OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 8 September 2011 [1]

I — Introduction

1. By its appeal, France Télécom SA ('France Télécom') is seeking to have set aside the judgment of the Court of First Instance of the European Communities in Joined Cases T-427/04 and T-17/05 *France and France Télécom* v *Commission* [2009] ECR II-4315 ('the judgment under appeal'), [2] by which that Court dismissed the action for annulment brought by the French Republic (Case T-427/04) and by France Télécom (Case T-17/05) against Commission Decision 2005/709/EC of 2 August 2004 on the State aid implemented by France for France Télécom (notified under document number C(2004) 3061) ('the contested decision'). [3]

2. This case relates to the changes in France Télécom's status in the course of the liberalisation of the telecommunications sector and raises questions as to whether an advantage can be identified with regard to tax measures and concerning the legal protection granted to beneficiaries of a tax measure which is proved to constitute unlawful State aid.

3. Until 1990, France Télécom's business activities were conducted by a directorate in the French Ministère des Postes et Télécommunications (Ministry of Posts and Telecommunications) (PTT). France Télécom was established, in the form of a *sui generis* public-law corporation, on 1 January 1991, by Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service. [4] Under Law No 96-660 of 26 July 1996 on the national undertaking France Télécom, [5] on 31 December 1998, France Télécom was transformed into a national undertaking in which, at the material time, the State held, directly or indirectly, more than half of the share capital. France Télécom was thus governed by Law No 90-568 and was also subject, in so far as it was not contrary to that law, to the legislation applicable to public limited companies.

1 — Original language: French.

2 — In view of the fact that the judgment under appeal was delivered on 30 November 2009, the references to the provisions of the Treaty follow the numbering applying before entry into force of the Treaty on the Functioning of the European Union.

3 — OJ 2005 L 269, p. 30.

4 — JORF, 8 July 1990, p. 8069.

5 — JORF, 27 July 1996, p. 11398.

II — Relevant legislation

4. Regulation (EC) No 659/1999 [6] was adopted to codify the consistent practice developed and established by the European Commission for the application of Article 88 EC, in order to increase transparency and legal certainty. It entered into force on 16 April 1999.

5. Recital 14 to Regulation No 659/1999 states that 'for reasons of legal certainty it is appropriate to establish a period of limitation of 10 years with regard to unlawful aid, after the expiry of which no recovery can be ordered.'

6. Under Article 15 of Regulation No 659/1999:

'1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

III — Facts of the dispute

A — *National provisions specifying the tax regime applying to France Télécom*

1. France Télécom's liability to business tax. General business tax regime [7]

7. As summarised at paragraphs 16 to 24 of the judgment under appeal, business tax is

6 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

7 — Business tax was introduced by Law No 75-678 of 29 July 1975 abolishing trade tax ('la patente') and establishing a business tax ('taxe professionnelle') (JORF, 31 July 1975, p. 7763).

a local tax, the rules of which are laid down by law and codified in the General Tax Code. Business tax is payable each year by natural or legal persons regularly carrying on a self-employed business as at 1 January. The imposition of business tax depends on the taxable person's ability to pay, which is assessed in accordance with economic criteria on the basis of the extent of the business activities engaged in by the taxable person in the territory of the recipient body.

8. It follows that business tax is a tax based not on the profit made by the undertaking's business but, at the material time, on a proportion of the value of the production factors – capital and labour – used by the taxable person in each municipality in which the tax was established.

9. For taxation relating to the years 1994 to 2002, in the case of legal persons liable to corporation tax, the basis for the business tax included (i) the rental value of the fixed assets which the taxable person had used to meet its business requirements during the period of reference and (ii) a proportion of the salaries paid during the reference period. That reference period was the penultimate year preceding the year of taxation, where the financial year coincided with the calendar year, or, where that was not the case, the financial year ending during the penultimate year preceding the year of taxation.

10. Business tax is established in each municipality in which the taxable person has premises or land, on the basis of the rental value of the assets situated therein or connected therewith and the salaries paid to staff.

2. The rules applying to France Télécom

(a) The principle of liability to tax under the general law

11. Law No 90-568, by which France Télécom was founded, lays down special tax provisions. Subject to certain exceptions, France Télécom is, in principle, subject to duties and taxes payable by private undertakings carrying on the same transactions.

(b) The fixed levy

12. Until 1 January 1994, France Télécom was subject only to such duties and taxes as were actually borne by the State. Consequently, France Télécom was not liable inter alia for corporation tax or local taxes, such

as business tax. In exchange, France Télécom had to pay, for the years 1991 to 1993, a contribution fixed each year by the Finance Law of a maximum amount, the base for which, before the application of discount factors, was equal to the balance shown by the additional budget for telecommunications for the year 1989.

15. The tax revenue had to be paid to the State or, for the proportion exceeding the contribution paid for 1994, adjusted each year according to the fluctuation in the consumer prices index, to the Fonds national de péréquation de la taxe professionnelle (National Business Tax Equalisation Fund).

16. The special rules governing the charging of business tax, which were laid down without limitation as to duration, were abolished by the 2003 Finance Law. [8]

(c) The special tax regime from 1994

13. The tax – the basis of assessment for which, for the purposes of calculating specific tax bases, followed the general rules laid down in the General Tax Code – was established by application of a national weighted average rate, based on the rates voted the previous year by all the local authorities. Furthermore, a rate of 1.9% – instead of 8% – was applied to France Télécom in respect of management costs.

14. In this regard I note at the outset that business tax is collected in this way by the State tax authorities, not by the local authorities concerned. The sums levied by the State in respect of the abovementioned management costs were intended to offset the expenses incurred by the tax authorities in assessing tax and collecting business tax for the local authorities.

B — *The administrative procedure preceding the adoption of the contested decision*

17. On 13 March 2001 the Association des collectivités territoriales pour le retour de la taxe professionnelle de France Télécom et de La Poste dans le droit commun (Association of local authorities for the reinstatement of the business tax regime applicable to France Télécom and La Poste under the general law) submitted a complaint to the Commission, to the effect that the special tax regime constituted State aid which was incompatible with the common market. The complainant referred inter alia to the loss of revenue for certain local authorities as a result of the application of a national weighted average rate.

8 — See Article 29 of Law No 2002-1575 of 30 December 2002 establishing the 2003 Finance Law (JORF, 31 December 2002).

18. Following that complaint, the Commission decided on 28 June 2001 to initiate the preliminary examination procedure in respect of the special tax regime and sent the French Republic a request for information in that regard.

19. On 30 January 2003 the Commission adopted a decision initiating the formal investigation procedure provided for under Article 88(2) EC in respect inter alia of the exemption from business tax granted to France Télécom from 1991 to 1993 and of the special tax regime. In the decision initiating the formal investigation, the Commission estimated the advantage conferred on France Télécom as being worth approximately FRF 1 000 million per annum since 1994 (paragraphs 73 and 74). That decision was published on 12 March 2003. [9]

20. In communications between the French authorities and the Commission, the French Republic, while stressing that its estimates were approximate, submitted by fax of 5 July 2004 a new estimate of the financial consequences of the application of France Télécom's business tax regime from 1991 to 2002. This new assessment, calculated on the basis of the business tax to which France Télécom had actually been liable for the year 2003, showed that, during that period, France Télécom had been overtaxed in the amount of more than EUR 1 700 million exclusive of discounting.

C — *The contested decision*

21. On 19 and 20 July 2004, at its 1 667th meeting, the College of Commissioners approved a draft decision finding that France Télécom had received State aid during the period from 1994 to 2002 by virtue of the special tax regime and empowered the member responsible for competition to adopt, with the agreement of the President, the definitive version of the decision in French, the authentic language.

22. On 2 August 2004 the Commission adopted the contested decision, which was notified to the French Republic on 3 August 2004.

23. In the contested decision, the Commission found, first, that the fixed levy for the period from 1991 to 1993 could be regarded as replacing the business tax normally payable for those years. Accordingly, the exemption from business tax during that period did not constitute State aid (recitals 22 to 33 and 53 to the contested decision).

9 — OJ 2003 C 57, p. 5.

24. On the other hand, the Commission considered that the special tax regime applicable from 1994 to 2002 introduced State aid consisting in the difference between the tax which France Télécom should have paid under the general law and the amount of business tax that it actually paid ('the tax differential'). Moreover, that new aid, implemented unlawfully, was incompatible with the common market. It therefore had to be recovered (recitals 34 to 53 to the contested decision).

