2011, the Commission communicated the comments by interested parties to Germany.

(33) On 14 November 2011, Germany submitted its comments on the third parties' observations.

(34) On 18 November 2011, the Commission sent a further information request concerning details of the pension financing for the period after 2007. On 2 January 2012 and 19 January 2012, Germany submitted replies. On 16 December 2011, the Commission submitted to Germany an expert study by Charles River Associates concerning profit benchmarking ([9]) for comments to which Germany replied on 16 January 2012.

1.1.9. *2012 Decision*

(35) On 25 January 2012, the Commission adopted Decision 2012/636/EU- ([10]) ('the 2012 Decision').

(36) In that Decision, the Commission concluded with regard to the pension measure that the measure constitutes unlawful and incompatible State aid and ordered recovery of the aid for the period from 1 January 2003 until the comparative advantage has been brought to an end. With regard to the aid for the period from 1995 to 2002, the Commission concluded that it was impossible to quantify the amount of incompatible aid. Consequently, the Commission did not order recovery of the aid with regard to this period.

(37) With regard to the public transfers, the Commission concluded that they were unlawfully granted by Germany in breach of Article 108(3) TFEU, but are compatible with the internal market. With regard to the public guarantee, the Commission concluded that the measure constitutes existing aid to Deutsche Post pursuant to Articles 107(1) and 108(3) TFEU.

1.2. **Summary of relevant Court procedures**

1.2.1. *Annulment of the 2002 Decision*

(38) In its 2008 judgment ([11]), the General Court annulled the 2002 Decision because the Commission failed to carry out a comprehensive analysis of all universal service revenues and costs to determine whether Deutsche Post had been under- or overcompensated.

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

(40) On 2 September 2010, the Court of Justice dismissed the Commission's appeal against the General Court's judgment ([12]).

([8]) OJ C 263, 7.9.2011, p. 4.

([9]) Charles River Associates, March 2011, 'Estimating a reasonable profit margin for provision of letter services', submitted by Belgium in State aid case SA.14588 – State aid to Bpost.

([10]) Commission Decision 2012/636/EU of 25 January 2012 – Measures C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG (OJ L 289, 19.10.2012, p. 1).

([11]) Judgment of the General Court of 1 July 2008, *Deutsche Post* v *Commission*, T-266/02, ECLI:EU:T:2008:235.

([12]) Judgment of the Court of Justice of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, ECLI:EU:C:2010:481.

1.2.2. *Annulment of the 2007 Extension Decision*

(41) Deutsche Post challenged the validity of the 2007 Extension Decision, claiming that the 2002 Decision created legitimate expectations that the Commission would not resume its investigations.

(42) On 8 December 2011, the General Court rejected that challenge as inadmissible ([13]), on the basis that the 2007 Extension Decision concerned the same measures targeted by the Opening Decision.

(43) On 24 October 2013, the Court of Justice annulled the 2011 judgment of the General Court on the 2007 Extension Decision ([14]), referring the case back to the General Court.

(44) On 18 September 2015, the General Court annulled the 2007 Extension Decision ([15]). The judgment was not appealed.

1.2.3. *Partial annulment of the 2012 Decision*

(45) On 14 July 2016, the General Court annulled Articles 1 and 4 of the 2012 Decision ([16]), holding that the Commission had not proven the existence of an advantage conferred to Deutsche Post. The judgment was not appealed.

(46) The remainder of the 2012 Decision was not appealed.

1.2.4. *Annulment of the 2011 Extension Decision*

(47) On 10 April 2019, the General Court annulled the 2011 Extension Decision ([17]), holding that the Commission did not sufficiently motivate the opening of the formal procedure (violation of Article 296 TFEU) in relation to the existence of an advantage. The judgment was not appealed.

1.3. **Comments received following the annulment of the 2012 Decision and the 2011 Extension Decision**

(48) Following the annulment of the 2012 Decision and the 2011 Extension Decision, the Commission received additional submissions, from UPS by letters of 24 May 2019 and 17 July 2019 and from BIEK by letter of 31 May 2019. In their letters, UPS and BIEK underlined that they remained concerned about the pension measure and urged the Commission to continue and conclude its investigation. On 28 November 2019, UPS submitted further comments.

2. **DESCRIPTION OF THE INVESTIGATED MEASURE**

2.1. **Scope of the present Decision**

(49) At the outset, in view of the numerous decisions adopted by the Commission and the annulment of certain decisions, the Commission considers it necessary to clarify the scope of the present Decision.

(50) The Commission recalls that it concluded in the 2012 Decision:

(a) with regard to the public transfers, that they were unlawfully granted by Germany in breach of Article 108(3) TFEU, but are compatible with the internal market; and

(b) with regard to the public guarantee, that this measure constitutes existing aid to Deutsche Post pursuant to Articles 107(1) and 108(3) TFEU.

(51) With regard to these conclusions, the 2012 Decision has not been appealed and hence remains in force.

