JUDGMENT OF THE COURT (Third Chamber)

8 December 2011 [1]

In Case C-81/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 February 2010,

France Télécom SA, established in Paris (France), represented by S. Hautbourg, L. Olza Moreno and L. Godfroid, avocats,

appellant,

the other parties to the proceedings being:

European Commission, represented by E. Gippini Fournier and D. Grespan, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

1 Language of the case: French.

French Republic, represented by G. de Bergues and J. Gstalter, acting as Agents,

applicant at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta (Rapporteur), E. Juhász and D. Šváby, Judges,

Advocate General: N. Jääskinen,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 31 March 2011,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

Judgment

1 By its appeal, France Télécom SA ('FT') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') in Joined Cases T-427/04 and T-17/05 *France and France Télécom* v *Commission* [2009] ECR II-4315 ('the judgment under appeal'), by which that court dismissed the action for annulment of Commission Decision 2005/709/EC of 2 August 2004 concerning State aid paid by France to FT (OJ 2005 L 269, p. 30) ('the contested decision').

The facts of the dispute

2 In the judgment under appeal, the General Court set out the legal background and the facts of the dispute before it as follows:

'…

2. Liability of FT to business tax

General business tax regime

16 Business tax is a local tax, the rules of which are laid down by statute and codified in the General Tax Code.

17 … business tax is payable each year by natural or legal persons regularly pursuing a self-employed occupation as at 1 January.

18 … 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.

19 It follows that the business tax is not based 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 is established.

20 … 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 reference period and (ii) a proportion of the salaries paid during the reference period.

21 … the reference period … is to be the penultimate year preceding the year of taxation, where the financial year coincides with the calendar year, or, where that is not the case, the financial year ending during the penultimate year preceding the year of taxation.

22 … the business tax is to be established in each municipality in which the taxable person has premises or land, on the basis of the rental value of the assets situated in that municipality or connected with it, and the salaries paid to staff.

…

Rules applicable to FT

Principle of liability to tax under the ordinary law

25 Law No 90-568 [of 2 July 1990 on the organisation of the public postal and telecommunications services (JORF of 8 July 1990, p. 8069) ("Law No 90-568")], by which FT … [was] founded, lays down special tax provisions.

26 … subject to [certain] exceptions … FT is [in principle] to be subject to duties and taxes … payable by private undertakings carrying out the same transactions.

Fixed levy

27 … FT was, until 1 January 1994, to be subject only to such duties and taxes as were actually borne by the State. Consequently, FT was not liable inter alia for corporation tax or local taxes, such as business tax. In exchange, FT had to pay, for the years 1991 to 1993, a contribution fixed each year by the Finance Law, subject to 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 …

Special tax regime

…

30 The tax [payable by way of business 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 through the application of a national weighted average rate, based on the rates voted the previous year by all the local authorities …

31 Furthermore, a rate of 1.9% – instead of 8% – was applied to FT in respect of management costs, that is to say, an additional sum levied by the State to offset the expenses incurred by the tax authorities in assessing tax and collecting business tax for the local authorities.

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

…

3. Administrative procedure

35 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 under the general law of the business tax regime applicable to FT and La Poste) 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 municipalities as a result of the application of a national weighted average rate.

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

37 By letter of 26 September 2001, the French Republic replied that the special tax regime did not constitute State aid, because it did not confer any advantage on FT and entailed no loss of State resources.

38 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 FT from 1991 to 1993 and of the special tax regime ("the decision initiating the formal investigation"). The decision initiating the formal investigation was notified to the French Republic by letter of 31 January 2003. At the request of the French authorities, the Commission notified a rectified version of that decision on 7 March 2003. In the decision initiating the formal investigation, the Commission estimated the advantage conferred on FT as being worth approximately FRF 1 000 million per annum since 1994 (paragraphs 73 and 74). The initiation decision was published on 12 March 2003 (OJ 2003 C 57, p. 5).

...

4. The contested decision

53 On 19 and 20 July 2004, at its 1 667th meeting, the College of Commissioners approved a draft decision finding that FT had received State aid during the period from 1994 to 2002 by virtue of the special tax regime ("the aid at issue") 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 – after "legal linguistic revision".