25. The Commission gave the following reasons for categorising the special tax regime as State aid.

26. First, the Commission set out the reasons why it considered it to be appropriate to discount the argument of the French authorities to the effect that the advantage found during the period from 1994 to 2002 was more than offset by the fixed levy which France Télécom had had to pay during the period from 1991 to 1993 (recitals 35 to 41 to the contested decision).

27. Secondly, the Commission considered that the tax differential represented an advantage for France Télécom, granted from resources which should have been incorporated in the budget of the State and accordingly constituted State aid (recital 42 to the contested decision).

28. Thirdly, in recitals 43 and 44 to the contested decision, the Commission stated that, in order to determine the net advantage from which France Télécom had benefited, it could not take into consideration, at the stage of the decision establishing the existence of State aid, the French Republic's argument that the corporation tax factor should be corrected downwards because of the higher amounts paid by way of business tax.

29. Fourthly, the Commission, rejecting the arguments submitted by the French Republic that the aid in question could not be recovered by reason of the application of the limitation rules laid down in Article 15 of Regulation No 659/1999, found that the aid in question was new aid, not existing aid (recital 43 to the contested decision). The Commission concluded that, since the first form of aid identified had been granted in 1994 – that is to say, fewer than 10 years before 28 June 2001 – the aid in question had to be recovered in its entirety (recital 51 to the contested decision).

30. Fifthly, the Commission stated that the French authorities had not put forward any focused argument to prove that the aid at

issue was compatible with the common market and that it could see no legal basis on which the aid could be declared compatible with the common market (recital 52 to the contested decision).

31. Consequently, in recital 53 to the contested decision, the Commission concluded that (i) the business tax scheme applicable to France Télécom during the period from 1991 to 1993 did not constitute State aid and (ii) the tax differential from which France Télécom had benefited during the period from 1994 to 2002, as a consequence of the special tax regime, constituted State aid which was incompatible with the common market, which had been unlawfully implemented, and which must therefore be recovered.

32. As regards the amount which was to be recovered, the Commission estimated that the aid was in the amount – net of interest – of between EUR 798 million and EUR 1 140 million (recitals 54 to 59 to the contested decision). According to the Commission, the exact amount to be recovered was to be determined by the French authorities, in accordance with their duty to cooperate in good faith, when the contested decision was implemented (recitals 59 and 60 to the contested decision).

33. Article 1 of the operative part of the contested decision reads as follows:

'The State aid granted illegally by [the French Republic] in infringement of Article 88(3) … EC … to France Télécom under the business tax scheme applicable to that company during the period [from] 1 January 1994 to 31 December 2002 … is incompatible with the common market.'

34. On 25 October 2006 the Commission brought an infringement action seeking a declaration from the Court of Justice that, by failing to execute the contested decision within the prescribed period, the French Republic had failed to fulfil its obligations under Articles 2 and 3 of the contested decision, the fourth paragraph of Article 249 EC and Article 10 EC. By judgment of 18 October 2007 in *Commission* v *France*, [10] the Court declared the Commission's action well founded.

IV — The procedure before the General Court and the judgment under appeal

35. In their actions before the General Court for annulment of the contested decision, the French Republic and France Télécom

10 — Case C-441/06 [2007] ECR I-8887.

submitted, in essence, that the Commission was incorrect in finding, first, that France Télécom had benefited from unlawful State aid and, secondly, that the aid had to be repaid. [11]

36. By the judgment under appeal the General Court rejected the pleas put forward by the French Republic and France Télécom in their entirety and, consequently, confirmed the lawfulness of the contested decision.

11 — The actions before the General Court were brought by the French Republic and France Télécom. The French Republic put forward four pleas in law in support of its claims which were rejected by the General Court as unfounded. The four pleas alleged, respectively, a manifest error of assessment and an error in law on the part of the Commission in considering that the special regime in force between 1994 and 2002 had conferred an advantage (see the findings of the General Court at paragraphs 191 to 241 of the judgment under appeal), infringement of the rights of the defence (see the findings of the General Court at paragraphs 136 to 142 of the judgment under appeal), infringement of Article 15 of Regulation No 659/1999 as regards the limitation period (see the findings of the General Court at paragraphs 318 to 327 of the judgment under appeal), and, lastly, infringement of the principle of the protection of legitimate expectations (see the findings of the General Court at paragraphs 259 to 279 of the judgment under appeal). For its part, France Télécom put forward five pleas before the General Court which were likewise rejected and alleged, respectively, infringement of the rights of the defence (see the findings of the General Court at paragraphs 146 to 153 of the judgment under appeal), three manifest errors of assessment and one error of law in so far as the Commission considered that France Télécom had benefited from an advantage (see the findings of the General Court at paragraphs 191 to 241 of the judgment under appeal), infringement of Article 15 of Regulation No 659/1999 on the limitation period (see the findings of the General Court at paragraphs 318 to 327 of the judgment under appeal), infringement of legitimate expectations and legal certainty (see the findings of the General Court at paragraphs 259 to 305 of the judgment under appeal), and, lastly, infringement of the rules relating to the adoption of Commission decisions (see the findings of the General Court at paragraphs 114 to 130 of the judgment under appeal).

V — The appeal and treatment of the pleas in law

37. In its appeal, France Télécom relies on five pleas in law, the second of which is divided into three parts and the third into two parts. France Télécom complains in essence that the General Court misapplied the concepts of State aid and of advantage and infringed the principle of legitimate expectations. It also cites a failure to state the reasons for the judgment under appeal in response to the arguments relating to the principle of limitation. Lastly, as to the plea concerning infringement of the principle of legal certainty, the judgment under appeal is, it claims, vitiated by an error in law and a failure to state reasons.

38. It is clear at the outset that, irrespective of the number of pleas put forward by France Télécom in its appeal, the appellant primarily addresses three points.

39. The first point, which is the subject of the first and second grounds of appeal, concerns the concept of State aid and its constituent concept of advantage. By its second ground of appeal, France Télécom alleges that the General Court misapplied the concept of advantage in that it refused to conduct a comprehensive examination of the special regime. In the first ground of appeal alleging failure

to have proper regard to the concept of State aid, France Télécom in fact confines itself to complaining that the General Court erred in law in accepting that an advantage could be identified not on the basis of the inherent characteristics of the regime but on the basis of unrelated factors which could be determined only *ex post facto*. Since the arguments raised in those two grounds of appeal are closely related, I propose considering them together under a joint heading on the issues concerning the existence of an advantage.

40. The second point concerns the calculation of the limitation period which is addressed, in the fourth ground of appeal relied on by France Télécom, in particular from the perspective of a failure to state the reasons for the judgment under appeal.

41. The third point, which is addressed in the third and fifth grounds of appeal, concerns infringement of the general principles of law, such as the principle of legitimate expectations and the principle of legal certainty.

42. Consequently, I propose to assess the appeal by grouping the pleas put forward by France Télécom on the basis of the points mentioned above.

VI — The concepts of State aid and advantage [12]

A — *Identification of an advantage*

43. The identification of an advantage, whether substantive or temporal, constitutes a key component of this appeal.

44. I should point out in this regard that, according to settled case-law, for a measure to be categorised as State aid within the meaning of the Treaty, each of the four cumulative conditions laid down in Article 87(1) EC must be fulfilled. [13] The provision thus covers aid granted by a 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, in so far as it affects trade between Member States. The concept of aid, within the meaning of that provision, is more general than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges that are

12 — France Télécom's first and second grounds of appeal.

13 — See, inter alia, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 38 and 39 and the case-law cited there, and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 52.

normally included in the budget of an undertaking in comparison with an undertaking in a comparable situation. [14]

45. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers constitutes State aid for the purposes of Article 87(1) EC. [15] Similarly, a measure which grants to certain undertakings a tax reduction or a deferral of liability to tax that would otherwise be payable may constitute State aid.

46. In order to determine whether such an advantage constitutes aid within the meaning of Article 87 EC, it is necessary to establish whether the recipient undertaking is given an economic advantage that it would not have obtained under normal market conditions. [16]

47. As I have already stated in my Opinion in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom*, [17] a measure liable to be regarded as fiscal aid must correspond to a certain fiscal cost. The Commission must be in a position to identify the value of the actual or potential loss in tax revenue which represents the amount of the supposed aid. The only means available to the Commission of estimating the value of that loss is to refer to a general regime applicable in the reference framework being examined.