([13]) Judgment of the General Court of 8 December 2011, *Deutsche Post* v *Commission*, T-421/07, ECLI:EU:T:2011:720.
([14]) Judgment of the Court of Justice of 24 October 2013, *Deutsche Post* v *Commission*, C-77/12 P, ECLI:EU:C:2013:695.
([15]) Judgment of the General Court of 18 September 2015, *Deutsche Post* v *Commission*, T-421/07 RENV, ECLI:EU:T:2015:654.
([16]) Judgment of the General Court of 14 July 2016, *Germany* v *Commission*, T-143/12, ECLI:EU:T:2016:406.
([17]) Judgment of the General Court of 10 April 2019, *Deutsche Post* v *Commission*, T-388/11, ECLI:EU:T:2019:237.

(52) Moreover, the Commission notes that the 2007 Extension Decision and the 2011 Extension Decision were annulled by the Courts.

(53) Against this background, the investigation only concerns the payments described in the Opening Decision.

(54) In particular, the Opening Decision refers to the following:

(a) the payments performed by Deutsche Post to the pension fund (established in the context of the privatisation of Deutsche Post) in the amount of DEM 4 billion (approx. EUR 2,05 billion) per year between 1995 and 1999;

(b) the deficit of DEM 8,2 billion (approx. EUR 4,19 billion) accumulated in the pension fund as a result of the early retirement of a considerable number of Deutsche Post employees by 1999; and

(c) the fact that Germany, in accordance with what the German Minister of Finance announced on 18 January 1999, covered that deficit.

(55) Against this background, the pension measure as described above forms the subject of the present Decision.

2.2. **The pension measure for the period from 1995 to 1999**

(56) The pension measure based on the Law on the regulations governing the staff of the former German federal postal service (*Gesetz zum Personalrecht der Beschäftigten der früheren Deutschen Bundespost (Postpersonalrechtsgesetz)*) ([18]) ('PostPersRG') has financed since 1995 a major share of the pensions for Deutsche Post's retired civil servants. To fully apprehend the effects of the pension measure in the assessment in section 5, the following sections will describe in more detail the civil servants' social benefits and contributions in comparison to the compulsory social insurances for employees under private law contracts ('private employees').

2.2.1. *Social benefits for civil servants*

(57) Civil servants are entitled to old age pensions, health care and long-term care. The benefits for Deutsche Post's civil servants are the same as for all other civil servants.

(a) The level of the pension is pre-defined, pursuant to Article 14 of the Law on civil service pensions (*Gesetz über die Versorgung der Beamten und Richter in Bund und Ländern* (*Beamtenversorgungsgesetz – BeamtVG*) of 24 August 1976 ([19]), at a certain percentage of the last salary that the civil servant earns.

(b) Civil servants are entitled to reimbursement of between 50 % and 70 % of health and long-term care expenses, while they have to assume the remaining expenses themselves. The exact breakdown of health care and long-term care costs depends on several criteria such as the number of children. The civil servants can choose either to insure themselves with a voluntary complementary insurance or to pay their share of the health care and long-term care expenses out of their own pocket.

2.2.2. *Financing of civil servants' social benefits from 1989 to 1994 at POSTDIENST*

(58) After the first postal reform of 1989, pursuant to Article 54(2) of the Law on the corporate legal structure of the German federal postal service (*Gesetz über die Unternehmensverfassung der Deutschen Bundespost* (*Postverfassungsgesetz – PostVerfG*) ([20]), POSTDIENST, TELEKOM and POSTBANK had to fully finance the pension payments and health expenses of the retired civil servants who were allocated to the respective companies on the basis of their former activities.

(59) That provision lays down that, whereas the claim of the civil servant continues to be directed against the State, the State has the right to claim the entire amount from POSTDIENST, TELEKOM and POSTBANK respectively.

([18]) Article 4 of the Law on the reform of postal services and telecommunications (*Gesetz zur Neuordnung des Postwesens und der Telekommunikation* (*Postneuordnungsgesetz – PTNeuOG*), 14 September 1994, Federal Law Gazette (*Bundesgesetzblatt*) ('BGBl.') 1994, Part I, No 61, p. 2325.

([19]) BGBl. 1976, Part I, No 111, p. 2485.

([20]) Article 1 of the Law on the restructuring of postal and telecommunications services and of the German federal postal service (*Gesetz zur Neustrukturierung des Post- und Fernmeldewesens und der Deutschen Bundespost (Poststrukturgesetz – PostStruktG)*, 8 June 1989, BGBl. 1989, Part I, No 25, p. 1026.

2.2.3. *Financing of social benefits for DPAG's civil servants since 1995*

(60) With the 1994 reform of postal services and telecommunications (*Gesetz zur Neuordnung des Postwesens und der Telekommunikation*), civil servants who had worked for POSTDIENST were, pursuant to Article 2(1) PostPersRG, transferred to DPAG. Thereby, the civil servants kept, pursuant to Article 2(3) PostPersRG, their existing legal status. DPAG took over, pursuant to Article 1(1) PostPersRG, all employer's rights and obligations from the federal State and assumed, pursuant to Article 2(3) PostPersRG, all the civil servants' claims relating to property rights.

