

Commission Decision of 20 December 2011 on the State aid C
85/01 on ad hoc measures implemented by Portugal in favour of
RTP (notified under document C(2011) 9429) (Only the English
text is authentic) (Text with EEA relevance) (2012/365/EU)

- Article 1 (1) The following ad hoc measures granted by Portugal in...
- Article 2 The exemption from notarial deed charges and publication costs
provided...
- Article 3 (1) The unlimited exemption accorded to RTP from the
payment...
- Article 4 (1) Portugal shall repeal the law referred to in Article...
- Article 5 (1) Recovery of the aid granted under the law referred...
- Article 6 (1) Within two months following notification of this Decision,
Portugal...
- Article 7 This Decision is addressed to the Portuguese Republic.
Signature

- (1) With effect from 1 December 2009, Article 88 of the Treaty establishing the European Community (EC) has become Article 108 of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Article 108 of the TFEU should be understood as references to Article 88 of the EC Treaty, where appropriate. In the same manner, Article 86(2) of the Treaty establishing the European Community has become Article 106(2) of the Treaty on the Functioning of the European Union.
- (2) [OJ C 329, 24.12.2008, p. 24.](#)
- (3) [OJ C 85, 9.4.2002, p. 9.](#)
- (4) [OJ L 142, 6.6.2005, p. 1.](#)
- (5) Judgment of the Court of First Instance of 26 June 2008, in Case T-442/03, *SIC v Commission* [2008] ECR II-1161.
- (6) See paragraph 255 and 256 of the Judgment in Case T-442/03.
- (7) See footnote 2.
- (8) Case No E 14/05 of 22 March 2006 — Compensation payments to public service broadcaster RTP.
- (9) Case NN 31/06 of 4 July 2006 — Financial support to restructure the accumulated debt of the Portuguese public service broadcaster RTP ([OJ C 222, 15.9.2006, p. 4.](#))
- (10) Law No 40341 of 18 October 1955 in which the Portuguese Government undertook to promote: ‘the establishment of a public limited company (...) with which it will conclude a concession contract for public service television broadcasting on Portuguese territory’.
- (11) Points 11.4 and 11.5 of Cabinet Resolution No 49/90 of 31 December 1990 and point 3 of Cabinet Resolution No 6/92 of 22 February 1992.
- (12) The Annex to Law No 21/92 on the Statutes of RTP provides in Article 3(2) thereof that RTP may perform the following commercial activities: (i) television advertising; (ii) marketing of products (namely of programmes and publications related to their activities); (iii) providing technical consultancy and professional training and cooperation with other national and foreign bodies; (iv) marketing and rental of television equipment, films, magnetic tapes, videocassettes and similar products; (v) take interests in additional company groups and European economic interest groups as well as hold shares or quotas in other companies, under any of the forms foreseen under commercial legislation.
- (13) This Decision contains no further description of the measures, which were not been annulled by the Court in Case T-442/03. See recital 11 of this Decision.
- (14) EUR 1 = 200,482 PTE, fixed exchange rate at the time when Portugal adopted the euro ([OJ L 359, 31.12.1998, p. 1.](#))
- (15) According to Article 5 of Law No 21/92: ‘Performance of the public service obligations entrusted to RTP SA [...] shall confer on that company the right to a compensation payment the exact amount of which will correspond to the actual cost of providing the public service, which shall be determined on the basis of objectively quantifiable criteria and in accordance with the principle of sound management.’
- (16) This provision has now been amended and stipulates publication on a publicly accessible internet site.
- (17) Article 3(2) and (3) of Law No 84/88 of 20 July 1988.
- (18) Decree-Law No 404/90 of 21 December 1990.
- (19) Submission Portugal 8 June 2010, paragraph 248 et seq.
- (20) Clause 14 of the old public service contract from 17 March 1993 and Clause 21 of the new public service contract from 31 December 1996 concluded between the Portuguese State and RTP, see footnote 26.
- (21) Law No 7/98.
- (22) Article 1 of Decree-Law No 160/96.
- (23) A rate of 3,54 % was applied in 1999, 4,14 % in 2000; 5,05 % in 2001; 3,62 % in 2002; and 2,95 % in 2003.