48. In its appeal in this case, France Télécom states that it is impossible to establish, on the date on which the special regime was introduced, whether the contested regime would create an advantage liable to constitute State aid.

49. First, it must be borne in mind that this argument is a hypothetical one since the national authorities failed to notify the regime established pursuant to Law No 90-568. At this juncture it is therefore impossible to ascertain what the outcome of an examination at that time by the Commission might have been.

14 — See, inter alia, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90; and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29.

15 — See Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14.

16 — Regarding the effect of establishing the existence of an advantage on an examination of selectivity, see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 41; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 47; Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 46; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 82.

17 — See point 160 et seq. of the Opinion.

50. Furthermore, on a general note, it may prove excessively difficult for the Commission to determine the exact value of the aid granted in the case of measures spanning a number of years.

51. In this regard, without seeking to diminish the difficulties relating to an assessment *ex ante*, or in any event before entry into force of those measures, a distinction should be drawn between the possibility of quantifying the exact amount of the aid and the possibility of examining the draft measures at issue from the perspective of Article 87 EC.

52. Of course, unlike individual aid granted to a given undertaking, in the case of a tax regime in the form of legislation on a particular type of tax which applies to an indeterminate number of recipients, it is impossible for the Commission or the Member State to put an exact figure *ex ante* on the aid.

53. However, in assessing the effects, whether potential or not, of the regime at issue on competition, such a factor cannot exempt the Member State from its obligation to notify; nor can it, subsequently, deprive the Commission of the possibility of examining it and defining it in the light of the Treaty provisions on State aid.

54. Consequently, where, as a result of its consideration of a general regime applicable in the reference framework being examined, the Commission can establish an actual or potential loss in tax revenue which represents the amount of the supposed aid awarded to the alleged recipient undertakings, the existence of the advantage must be considered to be established. Thus, the exact determination of its value is, initially, of only secondary importance and will become relevant upon its recovery, if the measures concerned are shown to be unlawful.

55. In this case, the tax model applying to France Télécom during the period in question clearly represents an exception as compared with the regime under the general law.

56. Thus, France Télécom had been subject to a specific tax regime the aim of which was to ensure that the resources derived from the business tax (in principle collected locally, on the basis of a rate fixed by each local authority) continued to produce revenue for the general State budget. With a view to achieving that objective, Law No 90-568 had created a 'national' business tax, applicable to France Télécom, calculated on the basis of an average rate weighted by the rates applicable in the local authorities and collected in the principal place of business of that company.

57. During the period from 1991 to 1993, under the transitional regime, France Télécom was exempted from corporation tax and local taxes in return for payment of a levy fixed by legislation. Under the definitive regime applying from 1994 to 2002, the ordinary corporation tax regime and a special regime for local taxes, including business tax, were applied to France Télécom. It should be added in this regard that the business tax gave rise to the application of an additional exemption which consisted in a reduction in the management costs charged by the State amounting to three quarters of the costs normally applicable.

58. As is apparent from the documents before the Court, the special tax provisions applying to France Télécom did not by themselves constitute the advantage. The Commission took the view that the aid was constituted by the tax differential representing the difference between the amount of the business tax contributions that the undertaking would have had to pay if it had been subject to the tax under the general law and the amount that it was actually charged under the special tax provisions. That configuration therefore resulted in a taxation model that allowed undertaxation.

59. The matter thus involves a dual categorisation in which the existence of an advantage is attributable, first, to a fixed element forming part of the special tax regime applied to France Télécom, as opposed to the general law regime and, secondly, to a variable element, which depends on factual circumstances, namely, the location of premises or land in various local authorities and the tax rate applicable in those authorities.

60. That particular method – applied in this case – of identifying the advantage has decisive consequences as regards the annual nature of the advantage, the possibility of separating the two tax regimes to which France Télécom was successively subject and the calculation of the limitation period.

61. Lastly, it must be noted that the specific nature of the regime applying to France Télécom between 1994 and 2003 cannot in any way automatically preclude its being categorised as State aid for the purposes of Article 87 EC.

62. In this connection, I should like to point out that the reasons which should have prompted the French authorities to notify the tax regime applying to France Télécom must be considered, first of all, with regard to the reduction of the management costs from 8 % to 1.9 %. It should also be noted that Law No 90-568 contains no adjustment mechanism which would have allowed an annual examination of the effects of the special regime on France Télécom's competitive position, given that the legislature could simply have transferred to the State the right to the revenue from the business tax payable by

France Télécom, without introducing other changes in relation to the regime under the general law. [18]

B — *Misinterpretation of the concept of advantage as alleged by France Télécom in its second ground of appeal – preliminary observations*

63. By its second ground of appeal, France Télécom alleges in essence that the General Court erred in law in misinterpreting the concept of advantage by holding that the advantage was constituted by the tax differential, thus leading it to refuse to apply set-off as between the two taxation periods. According to France Télécom, the General Court failed to fulfil the obligation to conduct an overall examination of all the provisions laid down by a special regime and, in so doing, had misapplied the concept of advantage.

64. In order to facilitate the analysis of the various legal points put forward by France Télécom in support of its appeal, I shall consider the various parts of this plea in reverse order to that of the appeal, beginning with the alleged error in law affecting the interpretation of the advantage specified in the contested decision, before going on to assess the issues which arise as a result in relation to the overall assessment of the regime and the issue of set-off.

C — *The second part of the second ground of appeal alleging that the General Court erred in law in its interpretation of the contested decision and substituted its own grounds*

1. Claims of the parties

65. France Télécom submits that the General Court misinterpreted the contested decision in finding that the Commission had not considered the aid at issue to be constituted by the special tax provisions applying to France Télécom but rather by the tax differential established each year, substituting its own grounds for those of the contested decision.

66. France Télécom notes that recital 42 to the contested decision merely concludes that

18 — It is not inconceivable, in these circumstances, that the legislature would not have considered the reduction in the management costs to be justified, in the absence of any administrative simplification in the collection of business tax as compared with the regime under the general law.

there can be no set-off as between the two tax periods. It cannot be established from that recital that the Commission took the view that the aid at issue was constituted by the tax differential established each year in respect of which the business tax was payable rather than by the special tax provisions applying to France Télécom.

67. France Télécom also states that such an interpretation is, moreover, clearly manifestly contrary to the enacting terms of the contested decision, according to which the aid at issue consists in the business tax scheme applicable to that undertaking during the period from 1 January 1994 to 31 December 2002.

68. The Commission contends that the ground of appeal is irrelevant and, in any case, unfounded. The General Court's findings were not based on the annual nature of the business tax or on the finding that the aid consisted in the tax differential established each year. The Commission states that the annual nature of the business tax cannot be relied upon, as it is apparent that other factors in the General Court's reasoning justify its refusal to allow set-off as between the fixed levy and the alleged undertaxation in respect of business tax between 1994 and 2002.

2. Assessment

69. As regards, first, the Commission's argument concerning the supposed irrelevance of the second ground of appeal, it need only be noted that, since France Télécom puts forward that plea in order to criticise part of the reasoning adopted by the General Court, the Commission's contention should be rejected.

70. By the second part of the second ground of appeal, France Télécom criticises the General Court's findings at, in particular, paragraphs 201 and 202 of the judgment under appeal.

71. At paragraph 201 of that judgment, the General Court refers to recital 42 to the contested decision concerning analysis of the regime in the period from 1994 to 2003, according to which 'the difference between the business tax actually paid by France Télécom and that which should have been due under the ordinary law from 1 January 1994 to 1 January 2003 constitutes State aid inasmuch as it represents an advantage for France Télécom granted through resources which would otherwise have been incorporated in the budget of the State.'

72. Thus, having ruled out in the previous recitals to the contested decision any set-off as between the two tax regimes at issue, as advocated by the French authorities, the

Commission came to the conclusion that the tax differential it had found to exist constituted State aid.

73. In that regard it is sufficient to state that, without erring in law, at paragraph 201 of the judgment under appeal, the General Court construed the wording of the contested decision as meaning that State aid was the result of the tax differential. The General Court went on, at paragraphs 219 to 225 of the judgment under appeal, to investigate whether that tax differential actually existed, presenting a line of reasoning which was not challenged by France Télécom in that context.