54 On 2 August 2004, the Commission adopted [the contested decision]. It was notified to the French Republic on 3 August 2004.

…

61 In the contested decision, the Commission found, first, that the fixed levy, provided … 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 [of the contested decision]).

62 On the other hand, the Commission found that the special tax regime applicable from 1994 to 2002 introduced State aid consisting in the difference between the tax which FT should have paid under the general law and the amount of business tax actually paid ("the tax differential"). Moreover, that new aid, implemented unlawfully in breach of Article 88(3) EC, was incompatible with the common market. It therefore had to be recovered (recitals 34 to 53 of the contested decision).

63 The Commission gave the following reasons for categorising the special tax regime as State aid for the purposes of Article 87(1) EC.

64 First, the Commission set out the reasons why it considered it 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 FT had had to pay during the period from 1991 to 1993 (recitals 35 to 41 of the contested decision).

65 First of all, the Commission states that Law No 90-568 had established two successive and distinct tax regimes: (i) an exemption regime, applicable from 1991 to 1993, under which a fixed levy replaced the general law taxes, including business tax, and (ii) a special regime introduced by way of derogation, as a result of which business tax was underpaid and which initially applied from 1994 and which was terminated with effect from the 2003 tax assessments (recitals 36 and 38 of the contested decision).

…

67 Consequently, the Commission found that it could not agree that the tax differential from which FT had benefited between 1994 and 2002 had been offset by the fixed levy paid between 1991 and 1993, which was not connected with business tax either specifically by Law No 90-568 or by the method by which it was calculated (recital 38 of the contested decision).

68 Moreover, the Commission found that payment of the fixed levy at issue was more akin to paying a share of the earnings to the owner of the capital than to taxation. In those circumstances, it was only by way of exception that the Commission had been able to accept that the levy offset the total exemption from business tax from which FT had benefited from 1991 to 1993. A normal application of the law could, on the contrary, have led to the conclusion that that exemption constituted State

aid, the amount of which should have been added to that of the tax differential enjoyed by FT since 1994 under the special tax regime (recitals 38 and 39 of the contested decision).

69 Lastly, the Commission found that the argument that the payments made by FT to the State between 1991 and 1993 should be set off against the under-taxation of FT from 1994 would involve categorising the surplus tax paid by FT (as compared with the tax payable under the general law) between 1991 and 1993 as a tax credit, which was not the aim of Law No 90-568. Nor, according to the Commission, does that a posteriori theoretical justification reflect the normal application of French tax law: rather, it is designed solely to prevent recovery of the State aid granted to FT (recital 40 of the contested decision).

70 Secondly, the Commission found that the tax differential represented an advantage for FT, granted from resources which should have been incorporated into the budget of the State and accordingly constituted State aid (recital 42 of the contested decision).

71 Thirdly, in recitals 43 and 44 of the contested decision, the Commission stated that, in order to determine the net advantage from which FT 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 …

72 Fourthly, the Commission – rejecting the arguments submitted by the French Republic to the effect that the aid at issue could not be recovered because of the limitation rules laid down in Article 15 of [Council] Regulation [EC] No 659/1999 [of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1)] – found that the aid at issue was new aid, not existing aid (recital 45 [of the contested decision]).

73 First, the Commission stated that the expiry of the limitation period laid down in Article 15 of Regulation No 659/1999 did not have the effect of converting new aid into existing aid, but only of preventing the Commission from ordering the recovery of aid granted more than 10 years before the date on which time began to run for the purposes of barring recovery (recitals 46 to 48 of the contested decision).

74 Second, the Commission argued that Law No 90-568 had established an aid scheme and that any limitation concerns only the aid granted under that scheme and not the scheme itself. The point from which time starts to run is therefore the day on which each form of aid was actually granted to FT, that is to say, on the date, each year, on which the business tax was due (recital 49 of the contested decision).

75 Third, the Commission added that the limitation period had been interrupted by the request for information sent to the French Republic on 28 June 2001 (recital 50 of the contested decision).

76 The Commission therefore 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 at issue had to be recovered in its entirety (recital 51 of the contested decision).