(61) Pursuant to Article 15 PostPersRG, the payment of pension and health expenses to retired civil servants was taken over by a newly created pension fund for Deutsche Post's civil servants. On 1 July 2001, the pension funds for Deutsche Post, TELEKOM, and POSTBANK were merged into the pension fund for civil servants of the postal service (*Postbeamtenversorgungskasse*) ('the Pension Fund').

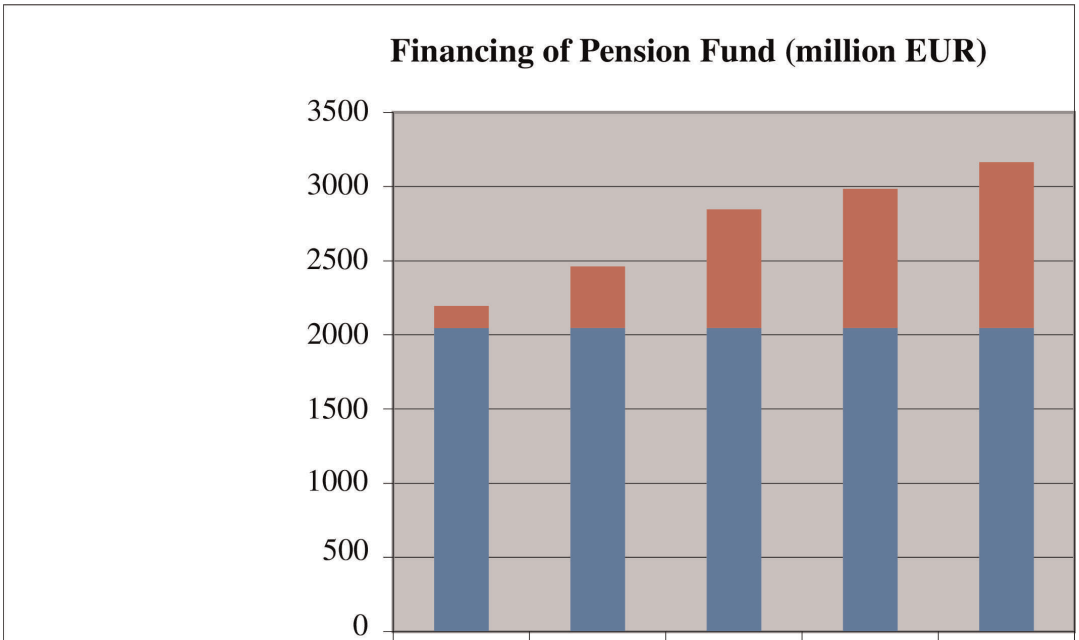
(62) Pursuant to Article 16(1) PostPersRG, Deutsche Post had to pay yearly contributions of EUR 2,045 billion to the Pension Fund for the period from 1995 to 1999 which total EUR 10,225 billion.

(63) The remaining deficit (e.g. the difference between the pensions for the retired civil servants and the contribution by Deutsche Post to the Pension Fund), was covered by a pension measure, pursuant to Article 16(2) PostPersRG. The pension measure increased from EUR 151 million in 1995 to EUR 1,118 billion in 1999.

(64) The graphs in Figures 1 and 2 below represent the respective contributions of Deutsche Post and Germany (in amount and percentage) to the Pension Fund.