74. Furthermore, contrary to France Télécom's claims, the interpretation reached by the General Court, that the aid is constituted by the tax differential stemming from the application of legislative provisions establishing a special regime, is still consistent with the enacting terms of the contested decision under which only the regime applying to France Télécom between 1994 and 2002 constitutes State aid that is incompatible with the common market and unlawful. It was by virtue of that special regime that France Télécom did not pay into the State budget the amounts of the tax that it would have had to pay pursuant to the regime applying under the general law.

75. In view of the above, it should be noted that the General Court's finding at paragraph 201 of the judgment under appeal accurately reflects the aim underlying Article 87 EC in that it is necessary to make a distinction, in the context of State aid, between, on the one hand, the form that State aid takes, which finds its physical embodiment in an enabling measure which is subject to the obligation to notify, and, on the other hand, the objective effects of the measure the analysis of which makes it possible to determine whether an advantage exists.

76. It is therefore crucial to identify, for the purposes of construing the concept of aid, first, the element which constitutes the normative act underlying the contested measure such as a law, an administrative decision or any other act or practice attributable to the Member State and, secondly, the economic element which is the basis for examining the effects of that act to establish whether there is a selective advantage.

77. Consequently, it would be inaccurate to find that tax measures *per se* constitute State aid. The selective advantage may be represented only by the effects of the application of those measures to the undertakings concerned. If the measure at issue is constituted by a specific aspect of the calculation of the tax, without amounting to a direct (open/transparent) tax reduction, such effects can be established only on an annual basis in so far as the tax year corresponds to that period.

78. Moreover, the contested decision as a whole is based on the premiss that the

business tax regime laid down by Law No 90-568 itself led, by application of a national weighted average rate resulting from the rates approved the preceding year by all the local authorities concerned, to the undertaxing of France Télécom as compared with the amount that would have been payable if France Télécom had been subject to the regime under the general law. That view is, moreover, borne out by the wording of the enacting terms of the contested decision.

79. As regards paragraph 202 of the judgment under appeal and the alleged substitution of reasons, it should be noted that the General Court did not go beyond the appropriate level of judicial review by substituting its own economic appraisal for that of the Commission, as the issues regarding the annual nature of the mechanism at issue are integral to the Commission's reasoning in the contested decision. Furthermore, the General Court cannot be alleged to have engaged in any contradictory reasoning since it refers at paragraph 202 to the fact that the business tax is charged annually, by virtue of the provisions of the General Tax Code. It is therefore clear that the nature of the tax provisions forms an integral part of the examination as to whether an advantage exists.

80. In the light of the foregoing, the second part of the second ground of appeal invoked by France Télécom must be rejected.

D — *The third part of the second ground of appeal alleging a failure to conduct an overall analysis of the special tax regime*

1. Claims of the parties

81. France Télécom takes the view that neither the annual nature of the tax nor the differences between the two tax periods can justify a partial analysis of the special tax regime in dispute. It considers that the General Court was wrong to refuse to take account, in its analysis of the effects of the special tax regime, of the overtaxation that the fixed levy represented for the undertaking as compared with the level of taxation that it would have had to bear if it had been subject to the general law from 1991 to 1993.

82. According to France Télécom, even if it were to be accepted that the annual nature of the tax might be taken into consideration in its analysis, the General Court would have had to acknowledge that, in respect of the initial financial years coming under the special tax regime, it had been overtaxed as compared with its competitors.

83. France Télécom concludes from the above that the General Court should have required that the comparison of the general law and the special tax regime applying to it

should include all the effects of the special regime, that is to say, not only any advantages obtained by the undertaking during the period from 1994 to 2002 but also the exceptional additional taxation that France Télécom had to bear between 1991 and 1993.

2. Assessment

84. Having correctly drawn attention to the case-law under which the Commission is under a duty to consider complex measures in their entirety, the General Court, at paragraph 200 of the judgment under appeal, held that Law No 90-568 introduced a derogating tax regime, applicable in particular to France Télécom, characterised by being implemented in two stages.

85. At paragraph 203 of the judgment under appeal, the General Court was right to point out that, in the contested decision, the Commission looked at the differences existing between the two tax periods, relating in particular to the fact that the fixed levy wholly replaced the business tax contribution between 1991 and 1993, whereas the liability to tax under the special tax regime from 1994 to 2002 resulted, each year, in a tax differential. The General Court consequently took the view that, in that decision, the Commission did indeed conduct an overall examination of all the relevant provisions but that, in view of the differences between the two tax periods, it had refused to apply set-off.

86. It must be noted in that regard that the need for a comprehensive examination, which the Commission in fact undertook, cannot be treated as representing an obligation to take account of all the tax periods for the purpose of establishing the existence of the advantage. Consequently, the General Court was entitled to hold that the Commission had examined the regime in its entirety, in order to conclude that only the tax regime applicable during the second period involved the granting of State aid to France Télécom.

87. Consequently, the third part of the second ground of appeal must be rejected as unfounded.

E — *The first part of the second ground of appeal – set-off*

1. Claims of the parties

88. France Télécom maintains that, by failing to undertake a comparison between the regime under the general law and all the provisions laid down by Law No 90-568, the

General Court erred in law. In order to determine whether an advantage existed, the General Court compared the charges imposed on France Télécom under the special regime with the level of taxation that would have been applied to it if that company had been subject to the tax regime under the general law. It confined that comparison to the period from 1994 to 2002 without taking into account the tax burden imposed on France Télécom from 1991 to 1993.

89. France Télécom takes the view that, by relying in this regard on the Court's judgment in *Italy* v *Commission*,[19] the General Court erred in law in precluding set-off as between the different tax periods. The General Court wrongly inferred from that judgment that an exemption could not be offset by a specific charge which is different from and unconnected with the advantage.

2. Assessment

90. By this part of the second ground of appeal, France Télécom is taking issue with paragraphs 207 and 214 of the judgment under appeal. After accepting the Commission's reasoning as regards the distinction between the fixed levy in force between 1991 and 1993 and the special tax regime in force between 1994 and 2002, the General Court ruled out any obligation to apply set-off in this case as between the two periods of taxation.

91. It should be observed in this connection that the case-law provides that, where it examines a measure likely to constitute State aid, the Commission is required to take into consideration all the effects of that measure for the potential beneficiary and, in particular, to determine, if necessary, the specific charges imposed on an advantage.[20]

92. First, the General Court's reference to paragraph 34 of *Italy* v *Commission* is indeed incorrect: the principle affirmed by the General Court at paragraph 207 of the judgment under appeal cannot be inferred from paragraph 34 of the former judgment.

93. As the Commission points out, the General Court probably intended to have regard to paragraph 34 of a different *Italy* v *Commission* judgment.[21] In that paragraph of the judgment in question, the Court rejected the argument put forward by the Italian authorities that the reduction at issue was not a 'State aid' because the loss of revenue resulting from it was made good through funds

19 — Case C-66/02 [2005] ECR I-10901.

20 — Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 7.

21 — Case 173/73 [1974] ECR 709. The relevant paragraph in the French-language version of the judgment in question is numbered 34. In the English-language version, however, the paragraph in question is numbered 16.

accruing from contributions paid to the unemployment insurance fund.

94. The Court will, however, have to be satisfied with simply noting that incorrect reference which none the less does not constitute an error in law capable of invalidating the decision of the General Court.

95. In spite of that incorrect reference to the case-law, it is clear that the General Court gave a detailed and exhaustive explanation of the reasons for its view that, whilst meeting its obligation to conduct an overall analysis of the regime resulting from Law No 90-568, the Commission was justified in rejecting the set-off advocated by France Télécom.

96. In the light of the judgment in *Enirisorse,* [22] it is must be pointed out that the obligation to conduct an overall analysis, which makes it possible correctly to identify the existence of an advantage in special tax measures, must be based on the reality of the situation.

97. It is clear to me that the mere fact that the two tax periods are referred to in the same law is insufficient to form the basis of an obligation to apply set-off between the measures applying to one and the same recipient.

22 — Cited above, at paragraph 43, and point 32 of the Opinion of Advocate General Poiares Maduro in that case.

Those measures are based on different legal models, such that it was necessary to distinguish between the measure constituting aid and the measure not meeting the criteria under Article 87 EC.

98. In this regard, it should be found, as is apparent from the documents in the case, that the levy applicable between 1991 and 1993 was defined by parameters separate from those applied from 1994 under the special business tax regime.