- (24) Article 5 of the amended loan contract.
- (25) Law No 58/90 of 7 September 1990 on the activity of television broadcasting.
- (26) On 17 March 1993, a public service contract (the old public service contract) was signed between Portugal and RTP. On 31 December 1996, it was replaced by the new public service contract.
- (27) RTP must: (a) respect the principles of freedom, independence, non-discrimination and non-concentration; (b) safeguard its independence from the public authorities; and (c) adapt programmes to quality and variety requirements in the interests of the public.
- (28) RTP must: (a) and (c) to contribute to enlightening, informing and educating the population; (b) to guarantee news coverage; (d) to (h) to make broadcasting time available for official messages, religious events, political parties, trade unions, the government and the public administration; (i) to broadcast two general coverage programmes, one of which should cover the Autonomous Regions of Madeira and the Azores; (j) and (m) to broadcast programmes on education, training, sport and culture; (l) to support and promote the cinema; (n) to keep audiovisual files; (o) to exchange programmes and information with Madeira and the Azores; (p) to produce and broadcast programmes for Portuguese communities abroad; (q) to cooperate with Portuguese-speaking countries; (r) to ensure direct coverage of main events abroad; (s) to maintain contacts with other European public service television broadcasters; and (t) to ensure that television broadcasting is in conformity with the guidelines laid down by the competent international bodies.
- (29) Clause 4 of the old public service contract and Clauses 4 and 5 of the new public service contract.
- (30) Clauses 5 to 8 and Clause 10 of the old public service contract and Clauses 6 to 13 of the new public service contract.
- (31) Clause 1 of the old public service contract stated that the aim of that contract was to lay down the terms under which RTP would provide the public television service. Clause 1 of the new public service contract states that RTP is the sole provider of public service broadcasting within the meaning of Article 5 of Law No 58/90 and of Article 4 of Law No 21/92.
- (32) Clause 9 of the old public service contract and Clause 23 of the new public service contract.
- (33) Clauses 15, 16, 18 and 19 of the old public service contract and Clauses 18 and 25 of the new public service contract.
- (34) Clause 19 of the old public service contract, Clause 25 of the new public service contract and Article 47(2) of Law No 31-A/98.
- (35) Paragraphs 53 and 54 of the Letter of Portugal of 8 June 2010. See also paragraph 108 of the submission 7 September 2009.
- (36) The full name of the auditor is: '*Pedro Roque SROC, Revisores Oficiais de Contas, inscrita na Lista das SROC/s com no 125*', Lisbon. It is a statutory auditor registered in the official list of auditors in Portugal, which means the auditor has to adhere to certain auditing standards and give an independent audit view.
- (37) BDO Binder & Co. Auditoria, Impostos e Consultoria, Lisbon, Portugal.
- (38) <http://www.erc.pt/pt/estudos-e-publicacoes/auditorias-ao-servico-publico-de-radio-e-televisao>
- (39) Clause 13 of the old public service contract and Clause 20 of the new public service contract.
- (40) Clause 14 of the old public service contract and Clause 21 of the new public service contract.
- (41) Clause 12 of the old public service contract lays down in detail which costs may be compensated for and how they are to be calculated: the coverage differential (the difference in costs borne by RTP Channel 1 and the costs borne by the largest private television operator), the operating deficit in the Autonomous Regions, the deficit in running the audiovisual library, the operational cost of RTP-International, the cost of operating the structure for cooperation with the Portuguese-speaking African countries (PALOPs), the cost of allowing viewing time for certain entities, the cost of delegations and correspondents, and the costs of the S. Carlos National Theatre Foundation. Clause 15 of the new public service contract lays down in detail which costs can be compensated for and how they are to be calculated. The items to be covered are: (1) the operating costs of RTP 1 and RTP 2; (2) specific services referred to in Clause 7(a) to (l); and (3) the coverage differential.
- (42) Information provided by Portugal by letter of 31 March 1999.
- (43) Clause 14(2) of the new public service contract.