Figure 1

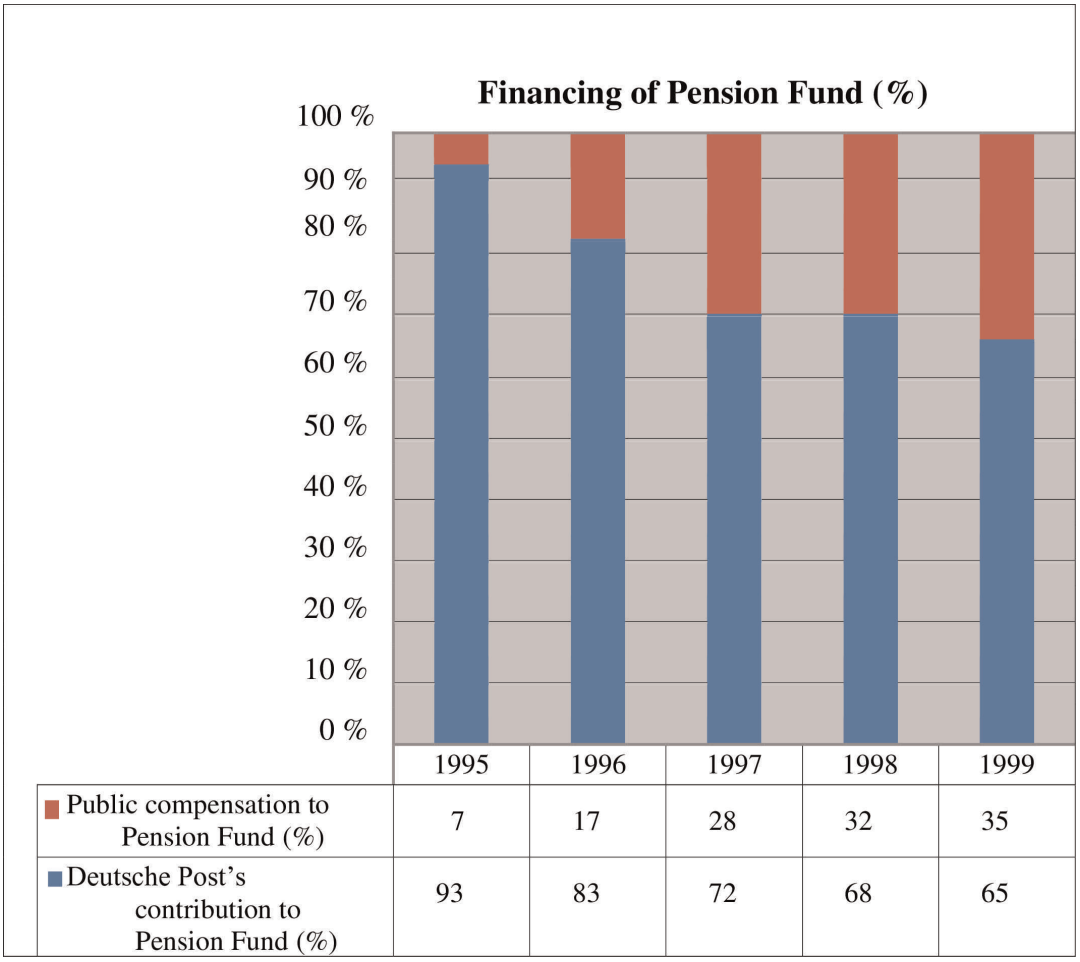
Financing of the Pension Fund (million EUR)



	1995	1996	1997	1998	1999
Public compensation to Pension Fund	151	417	801	941	1118
Deutsche Post's contribution to Pension Fund	2045	2045	2045	2045	2045

Figure 2

Contributions to the Pension Fund (%)



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

(65) Private employees are compulsory members of four statutory social insurances: pension, unemployment, health and long-term care insurances ([21]). Compared to the civil servants' regime, the statutory social insurance schemes offer a different coverage for pension insurance and health and long-term care insurances:

(a) the level of the pension is not defined in terms of percentage of the last monthly salary but of an average life-time salary;

(b) expenses for health and long-term care are fully covered.

(66) There also exist important differences in the financing of the social benefits compared to those of civil servants:

(a) the statutory social insurances are financed by joint contributions from the employee and the employer during the employee's working life ('compulsory social contributions');

(b) the total compulsory social contribution rate is formally divided into an employee's share and an employer's share which both cover about half of the total compulsory social contribution rate;

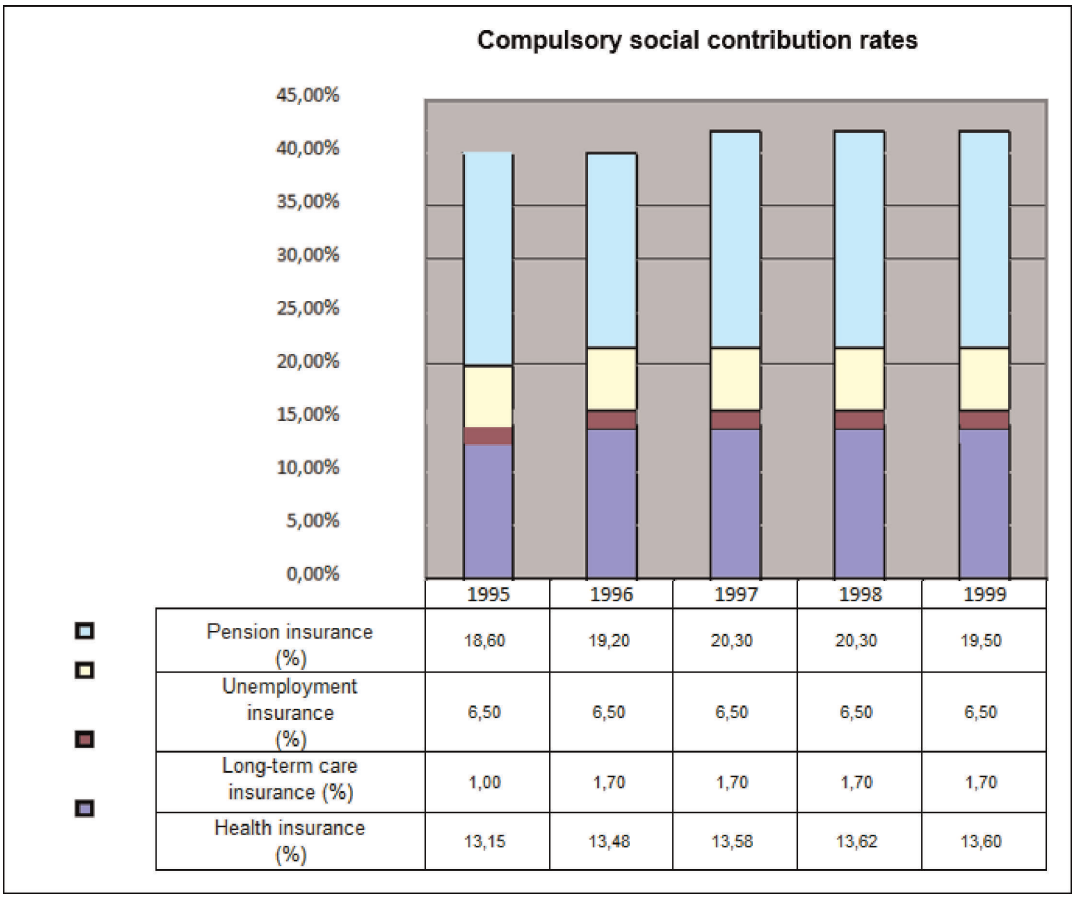
(c) the employer has the formal obligation to pay the total compulsory social contribution rate to the social insurances funds.