99. I would observe that it follows clearly from the debates before the French National Assembly that 1994 had been chosen as the appropriate date so as to have a sufficient period for calculating the amounts liable for business tax, since the government had no detailed evaluation of the immovable property or taxable amounts concerned. [23]

100. It must also be pointed out that, even if it were the case that the regime applying to France Télécom consisted in two inextricably linked periods, the first entailing overtaxation of the undertaking and the second undertaxation, was accurate, it is common ground that the legislation at issue did not contain any

23 — See National Assembly, complete minutes of 3rd session of 11 May 1990, available on the internet at: http://archives.assemblee-nationale.fr/9/cri/1989-1990-ordinaire2/042.pdf.

mechanism for offsetting amounts of the business tax or for determining the point at which the purported overtaxation in the period from 1990 to 1993 should have been offset. Indeed, even if one accepts the argument put forward by France Télécom in this regard, there would come a point at which the effects of the overtaxation at issue would have been exhausted, implying a future advantage for France Télécom during the period commencing in 1994. However, in the absence of such a mechanism, the claim that set-off must be applied is without foundation.

101. Lastly, the case-law on classification of the set-off of structural disadvantages under Article 87 EC must be considered to be irrelevant. That case-law makes it possible to exclude aid being categorised as State aid in specific circumstances intended to correct a competitive situation that is unfavourable to a particular undertaking. [24] In the circumstances of this case, it cannot reasonably be maintained that the taxation model applicable from 1994 served to redress the fact that France Télécom had borne additional burdens as a result of a special regime not applying to rival undertakings subject to the general law under normal market conditions. On the contrary, according to the debates in the French Senate and National Assembly, the aim of the special regime applicable from 1994 was to enable the State, not the local authorities, to collect the business tax paid by France Télécom. [25] In any event, I would stress that, in terms of establishing the existence of an advantage, it is irrelevant whether the proceeds of the business tax were earmarked for the State or for the budget of the local authorities.

102. In any event, it is apparent from the documents in the case that France Télécom was required to pay into the Fonds national de péréquation de la taxe professionnelle (National Business Tax Equalisation Fund) as operating surplus an amount equivalent to that collected by the State from the former administration of Posts and Telecommunications ('PTT') prior to the date of establishment of France Télécom. That, moreover, was why the Commission concluded that the levy for the benefit of the general budget to which France Télécom was subject from 1991 to 1993 was of a mixed nature, being partly in the nature of a tax and partly in a form equivalent to participation by the State as owner in the operating results. [26]

103. Thus, after considering the features, the objectives and the temporary nature of the regime applicable to France Télécom, the

24 — See, in this regard, Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 30, and *Enirisorse*, paragraph 32.

25 — See minutes of the session of 7 June 1990 in the Senate (JORF, 8 June 1990, p. 1361) and of the session of 19 June 1990 in the National Assembly (JORF, 20 June 1990, p. 2604).

26 — See recitals 25 to 31 to the contested decision.

General Court was fully entitled to hold, at paragraph 231 of the judgment under appeal, that the lump-sum levy constituted a means of taxation specific to France Télécom which could not be taken into consideration for the purpose of offsetting the consequences of the tax regime applying from 1994.

104. Consequently, the first part of the second ground of appeal must also be rejected.

F — *France Télécom's first ground of appeal concerning the misapplication of the concept of State aid*

1. Claims of the parties

105. After referring to the General Court's conclusion that it was 'impossible' to determine, on the date on which the special regime was introduced, whether it constituted State aid, France Télécom states that the General Court also took the view that the existence of an advantage had to be established each year and depended on external parameters.

106. However, France Télécom complains that the General Court misapplied the concept of State aid in accepting such a classification whilst acknowledging that determining whether or not an advantage exists did not depend on the features of the regime applying to France Télécom but on external parameters the effects of which could only be established *ex post facto*. According to France Télécom, the advantages or disadvantages resulting from external and unforeseeable factors cannot confer the property of aid on a measure which was not aid at the time of its adoption.

107. Moreover, citing the case-law in *France* v *Commission* involving the company Stardust Marine,[27] France Télécom denies that the measure in question can be imputed to the Member State, since the existence of the advantage was dependent 'solely' on conditions unrelated to the special tax regime, as the General Court acknowledged.

108. For its part, the French Government states that the special tax regime *per se* is not capable of constituting State aid. Such a regime did not necessarily confer a selective advantage on the undertakings concerned.

27 — Case C-482/99 [2002] ECR I-4397, paragraphs 71, 77 and 81.

109. The Commission takes the view that the first ground of appeal is inadmissible in that it was not put forward at first instance. It adds that the points objected to by France Télécom were plainly set out in the contested decision.

110. The Commission claims, in the alternative, that the plea is unfounded. The level of taxation under the special regime in question could not be determined accurately in advance for each year. However, that regime was likely to result in lower taxation as compared with taxation under the normal business tax regime.

2. The admissibility of the plea

111. As regards the Commission's objection of inadmissibility based on the novel nature of the ground of appeal put forward, it is settled case-law that to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued at first instance before the General Court. [28]

112. It must be stated, however, that, contrary to what the Commission contends, the appellant, rather than putting forward a new plea before the Court of Justice, is putting forward an argument forming part of the plea concerning the existence of State aid, which has already been discussed before the General Court, in particular in the first and second pleas advanced before that Court. Therefore, the plea of inadmissibility cannot be upheld.

3. Substance

113. By this ground of appeal, France Télécom is criticising the General Court's reasoning set out, in particular, in paragraphs 323 and 324 of the judgment under appeal. In order to respond fully to that plea, it is necessary to set out the reasoning previously adopted by the General Court at paragraphs 199 to 241 of the judgment under appeal, in response to the first and second pleas in law raised at first instance.

114. First of all, I note that France Télécom's reference to paragraph 324 of the judgment

28 — See, inter alia, Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others* v *Commission* [2004] ECR I-10653, paragraph 60, and Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission* [2006] ECR I-10367, paragraph 96.

under appeal in support of its assertion that the General Court accepted that it was impossible to determine whether there was an advantage on the date on which the special regime was introduced arises from an incorrect reading of the judgment under appeal.

115. At paragraph 324 of that judgment, in its response to the arguments on limitation presented by the applicant at first instance, the General Court simply rejected a legal argument on that matter. A legal statement which may be subject to review by the Court of Justice in the appeal and which relates to issues separate from those addressed by the General Court in its response cannot be inferred from one part of the General Court's reasoning taken out of context.

116. Secondly, as regards the examination of the specific features of the regime applying to France Télécom, including the annual nature of the business tax and the existence of an advantage connected with circumstances unrelated to the special tax regime, it should be stated at the outset that, far from having misapplied the concept of State aid, the General Court properly applied the provisions of Article 87 EC. The General Court made every effort – rightly – to draw all the legal consequences from the specific tax model applying to France Télécom, including the annual nature of the advantage established.

117. After correctly setting out the relevant case-law regarding determination of the existence of State aid, and in particular the existence of an advantage afforded to France Télécom, the General Court then considered, first, whether the Commission was entitled to assess the special tax regime separately from the fixed levy, and secondly, whether the Commission was justified in refusing to apply set-off, before finally assessing whether the existence of a tax differential was substantiated.

118. Thus, at paragraphs 199 to 241 of the judgment under appeal, the General Court gave a detailed and exhaustive response to the complaints concerning the existence of State aid in this instance. The passages of that judgment that France Télécom has criticised in its first ground of appeal merely reproduce the reasoning highlighted in the abovementioned section of the judgment under appeal.

119. As regards that reasoning, paragraph 323 of the judgment under appeal states that '[s]ince business tax is charged annually …, the existence of an advantage for France Télécom depended each year on whether the special tax regime had the effect of charging France Télécom a business tax contribution which was lower than that to which it would have been liable under the general law. That question itself depended on circumstances unrelated to the special tax regime and, in particular, on the level of the tax rates voted annually by the local authorities in the territory in which France Télécom had premises'.

120. France Télécom's criticism is therefore based on an incorrect reading of the judgment under appeal as, contrary to its claims, the General Court did not accept in any way that the question whether an advantage existed did not depend on the inherent features of the regime in question.

121. On the contrary, in assessing the complex nature of the tax regime applying to France Télécom, the General Court rightly considered that the finding that aid existed in this case was based on the 'unrelated circumstances' that, as it clearly stated at paragraph 323 of the judgment under appeal, depended on the level of the tax rates voted annually by the local authorities in the territory in which France Télécom had premises.