- (44) Excluding the cost associated with the coverage differential.
- (45) Clause 19(1) and (3) of the new public service contract. The new public service contract provided that the operating costs of RTP 2 could be compensated for retroactively from 1 January 1996.
- (46) See footnote 2. Comments from interested parties on other measures can be found in recitals 74 to 84 of Decision 2005/406/EC.
- (47) See, for instance, *Rui Gerra da Fonseca*: Having established the legislative nature of the statutes of a public undertaking based on a decree law, it is unconstitutional for them to be amended by any instrument other than a decree law, just as rules permitting their amendment by a mere instrument of private law are also unconstitutional. *Autonomia Estatutária das Empresas Públicas e Descentralização Administrativa, Coimbra 2005*.
- (48) Judgment No 224/95 of 26 April 1995 and Judgment No 576/96 of 16 April 1996.
- (49) Submission by Portugal of 8 June 2010.
- (50) Submission by Portugal 17 June 2011.
- (51) Law No 91/A/77 annulled the 1976 Statutes of RTP and it provided that RTP would be governed by an Administrative Commission.
- (52) See Judgment of the Court of Justice of 22 November 2001 in Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067.
- (53) Clauses 3 and 4 of the new public service contract.
- (54) Clause 14 of the old public service contract and Clause 21(3) of the new public service contract stipulate that: 'Participation in the abovementioned investments shall be covered preferably by the first contracting party and as shareholder in the form of an increase in capital.'
- (55) See paragraph 108 of the letter from Portugal of 7 September 2009.
- (56) See footnote 36 of this Decision.
- (57) Point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (*OJ C 384, 10.12.1998, p. 3*).
- (58) Judgment by the Court of Justice of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637.
- (59) Judgment of the Court of Justice of 17 June 1999 in Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa* [1999] ECR I-3735, paragraph 35.
- (60) Article 1 of Decree-Law No 160/96.
- (61) See paragraph 64 of Judgment in Case T-442/03,
- (62) See paragraph 51 of Judgment in Case T-442/03.
- (63) See paragraphs 214 to 221 of the submission by Portugal of 8 June 2010.
- (64) See paragraphs 75 to 77 of Judgment in Case T-442/03.
- (65) See also judgment of the Court of 8 November 2001 in C-14/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.
- (66) Law No 91/A/77 stipulated that an Administrative Council should govern RTP on account of its structural crisis.
- (67) See Judgment of the Court in Case C-342/96, *Kingdom of Spain v Commission* [1999] ECR I-02459.
- (68) Commission communication to the Member States — Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (*OJ C 307, 13.11.1993, p. 3*).
- (69) The reference rate is based on the five-year interbank swap rate plus a premium (see Commission notice on the method for setting the reference and discount rates (*OJ C 273, 9.9.1997, p. 3*)).

The reference rates for Portugal since 1 January 1997 can be found at http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html