(67) Figure 3 below presents the compulsory social contribution rates for private employees for the period from 1995 to 1999.

([21]) The sixth part of the Social Security Code (*Sozialgesetzbuch, Sechstes Buch* (*SGB VI*)) regulates pension insurance; the third part of the *Sozialgesetzbuch* (*SGB III*) regulates unemployment insurance; the fifth part of the *Sozialgesetzbuch* (*SGB V*) regulates health insurance; the Law on long-term care (*Gesetz zur sozialen Absicherung des Risikos der Pflegebedürftigkeit* (*Pflege-Versicherungsgesetz – PflegeVG*)) of 26 May 1994 (BGBl. 1994, Part I, No 30, p. 1014) and the eleventh part of the *Sozialgesetzbuch* (*SGB XI*) regulate long-term care insurance.

Figure 3

Compulsory social contribution rates (in percentage of private employees' gross wage)



	1995	1996	1997	1998	1999
Pension insurance (%)	18,60	19,20	20,30	20,30	19,50
Unemployment insurance (%)	6,50	6,50	6,50	6,50	6,50
Long-term care insurance (%)	1,00	1,70	1,70	1,70	1,70
Health insurance (%)	13,15	13,48	13,58	13,62	13,60

(68) Figure 3 shows that the compulsory social contribution rates have ranged from approximately 39 % to 42 % of the gross wage (gross wage = net wage + employee's share). Given that the employer's share and the employee's share cover about half of the total compulsory social contribution rate, their respective compulsory social contribution rates have been each in the range from approximately 19 % to 21 % of the gross wage.

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

3. GROUNDS FOR INITIATING THE PROCEDURE

(70) In the Opening Decision, the Commission considered that the fact that the State covered the deficit accumulated by 1999 – in connection with the early retirement of a considerable number of Deutsche Post civil servants between 1995 and 1999 – might have conferred an advantage on Deutsche Post.

(71) Therefore, the Commission considered that its preliminary investigation of the measure could not confirm the conclusion that the measure did not constitute State aid.

(72) In addition, the Commission concluded in the Opening Decision that based on its preliminary investigation, doubts were raised as to the compatibility of the measure with the internal market.

4. RELEVANT COMMENTS FROM INTERESTED PARTIES

(73) Interested parties submitted comments on the Opening Decision, the (now annulled) 2007 Extension Decision and the (now annulled) 2011 Extension Decision.

(74) This section summarizes comments that are considered relevant for the assessment of the measure at stake (i.e. the pension measure for the period from 1995 to 1999) and does not reflect all comments received in the course of past investigations on other measures and/or the pension measure for the period after 1999.

4.1. Comments from third parties

(75) According to the British Post Office ('the Post Office'), the assumption of pension liabilities that DPAG incurred as a consequence of the early retirement of 25 % of its staff is State aid. The Post Office submits that the pension shortfall should have been financed by the sale of business assets.

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

(77) In its submission of 28 November 2019 (following the General Court's 2019 judgment annulling the 2011 Extension Decision), UPS argues that the Commission should continue the investigation of the pension measure and, more particularly, should assess the pension measure applying the *Orange* ([22]) case law (as opposed to the *Combus* ([23]) case law). Furthermore, UPS takes the view that even on the basis of the *Combus* case law the Commission should conclude that the pension measure constituted incompatible aid.