122. In this regard, nothing in the passages of the judgment under appeal that are criticised by France Télécom makes it possible to find that the General Court had assumed that a selective advantage for France Télécom existed or, accordingly, that it erred in law.

123. Lastly, as regards the imputability of the measure, it is sufficient to note that, according to case-law, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State. [29] Moreover, a measure adopted by the State or through State resources does not necessarily have to be a measure adopted by the central power of the State concerned. It may equally originate from an infra-State authority. [30] Clearly, therefore, in view of the abovementioned reference by the General Court to 'unrelated circumstances', that aspect does not in any way deprive the tax regime applying to France Télécom of its character as a State measure.

124. Since France Télécom has failed to show that the General Court erred in law in its application of the concept of State aid, the first ground of appeal must be rejected as unfounded.

VII — The limitation principle [31]

A — *Claims of the parties*

125. By its fourth ground of appeal, France Télécom notes that under Article 15 of Regulation No 659/1999 the powers of the Commission to recover State aid are to be subject

29 — See Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 35 and the case-law cited.

30 — See, among many, Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17, and Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 55.

31 — France Télécom's fourth ground of appeal.

to a limitation period of 10 years. It claims that the French authorities had explained, during the administrative procedure, that any undertaxing of the undertaking during the period from 1994 to 2002 could not, in any event, be recovered as the regime had been established more than 10 years earlier. France Télécom takes the view that the reasoning adopted by the General Court in this connection is not sufficiently reasoned since the judgment did not specify the binding legal measure marking the date which initiated the limitation period. According to France Télécom, that measure had to be Law No 90-568.

126. The Commission observes that the limitation rules on State aid concern its recovery. Aid could not be recovered unless the amount of such aid could be determined. As regards the tax regimes at issue, the advantage could be established only on a yearly basis. Consequently, time could not start to run as regards the limitation period concerning the right of the authorities to order recovery of the aid at a time when such recovery could not, as yet, be ordered.

127. The French Republic, for its part, states in its response that it supports four of the five pleas raised by France Télécom in its appeal. As regards the limitation, the French Government argues that the judgment under appeal is vitiated by contradictory reasoning. On the one hand, at paragraph 324 of that judgment, the General Court considered that the limitation period under Article 15 of Regulation No 659/1999 started to run in 1994. On the other hand, at paragraph 276 of that judgment, the General Court held that the obligation to notify had to be set at the time when Law No 90-568 was adopted.

B — *Expiry of the limitation period*

128. It should be recalled that, under Article 15 of Regulation No 659/1999, the powers of the Commission to recover aid are to be subject to a limitation period of 10 years. Under Article 15(2) thereof, the limitation period is to begin on the day on which the unlawful aid is awarded to the beneficiary.

129. I should emphasise at the outset that the limitation period applies to unlawful aid only, that is to say, to aid that has not been notified. Accordingly, upon expiry of the limitation period, unlawful aid becomes existing aid.

130. The decisive factor for assessing the limitation period referred to in Article 15 of Regulation No 659/1999 is therefore the concept of the granting of aid.

131. In this regard it is essential to point out that determining the date of the grant of aid may vary depending on the nature of the aid in question.

132. In the case of an aid scheme, where the grant of the aid depends on the adoption of binding legal measures, it must be assumed, in principle, that the aid is granted on the date of adoption of such a measure.

133. However, in the light of the diversity and complexity of the models of measures that may constitute State aid, in particular in the area of direct taxation, the preceding finding does not exhaust the range of possibilities which the Commission may encounter in examining notified or non-notified measures.

134. Thus, in the case of a multiannual scheme resulting in payments or the recurring grant of advantages, there may be a significant interval between the date of adoption of a legal measure constituting the basis for the grant of the aid and the date on which the recipients will in effect be afforded the benefit of the advantage (or will be affected by its consequences, as in the case of a tax exemption).

135. In such circumstances, my view is that fiscal aid must be regarded as having been granted to the recipient only when that recipient benefits from it in a manner which is legally definitive, seen from a substantive perspective. Only the definitive benefit from the measure, which equates to the creation of an advantage in the strict sense, is determinative for the purposes of calculating the limitation period.

136. In that regard, I consider that the limitation period applying to tax advantages starts running afresh with each actual grant, yearly as the case may be, of the advantage which coincides with the date of consolidation of the situations on the basis of which the extent of the tax burden is determined. With regard to income tax, that corresponds to the end of the tax year during which the income included in the basis of that taxation was earned. [32]

137. It should further be noted that calculation of the limitation period may depend on the manner in which the advantage, and thus the State aid itself, is identified. Calculation of that period will therefore be derived from the establishment of the advantage.

138. That appears to me to be the position in this case, as the actual existence of the aid must be determined not only on the basis of the national law but also in the light of the

32 — Of course, the conditions for establishing the definitive nature of the benefit resulting from fiscal State aid may vary depending on the approaches adopted in the different legal systems. To my mind, such technical details of a fiscal nature cannot affect the calculation of the limitation period.

rates applying in each local authority area in which France Télécom's assets are situated.

139. As I have already stated, the General Court's analysis concerning the annual nature of the business tax and the resulting consequences was, in my view, accurate.

140. Consequently, the General Court was right to hold, at paragraph 324 of the judgment under appeal, that, having regard to the annual nature of business tax, the aid in question could not be regarded as having been 'awarded' before 1994, because it was then that the binding legal acts which made it possible, for the first time, to establish the existence of a tax differential were adopted.

141. As regards, therefore, the objection that the General Court failed to identify the acts in question, I am of the view that the objection is misconceived as a matter of law. Assessment of the special regime in its entirety has shown that the regime establishes business tax nationally, the amount of which is determined using a national weighted average rate resulting from the rates voted in the previous year by all the local authorities.

142. As is stated in paragraph 24 of the judgment under appeal, the rates applied to the tax bases are voted each year by the deliberative assemblies of the bodies which collect the tax. In order to be able to calculate the business tax payable, an individual rate must be set nationally for France Télécom. Consequently, the decisions by the local authorities concerned setting an individual rate must be regarded as relevant factors for determining the 'legal facts' referred to in Law No 90-568, those legal facts being essential for assessing France Télécom's actual tax burden as well as the burden arising from the regime under the general law, and consequently for determining the existence of an advantage.

143. I also note that it is necessary to read the passage of the judgment under appeal to which France Télécom takes objection in conjunction with paragraph 323 thereof in which the General Court refers, first, to paragraph 202 and then in turn to paragraph 17 of the judgment under appeal, the latter describing the relevant provisions of the General Tax Code. It is essential to bear in mind the conceptual difference between, first, the legal rule, namely Law No 90-568 and, secondly, the legal fact, namely the national weighted average rate resulting from the rates voted the preceding year by all the local authorities. Those decisions do not affect the principle of establishing the business tax for which France Télécom is liable; they contribute to determining the national average by establishing the individual rates from which that average will be calculated.

144. Furthermore, the approach adopted by the General Court is borne out by the wording of Article 15 of Regulation No 659/1999, under which the Commission's powers to recover aid are themselves subject to a

limitation period. If there had been no actual award inasmuch as the aid has not genuinely been granted in practice, the Commission cannot call for its recovery. Nor can it call for recovery unless it is certain that the measure at issue constitutes State aid.

145. As regards, lastly, the French Government's argument alleging contradictory reasoning as between paragraph 276, on the one hand, and paragraphs 323 and 324, on the other hand, of the judgment under appeal, it need only be stated that the General Court analysed the special regime from the perspective of, first, the obligation to notify and, secondly, the effects of the basic provision for determining whether an advantage exists for the beneficiaries of the measure in question.

146. Thus, the General Court's reasoning in paragraph 276 is part of the response to the arguments concerning the principle of legitimate expectations discussed in connection with the third plea raised at first instance. The General Court rightly referred to the notification obligation incumbent, under Article 87 EC, on the Member State seeking to establish a special tax regime such as that at issue here. Conversely, the General Court gave its ruling on the effects of that rule inter alia at paragraphs 323 and 324 of the judgment under appeal concerning the annual nature of the business tax. Since those two aspects make up the two parts of the analysis of the concept of State aid which it is essential to carry out, it cannot be held that the reasoning was contradictory.