- (70) See judgment of the Court of First Instance of 8 October 2002 in joined Cases *Métropole Télévision SA (M6)* (T-185/00), *Antena 3 de Televisión SA* (T-216/00), *Gestevisión Telecinco SA* (T-299/00) and *SIC — Sociedade Independente de Comunicação SA* (T-300/00) v *Commission* [2002] ECR II-3805.
- (71) In accordance with the case law of the Court of Justice, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that State aid. See Judgment of the Court of Justice of 17 September 1980 in Cases 730/79 *Philip Morris Holland v Commission* [1980] ECR 671, paragraph 11; judgment of the Court of Justice of 21 March 1991 in Case C-303/88 *Italian Republic v Commission* [1991] ECR I-1433, paragraph 17; judgment of the Court of Justice of 19 September 2000 in Case C-156/98 *Federal Republic of Germany v Commission* [2000] ECR I-6857, paragraph 33.
- (72) Judgment of the Court of Justice of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH et Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.
- (73) *Ibidem*, paragraphs 101 to 109. In those paragraphs the Court examined the question of whether some state payments to transport undertakings classified as State aid could be found to be compatible with the common market under Article 77 of the EC Treaty [now Article 93 TFEU] as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. This reasoning must apply *mutatis mutandis* to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2) of the EC Treaty [now 106 (2) TFEU].
- (74) [OJ C 320, 15.11.2001, p. 5](#). It is still the 2001 Communication which applies to this case for reasons of *ratione temporis*.
- (75) See paragraph 29 of the Broadcasting communication.
- (76) The Amsterdam Protocol considers that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. More specifically, Member States have ‘the competence [...] to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account’.
- (77) See paragraph 33 of the Broadcasting Communication.
- (78) *Ibidem*.
- (79) *Ibidem*.
- (80) See paragraph 81 of the judgment of the Court of First Instance in Case T-442/03. The Commission’s statement that the transformation was not necessary was not made in the context of the compatibility assessment under Article 86(2) EC Treaty, now Article 106(2) TFEU.
- (81) See paragraph 139 of the Judgment of the General Court in Joined Case T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)*, not yet published in the Court reports.
- (82) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ([OJ L 298, 17.10.1989, p. 23](#)). According to Article 5, ‘Member States shall ensure [...] that broadcasters reserve at least 10 % of their transmission time [...], or alternately, [...], at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. Furthermore, according to recital 45 to Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, the objective of supporting audiovisual production in Europe can be pursued within the Member State through the definition of a public interest mission for certain broadcasting organisations, [...] including the obligation to contribute substantially to investment in European production’ ([OJ L 202, 30.7.1997, p. 60](#)), repealed by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation

Status: This is the original version (as it was originally adopted).

- or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).
- (83) Clause 13 of the old public service contract and Clause 7(1)(a) of the new public service contract.
- (84) Letter from Portugal of 30 June 1999.
- (85) Broadcasting Communication, paragraph 40.
- (86) For 1992, a public service report was not available, but also not legally required, as it was only the old public service contract which stipulated that requirement. However, also for the year 1992 the auditors come to the conclusion that there was no infringement of the legislation valid at the time. Neither do they find any overcompensation.
- (87) Synthesis report of the external audits, point 1.4(b).
- (88) The translation reflects the Portuguese original, which speaks of ‘concession contracts’. The concession contracts are identical with the public service contracts, i.e. the old and the new public service contract as referred to throughout the decision, see also footnote 26 of this Decision.
- (89) For 1994, a value of PTE 14 034 734 000 was found which was found to exceed the amount allocated by the Government, but according to clause 15.4 no further compensation could be claimed than the PTE 7 145 million granted, as shown in Table 1 of this Decision. For 1996, an amount of PTE 14 594 568 000 was found, which was above the amount allocated of PTE 14 500 million. For the year 1997 a value of 11 752 261 000 was found which compares to PTE 10 350 million of actual allocation.
- (90) Page 23 of the synthesis report on all the audits.
- (91) Submission from Portugal of 25 August 2011.
- (92) See also recitals 27 and 116 of the Commission Decision in Case NN 31/06.
- (93) It should be noted that according to Portugal, the dimension of this criticism is much smaller as of the amount of EUR 53 million, only 4 million were lost.
- (94) See paragraphs 194 et seq. and in particular paragraphs 201 and 203 of the Judgment in Case T-442/03.
- (95) Broadcasting Communication, paragraphs 57 and 58.
- (96) The operating costs of the first and second channel under the old public service contract correspond to the financing costs and the costs of correspondence where other operators were also set up.
- (97) Broadcasting Communication, paragraph 58.
- (98) Ibidem.
- (99) Recital 91 of the decision initiating the procedure in this case.
- (100) It should be pointed out that in 1993 the complainant SIC also alleged a violation of Article 86(1) of the EC Treaty (formerly Article 90), now Article 106(1) TFEU as regards the legal structure put in place by the Portuguese State on the advertising market and RTP’s programme acquisition policy (see also Commission Decision 89/536/EEC of 17 September 1989). Subsequently, the Commission assessed these allegations under Article 86(1).
- (101) Broadcasting Communication, paragraph 58.
- (102) Reference in this regard is made to the facts part of the decision, which outlines the implementation for each of the measures.