4.2. Comments from Germany

(78) According to the German authorities, the State contribution to the Pension Fund was confined to what was necessary to offset an objective disadvantage imposed by the State on DPAG.

([22]) Judgment of the Court of Justice of 26 October 2016, Orange v Commission, C-211/15 P, ECLI:EU:C:2016:798.

([23]) Judgment of the General Court of 16 March 2004, Danske Busvognmænd v Commission, T-157/01, ECLI:EU:T:2004:76

(79) According to the German authorities, financing the early retirement of civil servants recruited before the privatisation of DPAG remained a basic obligation of the State vis-à-vis its civil servants. DPAG's co-responsibility for the financing of the Pension Fund therefore entailed atypical special costs. The State's contribution to the pension obligations only partly offset an objective disadvantage previously imposed by the State on DPAG. Therefore, Germany considers that there is no advantage to DPAG and also no distortion of competition or trade when the State makes a contribution toward the Pension Fund.

(80) Based on the *Combus* judgment ([24]), Germany is of the opinion that, in the course of the privatization of formerly State-owned universal service providers, the payment by the State of pension costs – which go beyond the level normally assumed by private competitors – does not constitute aid. Germany considers that a comparison should be undertaken between the social benefits for Deutsche Post's civil servants and competitors' social benefits to assess the existence of aid.

5. **AID ASSESSMENT OF PENSION MEASURE**

(81) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(82) A measure qualifies as State aid if the following cumulative conditions are met: (a) the measure is granted by Member States through State resources, (b) it confers a selective economic advantage on certain undertakings or the production of certain goods, (c) the advantage distorts or threatens to distort competition, and (d) the measure affects intra-EU trade.

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

5.1. **Existence of a financial advantage**

5.1.1. *Applicable methodology for the assessment of the presence of an advantage*

(84) On the basis of the *Combus* judgment, Germany claims that the pension measure did not provide any financial advantage because it relieved Deutsche Post from excess pension costs.

(85) In the 2012 Decision, the Commission rejected Germany's claims that the existence of an advantage had to be established based on the *Combus* case law.

(86) However, following the annulment of the 2012 Decision and of the 2011 Extension Decision, the Commission considers that the judgments of the General Court in Cases T-143/12 ([25]) and T-388/11 ([26]) oblige the Commission, in line with Article 266 TFEU, to apply the *Combus* case law in relation to the pension measure. Indeed, pursuant to the first paragraph of Article 266 TFEU, '[t]he institution […] whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'.

(87) In its judgment of 14 July 2016, the General Court held that 'the mere assertion that the pension costs are part of the costs which are normally included in the budget of an undertaking was not sufficient to establish, in the present case, the existence of a real economic advantage in favour of Deutsche Post. The Commission, which bore the obligation to prove that advantage, did not discharge that obligation and thus erred in law' ([27]).

([24]) Judgment of the General Court of 16 March 2004, *Danske Busvognmænd* v *Commission*, T-157/01, ECLI:EU:T:2004:76, paragraph 57.
([25]) Judgment of the General Court of 14 July 2016, *Germany* v *Commission*, T-143/12, ECLI:EU:T:2016:406.
([26]) Judgment of the General Court of 10 April 2019, *Deutsche Post* v *Commission*, T-388/11, ECLI:EU:T:2019:237.
([27]) Judgment of the General Court of 14 July 2016, *Germany* v *Commission*, T-143/12, ECLI:EU:T:2016:406, paragraph 154.

(88) Against this background, the Commission will assess the presence of an advantage for Deutsche Post by applying the *Combus* case law. Notably, the Commission considers that, contrary to the view expressed by UPS, the Commission is obliged to apply the *Combus* case law to assess the pension measure, rather than applying the *Orange* ([28]) case law. More particularly, the Commission considers the fact that in that judgment the Court of Justice may have discontinued its legal approach applied in *Combus* and that consequently the *Combus* case law may no longer be applicable to similar measures in other cases, does not call into question the Commission's obligation to apply the *Combus* methodology to the pension measure in the present case in accordance with the first paragraph of Article 266 TFEU (see recital (86).

5.1.2. *Presence of an advantage in the present case*

(89) In view of the application of the *Combus* case law in the present case, the Commission will assess whether Germany, by assuming responsibility for the difference between the lump sum fixed between 1995 and 1999 and the total amount of the costs of the pensions of former civil servants of Deutsche Post, conferred an economic advantage on Deutsche Post by comparison with its competitors.

(90) The Commission will carry out this analysis in the following three steps in order to determine the existence of an advantage:

(a) in a first step, the Commission will establish the level of wage-based social security contributions of other undertakings in the mail/parcel sector;

(b) then it will establish the level of wage-based social security contributions which Deutsche Post bears for its civil servants;

(c) finally, the Commission will compare the two levels.