147. In the light of the foregoing, the fourth ground of appeal must be rejected.

VIII — Breach of the general principles of law [33]

A — *The third ground of appeal relating to a breach of the principle of legitimate expectations*

1. Claims of the parties

148. Although France Télécom divides its third ground of appeal concerning a breach of the principle of legitimate expectations into three parts, I propose examining them together, having regard to their common objective.

33 — France Télécom's third and fifth grounds of appeal.

149. The first part of the third ground of appeal alleges that the General Court erred in law with regard to the circumstances in which the principle of legitimate expectations may be invoked.

150. First, France Télécom maintains that the General Court limited the right to invoke the principle of legitimate expectations to cases where aid had been notified. It implied, however, that the position might be different if justified by exceptional circumstances. Such circumstances existed in this case.

151. Secondly, France Télécom claims that the judgment under appeal is vitiated by contradictory reasoning and is based on an erroneous assumption that any tax derogation constitutes an advantage. In this case, the exceptional circumstances cited by the undertaking in order to rely on the principle of legitimate expectations concerned the fact that the existence of an advantage could be identified only *ex post*, not *ex ante*, by reason of changes in the circumstances unrelated to the special tax regime.

152. Thirdly, France Télécom argues that the General Court did not specify the legal measure which had to be notified or when it had to be notified. If the advantage lay in a tax differential established each year at the end of the financial year, it would have been impossible to identify an obligation to notify the regime at issue in advance.

153. In the second part of the third ground of appeal, France Télécom complains that the General Court was incorrect in its determination of the legal consequences arising from the decision relating to La Poste. [34] Thus, the General Court held that the principle of legitimate expectations was not applicable on the ground that the Commission had not commented on the special regime applicable from 1994. According to France Télécom, the Commission decision concerning La Poste constituted a positive act capable of producing legal effects and of creating legitimate expectations regarding the conformity of the regime at issue with the rules on State aid.

2. Assessment

(a) General observations

154. The Commission's examination of the regime at issue originates from the complaint made by a third party, namely the Association

34 — Decision of 8 February 1995 (OJ 1995 C 262, p. 11).

des collectivités territoriales pour le retour de la taxe professionnelle de France Télécom et de La Poste dans le droit commun (Association of local authorities for the reinstatement of the business tax regime applicable to France Télécom and La Poste under the general law).

155. The obligation to notify is a cornerstone of the model for the advance monitoring of State aid established in the Treaty. Under that system, Member States are subject, first, to an obligation to notify each measure capable of falling within the scope of Article 87 EC, once it is likely to constitute new aid, and, secondly, to a 'standstill' obligation, set out in Article 88(3) EC. That system confers procedural and substantive guarantees both as regards Member States and potential beneficiaries. [35]

156. In case of a breach of a rule requiring prior notification, Member States are required to bear the consequences thereof as regards both the classification of the measure at issue as unlawful aid and the possibility of relying on the general principles of law.

157. Furthermore, in so far as France Télécom claims that it was impossible to determine, on the date of entry into force of the special regime, whether that regime would establish an advantage capable of constituting State aid, it is important to note that neither the particularly complex nature of the regime at issue nor the recurring nature of the measure capable of constituting State aid may release the Member State from its obligation to notify. On the contrary, in the examination procedure initiated by the Commission, the steps which may be taken in a spirit of cooperation in good faith by the Member State and the Commission may result in solutions appropriate to the specific features of the measure in question.

158. A Member State which wishes to grant aid in derogation from the Treaty rules has a duty to cooperate with the Commission. That principle applies *a fortiori* to a Member State which has failed to notify an aid scheme to the Commission in breach of Article 88(3) EC. [36]

159. Furthermore, according to settled case-law, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union. [37]

160. It is also apparent from the case-law that in order for a claim to entitlement to the protection of legitimate expectations to be well founded, the European Union authority must have given precise assurances such as to give rise to a legitimate expectation on the part of

35 — See, in this regard, judgment of 9 June 2011 in Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others* v *Commission*, paragraph 93 and the case-law cited.

36 — *Diputación Foral de Vizcaya and Others* v *Commission*, paragraph 152.

37 — See, in particular, Case 112/80 *Dürbeck* [1981] ECR 1095, paragraph 48.

the person to whom they are given and that the assurances must be in accordance with the applicable rules. [38]

161. A Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 88 EC cannot rely on the legitimate expectations of the beneficiaries in order to release itself from the obligation to take the measures necessary to implement a Commission decision ordering it to recover the aid. [39]

162. The Court of Justice held that the same applies, *a fortiori*, in the case of a Member State which invokes the protection of legitimate expectations for its own benefit although it has failed to fulfil the obligation to notify. [40]

163. Moreover, the Court has consistently held that a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus from declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances. [41]

164. Lastly, I would observe that the refund of State aid of a fiscal nature may, in the case of an individual, involve payment to the State of sums corresponding to a tax for which that individual was not liable. Such a measure therefore involves recovery which affects a fundamental right recognised in Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'), [42] on the right to property, and in Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, [43] on entitlement to the peaceful enjoyment of possessions.

(b) The judgment under appeal

165. At paragraphs 259 and 262 of the judgment under appeal, after correctly setting out the rules governing the right to rely on

38 — Case C-414/08 P *Sviluppo Italia Basilicata* v *Commission* [2010] ECR I-2559, paragraph 107, and Case C-369/09 P *ISD Polska and Others* v *Commission* [2011] ECR I-2011, paragraph 123 and the case-law cited.

39 — *Diputación Foral de Vizcaya and Others* v *Commission*, paragraph 150.

40 — *Diputación Foral de Vizcaya and Others* v *Commission*, paragraph 151.

41 — Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 111 and the case-law cited.

42 — OJ 2010 C 83, p. 389.

43 — Signed in Rome on 4 November 1950 ('the ECHR').

the principle of the protection of legitimate expectations,[44] the General Court held that, pursuant to Article 14 of Regulation No 659/1999, the protection of the legitimate expectations of the recipient of the aid could be relied upon,[45] provided that the recipient has sufficiently precise assurances, arising from a positive action taken by the Commission, which leads it to believe that a measure does not constitute State aid for the purposes of Article 87(1) EC.

166. The General Court correctly held that, by contrast, where the Commission does not give an express opinion on a measure which has been notified to it, its silence cannot, on the basis of the principle of the protection of the legitimate expectations of the undertaking which is the recipient of State aid, preclude recovery of that aid.[46] It rightly acknowledged, however, that exceptional circumstances could be taken into account.

167. In that regard it need only be stated that the General Court cannot be alleged to have made any error regarding the identification of those circumstances, as it gave exhaustive consideration at paragraphs 263 to 268 of the judgment under appeal to all the arguments put to it which might constitute such circumstances.

168. Among the exceptional circumstances cited was the examination by the Commission of Article 21 of Law No 90-568, at the end of which the Commission concluded, in the decision concerning La Poste, that the reduction of the tax bases applying to La Poste did not constitute State aid.

169. As regards the Commission's silence in the decision on La Poste and the resulting legal consequences for the examination of the regime applying to France Télécom, it is sufficient to point out that it is evident from the system of preventive control concerning State aid operated by the Commission and, in particular, from the prohibition on implementing new aid before a final decision has been adopted that the existence of a Commission decision ruling on the compatibility of such aid cannot be in any doubt. That applies *a fortiori* where, as in this case, the aid has not been notified to the Commission pursuant to Article 88(3) EC, since that undermines the legal certainty that the above provision aims to guarantee.

170. Consequently, the General Court was right to hold that none of the arguments put forward by France Télécom could be considered to be an expression of a Commission decision. That is particularly so as

44 — See Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission* [1987] ECR 1155, paragraph 44, and Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and ECR II-1305, paragraph 104 and case-law cited.

45 — Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16.

46 — See, to that effect, Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 44.

authorisation for a tax regime at issue cannot be inferred merely from the Commission's silence.

171. France Télécom's argument at paragraph 99 of the appeal, to the effect that the General Court found that it was impossible, on the date on which the regime at issue was established, to determine whether that regime would introduce State aid, has already been discussed in the arguments relating to the first ground of this appeal.

172. Having regard to the foregoing considerations, the third ground of appeal must be rejected as unfounded.

B — *The fifth ground of appeal relating to a breach of the principle of legal certainty*

1. Claims of the parties

173. The first part of the fifth ground of appeal alleges a failure to state reasons for the judgment under appeal and an error in law due to the fact that it is impossible to determine the amount that must be recovered.

174. France Télécom claims that the General Court did not respond to the argument that, in the light of the circumstances of the case, the recovery obligation offended against the principle of legal certainty.