77 Fifth, 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 the Commission could see no legal basis on which it could be declared compatible with the common market (recital 52 [of the contested decision]).

78 Consequently, in recital 53 of the contested decision, the Commission concluded that (i) the business tax regime applicable to FT during the period from 1991 to 1993 did not constitute State aid and (ii) the tax differential from which FT 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 and which had been unlawfully implemented, and which must therefore be recovered.

79 However, the exact amount to be recovered could not be determined, owing to the discrepancies in the information submitted by the French authorities during the administrative procedure. The Commission estimated that the aid to be recovered was in the amount – net of interest – of between EUR 798 million and EUR 1 140 million (recitals 54 to 59 [of the contested decision]).

80 In recital 54 of the contested decision, the Commission referred to a report presented to the French Parliament by the Directorate-General for Taxes in November 2001, according to which "the immediate normalisation of the conditions of taxation of FT in relation to business tax would involve, at an unchanged rate, an over-taxation of almost 198 million euros for the company".

81 In addition, the Commission relied on the estimate of 15 May 2003, the results of which are set out in tabular form in recital 54 of the contested decision. According

to the figures produced by the French Republic, the aggregate theoretical taxation of FT under the general law, for the years 1994 to 2002, was EUR 8 362 million. The aggregate actual taxation charged to FT for the same years, under the special tax regime, is EUR 7 222 million. The tax differential enjoyed by FT during the period from 1994 to 2002 is therefore EUR 1 140 million.

82 The Commission also pointed out that, by letter of 29 January 2004, the French authorities had informed it of the amount of the tax charged to FT, under the general law, for the year 2003 (EUR 773 million) and confirmed that the estimate of 15 May 2003 was sound (recital 55 of the contested decision). It was not until the meetings held on 16 and 23 June 2003 that the French authorities contested the reliability of those figures (recitals 56 and 57 of the contested decision).

83 On 5 July 2004, of the French authorities submitted a new estimate. This gave different results, reproduced in tabular form in recital 58 of the contested decision. The aggregate theoretical taxation of FT under the general law, for the years 1994 to 2002, had been reduced to EUR 8 020 million. The tax differential enjoyed by FT during the period from 1994 to 2002 is therefore EUR 798 million.

84 Owing to the contradictory information provided by the French Republic during the administrative procedure, the Commission found that it was unable to determine the amount to be recovered, which was between EUR 798 million and EUR 1 140 million, plus interest. According to the Commission, the exact amount to be recovered had 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 of the contested decision).

85 In consequence of all the foregoing, the enacting terms of the contested decision state:

"*Article 1*

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

Article 2

1. [The French Republic] shall take all necessary measures to recover from FT the aid referred to in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision.

3. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery.

…

Article 3

[The French Republic] shall inform the Commission, within two months of notification of this Decision, of the measures that it proposes to take and that it has already taken to comply with it. For that purpose, [the French Republic] shall use the questionnaire annexed to this Decision.

Article 4

This Decision is addressed to the French Republic."

86 On 25 October 2006, the Commission brought infringement proceedings, claiming that the Court of Justice should declare 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 that decision, under the fourth paragraph of Article 249 EC and under Article 10 EC.

87 By judgment of 18 October 2007 in Case C-441/06 *Commission* v *France* [2007] ECR I-8887, "the Court of Justice held that the action was well founded."

The procedure before the General Court and the judgment under appeal

3 In their actions before the General Court for annulment of the contested decision brought on 13 October 2004 and 10 January 2005 respectively, the French Republic and FT submitted, in essence, that the Commission was incorrect in finding, first, that FT had benefited from unlawful aid and, second, that the aid had to be repaid.

4 By the judgment under appeal, the General Court rejected all the pleas put forward by the French Republic and FT.

Forms of order sought by the parties

5 FT claims that the Court should:

— set aside the judgment under appeal;

— give final judgment as to the substance, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, and grant the forms of order sought by FT at first instance;

— in the alternative, refer the case back to the General Court; and

— order the Commission to pay the costs.