5.1.2.1. Level of social security contributions of other undertakings in the mail/parcel sector

5.1.2.1.1. Calculation of the benchmark rate

(91) Private competitors have to compulsorily pay out of their revenues both the employer's share as well as the employee's share of social security contributions to the State. As shown in Figure 3, the total compulsory social contribution rates for the period from 1995 to 1999 have been in the range of approximately 39 % to 42 % of the gross wage. The employer's and the employee's respective compulsory social contribution rates have been each in the range from approximately 19 % to 21 % of the gross wage (see recital 68).

(92) Compared to the private employees, civil servants do not have to pay a share of social security contributions with regard to health care and long-term care, but instead have to cover 30 % to 50 % of their health care and long-term care expenses themselves (notably by concluding an additional private insurance). However, the civil servants' contribution of 30 % to 50 % to their health and long-term care expenses can be assumed to largely correspond in its economic effect to the private employees' contribution to the statutory health and long-term care insurances ([29]).

(93) Moreover, civil servants do not make any contributions to their pension and unemployment insurances. Deutsche Post's contribution should therefore go beyond the private employers' share and include the entire cost of the pension and unemployment insurance as well as the remaining health and long-term care expenses of the civil servants.

(94) The benchmark rate for Deutsche Post's social contributions ('benchmark rate') has therefore to include the total contribution rates (total contribution rate = employer's share + employee's share) for the pension and unemployment insurances and the employer's share of the health and long-term care insurances.

(95) As shown in Table 1 below, the benchmark rate has been between 32 % and 34,5 % of the private employees' gross wage for the period from 1995 to 1999.

([28]) Judgment of the Court of Justice of 26 October 2016, Orange v Commission, C-211/15 P, ECLI:EU:C:2016:798.

([29]) Given that the employees' share under the statutory health and long-term care insurances for private employees corresponds to about half of the total contribution rate (see recital 68), it can be assumed that the costs incurred by civil servants for an additional private insurance covering the 30 % to 50 % are largely equivalent to the private employees' contribution.

Table 1

Deutsche Post social contribution benchmark rate

(%)

	1995	1996	1997	1998	1999
Employer's share	**19,49**	**20,01**	**21,07**	**21,07**	**20,77**
Health insurance	6,44	6,48	6,82	6,82	6,82
Long-term care insurance	0,50	0,68	0,85	0,85	0,85
Unemployment insurance	3,25	3,25	3,25	3,25	3,25
Pension insurance	9,30	9,60	10,15	10,15	9,85
Employee's share	**12,55**	**12,85**	**13,40**	**13,40**	**13,10**
Unemployment insurance	3,25	3,25	3,25	3,25	3,25
Pension insurance	9,30	9,60	10,15	10,15	9,85
Deutsche Post benchmark rate	**32,04**	**32,86**	**34,47**	**34,47**	**33,87**

5.1.2.1.2. Calculation of the gross wage base

(96) As the level of social contributions that Deutsche Post has to bear for its civil servants should be equivalent to the level of compulsory social contributions, it is important that Deutsche Post is not only subject to an equivalent rate but also that the rate is calculated on an equivalent gross wage base.

(97) It is therefore necessary to construct a gross wage for the civil servants ('civil servants' gross wage') that provides an equivalent wage base to the private employees' gross wage.

(98) It is assumed that the civil servants' contributions to their health and long-term care expenses equals the private employees' contributions to the statutory health and long- term care insurances (see recital (92). Therefore, no adjustment of the wage base is necessary in this regard. However, since civil servants do not make any contributions to their pension and unemployment insurances (see recital (93), the incurred wage (i.e. the actual wage costs) should be increased by applying a factor taking into account the private employees' share of the contributions to the statutory pension and unemployment insurances.

(99) The following formula converts the incurred wage into a gross wage that is equivalent to the private employees' gross wage:

$$Civil\ servants' gross\ wage = incurred\ wage * \frac{100}{100 - (private\ employees' share\ of pension\ and\ unemployment\ insurances)}$$

(100) The following formula applied to the year 1997 would for example lead to the following result:

$$Civil\ servants' gross\ wage = incurred\ wage * \frac{100}{(100-(3{,}25 + 10{,}15))} = incurred\ wages * 1{,}15$$

(101) Taking e.g. the 1997 contribution rates, the civil servants' gross wage is 15 % higher than the incurred civil servants' wage.

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

5.1.2.2.1. Advantage based on comparison with benchmark rate

(102) Pursuant to Article 16(1) PostPersRG, Deutsche Post had to pay yearly contributions of EUR 2,045 billion to the Pension Fund for the period from 1995 to 1999 which totals EUR 10,225 billion.

(103) On that basis and considering the above, it is possible to calculate the gross wage- based social security contributions borne by Deutsche Post for the period from 1995 to 1999 and to compare it with the benchmark rate established in recital 95.