175. The second part of the ground of appeal alleges an error in law regarding the evaluation of the methods used to estimate the amount of the aid. France Télécom claims that the General Court erred in law in finding, first, that the Commission was right to establish a range on the basis of the approximate values provided by the French authorities in the formal investigation procedure and, secondly, that an infringement of the principle of legal certainty therefore could not be established. According to France Télécom, the judgment under appeal contains no reasoning in that regard.

176. France Télécom claims that the relevant estimates were not supplied by the French authorities with a view to determining the true extent of a tax differential during the period from 1994 to 2002. Those estimates were submitted in order to show that any undertaxation of the undertaking was broadly offset by its overtaxation during the initial years of the special tax regime laid down by Law No 90-568. In those circumstances, France Télécom takes the view that those approximate assessments could not reflect the level of taxation to which the undertaking would have been subject under the general law and that, on that

basis, the Commission should have refrained from ordering the recovery of the aid.

177. Consequently, according to France Télécom, the General Court conceded wrongly and without stating reasons in the judgment under appeal in that regard that the Commission could rely on imprecise and hypothetical approximate values to quantify the advantage that the undertaking had been able to enjoy.

2. Assessment

178. It is apparent from the case-law that the obligation to state reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the rules governing the matter in question. [47]

179. It is sufficient to establish in this regard that, at paragraphs 296 to 300 of the judgment under appeal, after correctly citing the case-law applying in the context of the recovery of State aid, the General Court was at pains, at paragraphs 301 to 305 of that judgment, to apply that case-law to the circumstances of this case, without failing to fulfil its obligation to give reasons for its decision.

180. It should also be noted that France Télécom's situation has already given rise to a judgment by the Court [48] declaring that the French Republic had not only failed to recover aid deemed to be unlawful but that it had also failed to fulfil its obligation of co-operation in good faith under Article 10 EC.

181. In that judgment, the Court held that no provision of Community law required the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information

47 — See, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 166 and the case-law cited.

48 — *Commission* v *France*.

enabling the recipient to work out that amount itself, without undue difficulty. [49]

182. The General Court was therefore right to confirm the lawfulness of the contested decision in so far as it does no more than indicate a range for the amount of aid to be recovered, in compliance with the principle of legal certainty.

183. The fifth ground of appeal must therefore be rejected as unfounded.

IX — Additional observations on the status of recipients as regards the recovery of unlawful aid in European Union law

184. Before concluding, I should like to point out that the following observations do not challenge the accuracy of the analysis set out in the judgment under appeal; I consider that the interpretation adopted by the General Court's interpretation is lawful.

185. It is apparent from settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful. [50] Thus, the Member State to which such a decision requiring recovery of illegal aid is addressed is obliged under Article 249 EC to take all measures necessary to ensure implementation of that decision. [51] Moreover, it has been consistently held that the obligation incumbent on a Member State to abolish aid regarded by the Commission as being incompatible with the common market has as its purpose to restore the previous situation existing on the European Union market. [52]

186. If, in this case, the Commission decision declaring State aid to be unlawful and ordering its recovery is upheld by a judgment of the Court of Justice, it is necessary to consider the legal remedies that may be available at this juncture to potential recipients of the aid in question.

187. To my mind, in France Télécom's case, the main difficulty lies in its obligation to effect a potential refund, in view of the fact that the contested decision is based on very

49 — See, inter alia, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39.

50 — See, inter alia, Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 16; Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 38; and Case C-507/08 *Commission* v *Slovakia* [2010] ECR I-13489, paragraph 42.

51 — See Case C-209/00 *Commission* v *Germany* [2002] ECR I-11695, paragraph 31; Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 21; and *Commission* v *France*, paragraph 42. The Member State must succeed in actually recovering the sums owed (see *Commission* v *Greece*, paragraph 44).

52 — Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 21, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 64.

variable estimates and not on a simulated tax model based on the retroactive application of business tax using the tax bases actually applying to France Télécom. [53]

188. A Member State which is obliged to recover unlawful aid is thus free to choose the means by which it will fulfil that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of European Union law. [54]

189. It is common ground that the term 'European Union law' covers the fundamental rights conferred on individuals by the Charter of Fundamental Rights. It follows that the existence of an absolute obligation on the part of the Member States to effect recovery must not undermine the fundamental rights of persons who may have benefited from the measures granted by the national authorities in breach of the Treaty.

190. In that regard, I note that recovery of State aid requires the recipient to refund the advantage from which it has benefited as a result of the aid granted. The measure therefore involves a transfer of assets from the beneficiary to the Member State. [55] If the recipient does not agree to carry out such a measure of its own accord, its only recourse is to the courts, which will, after a fair hearing, find against the recipient concerned.

191. Therefore, as soon as the issue involves the rights guaranteed by the Charter of Fundamental Rights, such as protection of the right to property, [56] the unconditional obligation to effect recovery incumbent on the Member State cannot automatically give rise to a corresponding obligation for individuals to effect a refund.

192. On the contrary, to my mind it cannot be disputed that an obligation to effect a refund must be open to challenge in a fair hearing by the recipient, for whom it must be possible to obtain all the procedural and substantive guarantees resulting from the Charter of Fundamental Rights and the ECHR. [57]

53 — I should add that the question of the calculation of the extent of the obligation to effect recovery is a point of fact which does not fall within the scope of the Court's jurisdiction in an appeal.

54 — Case C-210/09 *Scott and Kimberly Clark* [2010] ECR I-4613, paragraph 21, and *Commission* v *Slovakia*, paragraph 51.

55 — That aspect is particularly apparent in the case of recovery of fiscal aid, where the recipient is required to carry out a transfer of the assets corresponding to the advantage which it enjoyed when the taxation was lower.

56 — See Article 17 of the Charter of Fundamental Rights and Article 1 of the Protocol to the ECHR.

57 — Article 47 of the Charter of Fundamental Rights, entitled 'Right to an effective remedy and to a fair trial', is based on Article 6(1) of the ECHR which provides that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

193. Admittedly, the recipient is no longer justified in disputing the actual existence of State aid or its unlawfulness. However, even if the legality of the contested decision has also been confirmed by a judgment of the General Court, it is permissible, in my view, for the recipient to dispute its obligation to effect a refund as well as the extent of that obligation. [58]

194. These considerations must be distinguished from the case-law which has conferred on recipients the possibility of invoking before a national court an exceptional circumstance that was such as to create legitimate expectations that the aid granted was lawful, such expectations precluding the Commission from ordering the recovery of the aid concerned pursuant to Article 14(1) of Regulation No 659/1999. [59]

195. The administrative procedure provided for in Article 88 EC leads to the adoption of a Commission decision addressed to the Member State concerned. The recipient undertaking is neither party to that procedure nor addressee of the Commission decision, even though it may bring an action for annulment of that decision. [60] The Court has also confirmed that interested parties, [61] except for the Member State responsible for granting the aid, do not have the right to consult the documents in the Commission's administrative file in the course of the procedure for reviewing State aid. [62]

196. Consequently, the judgment under appeal cannot prevent the beneficiary from disputing before the national courts the sums to be refunded or even the existence of its obligation to effect a refund. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

58 — I note that, in accordance with Article 14(3) of Regulation No 659/1999, the requirement to recover unlawful aid laid down by a Commission decision must be met without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of that decision.

59 — *Commission* v *Italy*, paragraph 111 and the case-law cited. See also Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 103.

60 — It is clear from the case-law that interested parties other than the Member State responsible for the grant of the aid cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that State. See *Commission* v *Sytraval and Brink's France*, paragraph 59; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 82; and Case T-62/08 *ThyssenKrupp Acciai Speciali Terni* v *Commission* [2010] ECR II-3229, paragraph 162. I should add that the capacity to challenge Commission decisions before the General Court which may be afforded to a beneficiary does not mean that the beneficiary is the addressee of such a decision.

61 — Under Article 1 of Regulation No 659/1999, the beneficiary of the aid comes under the category of 'interested party' which, in accordance with Article 6(1) of that regulation, may submit comments, following a decision to initiate the formal investigation procedure, within a prescribed period which does not normally exceed one month.

62 — See Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885.

X — Conclusion

197. In conclusion, I propose that the Court should:

— dismiss the appeal brought by France Télécom SA;

— order France Télécom SA to pay the costs, and

— order the French Republic to pay its own costs.