6 The French Republic claims that the Court should:

— set aside the judgment under appeal;

— give final judgment as to the substance, in accordance with Article 61 of the Court's Statute;

— uphold the applicants' claims at first instance;

— in the alternative, refer the case back to the General Court; and

— order the Commission to pay the costs.

7 The Commission contends that the appeal should be dismissed and FT ordered to pay the costs.

The appeal

8 FT relies on five grounds of appeal, alleging that the General Court: (i) erred in law by classifying the special tax regime as State aid, when the existence of an advantage for FT depended on factors unrelated to that regime; (ii) misconstrued the concept of State aid in that the Commission failed to take account of the overall tax regime applicable to FT during the years from 1991 to 2002; (iii) failed to have proper regard for the principle of the protection of legitimate expectations; (iv) failed to state reasons in the judgment under appeal with regard to the principle of limitation and; (v) erred in law and failed to state adequate reasons for the judgment under appeal with regard to the principle of legal certainty.

The first ground of appeal, alleging that the General Court erred in law by classifying the special tax regime as State aid, when the existence of an advantage for FT depended on factors unrelated to that regime

Arguments of the parties

9 FT submits that the existence of any financial advantage that may have been conferred on it as compared with the position under the general law depends on a range of variables, such as the different rates of business tax applicable in the French municipalities in which taxable assets are held and the geographical location of those assets. Consequently, the special tax regime applicable to FT from 1994 was not advantageous in itself and, as a result, the General Court should have rejected the classification of the tax regime at issue as State aid.

10 FT takes the view that the General Court misconstrued the concept of State aid by finding, at paragraph 323 of the judgment under appeal, that the existence of any advantage did not depend on the specific features of the tax regime at issue, but on factors unrelated to that regime, the effects of which may be determined only ex post. The advantages or disadvantages deriving from those factors could not lead to a measure being characterised as aid when, at the time of its adoption, it could not be so characterised.

11 The French Republic submits that a special tax regime is not in itself capable of constituting State aid. Such a regime would not necessarily confer a selective advantage on the undertakings concerned.

12 The Commission considers that the ground of appeal in question is inadmissible, since it was not raised at first instance.

13 The Commission also maintains that the ground is unfounded. It was not possible to determine in advance, for each year, the precise level of taxation under the special regime. However, that regime could have led to less tax being payable by comparison with the position under the general law on business tax.

14 The Commission adds that it is not unusual for the examination of State aid to require account to be taken of events that took place after the occurrence of the measure in question, in order to determine whether such aid in fact existed and to quantify it in order to recover the advantage obtained.

Findings of the Court

15 With regard to the Commission's claim that the first ground of appeal is inadmissible, it should be noted that that ground, which forms part of the submissions relating to the existence of State aid, was put forward at first instance in the context of the first and second pleas relied on before the General Court.

16 As regards whether that ground is well founded, according to settled case-law, the definition of aid is more general than that of a subsidy. It includes not only positive benefits but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 45 and the case-law cited).

17 It should also be noted that the concept of advantage that is intrinsic to the classification of a measure as State aid is an objective one, irrespective of the motives of the persons responsible for the measure in question. Accordingly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. It is established case-law that Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (see Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 46 and the case-law cited).

18 As regards the present case, it should be noted that the tax regime to which FT was subject during the second period under consideration, namely during the years from 1994 to 2002, constituted an exception to the general law regime. In particular, that company benefited from specific tax treatment at national level, characterised by the fact that business tax was calculated on the basis of a weighted average rate, as opposed to the various rates applicable in the different local authorities, whereas the rates to which other undertakings were subject were those voted annually by those

authorities. Moreover, FT was subject to a single rate of business tax in its principle place of business, whereas other undertakings were taxed at the different rates voted by the local authorities in the territory within which those undertakings had establishments. A rate of 1.9 % was also applied to FT, as opposed to the rate of 8 % applicable to other undertakings, in respect of management costs.

19 As regards the argument relied on in the present appeal that the General Court's examination of the tax regime at issue should have taken account of a number of variables and extraneous factors, it should be noted that, even though, given the particular characteristics of that regime, the Commission was not in a position to determine in advance for each tax year the precise level of taxation for that year, it is nevertheless accepted that the regime was capable of resulting and in fact resulted – as is apparent from recital 59 of the contested decision and paragraph 225 of the judgment under appeal – in FT's liability to business tax being lower than it would have been if the general law business tax regime had been applied.