Table 2

Deutsche Post gross wage-based social security contributions and benchmark rate

	1995	1996	1997	1998	1999
Deutsche Post's contribution to Pension Fund (billion EUR)	2,045	2,045	2,045	2,045	2,045
Civil servants' take home pay (billion EUR)	3,522	2,992	2,712	2,581	2,288
Civil servants' gross wages (billion EUR)	4,050	3,441	3,119	2,968	2,631
Deutsche Post's contribution in % of gross wages	**50**	**59**	**66**	**69**	**78**
Benchmark rate (%)	**31,93 %**	**33,29 %**	**34,44 %**	**34,46 %**	**33,85 %**

(104) From that calculation, it would not appear that Deutsche Post has benefited from an advantage since it paid more than the calculated benchmark rate.

5.1.2.2.2. Advantage based on comparison with benchmark rate taking into account the potential impact of price regulation

(105) It *should* be noted that in recitals 332 to 338 of the 2012 Decision, the Commission considered that the price regulation of Deutsche Post was a relevant factor to calculate the gross wage-based social security contributions effectively borne by Deutsche Post and assess the proportionality of the pension measure.

(106) This was justified by the fact that Article 20(1) and (2) of the Law on Postal Services (*Postgesetz*) of 22 December 1997 ([30]) ('PostG') allows Deutsche Post to request that, when the Postal Regulator is setting the allowed level of revenues from the exclusive right and the regulated services, it includes into the costs to be recovered from consumers, an 'excess social burden' as well as the costs for the efficient provision of the universal service.

(107) The Postal Regulator accepted this approach for the first time in the 2002 price cap decision (applied from 1 January 2003) and also approved the 'excess social burden' in the 2007 and 2011 price cap decisions. The Commission considered that from an economic point of view, this led Deutsche Post to bear effectively lower contribution rates to social costs than its apparent contribution to the Pension Fund. Based on this consideration, in the 2012 Decision the Commission was able to establish and quantify the amount of incompatible aid to be recovered for the period from 1 January 2003 to the point in time when the comparative advantage has been brought to an end.

([30]) BGBl. 1997, Part I, No 88, p. 3294.

(108) With regard to the present Decision and thus the assessment of the pension measure for the period from 1995 to 1999, it could be discussed whether in the assessment of the existence of an advantage under the *Combus* methodology the potential impact of the price regulation of Deutsche Post should be taken into account when determining the potential advantage granted to the operator by means of the pension measure.

(109) However, the Commission considers that, in any event, the potential impact of the price regulation is not relevant with regard to the temporal scope of the measure under assessment in the present Decision, i.e. the period from 1995 to 1999.

(110) Indeed, as the Commission observed in the 2012 Decision, the first price cap decision of the Postal Regulator which took into account an 'excess social burden' as stipulated in the PostG was taken only in 2002 for the period from 2003 to 2007 ([31]). By contrast, the Commission considered with regard to the period before 2003 that it could not be inferred with certainty from the legal basis for the regulated prices in force during the period from 1995 to 2002 how the competent authorities decided the composition of the regulated prices on an *ex-ante* basis ([32]). Against this background, the Commission explained, that in the absence of any earmarked element of the tariff for social costs, it was not possible to determine the level of gross wage-based social security contributions taking into account the price regulation of Deutsche Post ([33]). Based on these considerations, the Commission concluded in the 2012 Decision that it could not establish and quantify any amount of incompatible aid for the period from 1995 to 2002 ([34]).

(111) For the present Decision, the Commission considers that these considerations apply in the same way within the assessment of the existence of an advantage under the *Combus* methodology, i.e. the benchmarking exercise described in recital 90). Since the Commission cannot, despite its best efforts, quantify any potential impact of the price regulation on the gross wage-based social security contributions borne by Deutsche Post for its civil servants, it cannot establish the existence of an advantage on that basis.

5.2. **Conclusion with regard to the existence of a financial advantage**

(112) It results from the above that, if the Commission limits itself to a direct comparison of Deutsche Post's contributions to the Pension Fund and the relevant benchmark rate, no advantage can be found for Deutsche Post. Moreover, even if the Commission were to enlarge its assessment to consider the potential impact of the regulation of Deutsche Post's prices – assuming this would be justified – it would still not be possible to determine, quantify and link to the pension measure a precise advantage for the period from 1995 to 1999.

(113) Based on the above, the Commission considers that it cannot establish that the pension measure, implemented for the period from 1995 to 1999 to Deutsche Post, conferred an advantage to the operator within the meaning of Article 107(1) TFEU. Given that the existence of an advantage, which is one of the cumulative conditions for the existence of aid, cannot be established, the Commission concludes that the pension measure did not involve State aid.

6. **CONCLUSION**

(114) The Commission finds that the pension measure implemented by Germany for the period from 1995 to 1999 does not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The pension measure which Germany has implemented in favour of Deutsche Post for the period from 1995 to 1999 does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

([31]) Decision 2012/636/EU, recital 332.
([32]) *Ibid.*, recital 329.
([33]) *Ibid.*, recital 329.
([34]) *Ibid.*, recital 408.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 7 February 2020.

For the Commission
Margrethe VESTAGER
Executive Vice-President