20 It should also be noted that, irrespective of the rates of business tax adopted by the local authorities, FT benefited in all circumstances from a reduced rate in respect of management costs.

21 In those circumstances, the General Court was correct to hold, at paragraph 323 of the judgment under appeal, that the finding of the existence of aid depended on a number of 'circumstances unrelated to' the special tax regime, such as the fact that the business tax was charged annually and the level of the tax rates voted each year by the authorities in the territory in which FT had establishments.

22 Contrary to the French Republic's and FT's claims, such circumstances do not in any way preclude the possibility that, even at the time of its adoption, the special tax regime could have been classified as State aid for the purposes of Article 87(1) EC. Indeed, it is necessary to make a distinction between, on the one hand, the adoption of an aid scheme, namely in the present case the special tax regime, and, on the other, the grant of annual aid to FT on the basis of that regime, the precise total amount of which depended on certain external factors.

23 As the Advocate General stated at point 59 of his Opinion, the present case 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 FT, as opposed to the general law regime, and, second, to a variable element, which depends on factual circumstances, namely the location of premises or land in the various local authorities and the tax rate applicable in those authorities.

24 On account of its specific features, as described at paragraph 18 above, the special tax regime could have resulted in FT's liability to tax being less than it would have been had it been subject to business tax under the general law regime.

25 The fact that FT's liability to professional tax was indeed lower as of 1994 is directly attributable to the specific features of the special tax regime applied to it, even though the exact amount of annual aid received by it under that regime depended on certain factors unrelated to the regime.

26 It is also apparent from the structure of the judgment under appeal that paragraph 323 of that judgment, which refers to circumstances unrelated to the special tax regime, concerns only the annual aid granted to FT under the special tax regime. In fact, that paragraph forms part of the analysis of the plea relating to the limitation in time of

the Commission's power to recover unlawful aid. The findings of the General Court in connection with that plea can relate only to aid actually received and, therefore, concern only the aid from which FT benefited under the special tax regime.

27 It follows from those considerations that the General Court did not err in law in finding that the special tax regime conferred an advantage on FT for the purposes of Article 87(1) EC, even though the exact amount of aid granted under that regime had to be determined by reference to certain factors unrelated to the regime.

28 The first ground of appeal is therefore unfounded.

The second ground of appeal, alleging that the General Court misconstrued the concept of State aid in that the Commission failed to take account of the overall tax regime applicable to FT during the years from 1991 to 2002

29 The second ground of appeal relied on by FT is subdivided into three parts. It is appropriate to examine, first, the second part, relating to the purported misinterpretation of the contested decision. Second, the first and third parts of this ground of appeal will be examined together as they are closely connected.

The second part of the second ground of appeal, alleging that the General Court erred in law in its misinterpretation of the contested decision and substituted its own grounds

— Arguments of the parties

30 FT maintains that the General Court misinterpreted the contested decision by concluding that the Commission considered that the aid at issue did not consist in the special tax provisions applicable to that company but in the tax differential established each year between the amounts actually paid by the company and the business tax that would have been due under the general law regime, thus substituting its own grounds for those of the decision. FT also submits that that interpretation is inconsistent with the enacting terms of the contested decision, according to which the aid at issue consists in the business tax scheme applicable to that company during the period from 1 January 1994 to 31 December 2002. The Commission therefore relied not on the fact that the tax differential established with effect from 1994 arose on an annual basis, but on other reasons of a different nature.

31 The Commission argues in reply that the General Court's reading of the contested decision in the judgment under appeal is consistent with the terms of the decision. It states that it was unnecessary to repeat in the enacting terms of the decision that the tax differential constituted an advantage. The aid from which FT benefited, which consisted in the under-taxation of that company as regards business tax between the years 1994 and 2002, was made available as a result of the business tax regime applicable to the company during that period.

— Findings of the Court

32 At paragraph 201 of the judgment under appeal, the General Court examined the part of the contested decision which found that the aid derived from a tax differential representing the difference between the amount which FT would have had to pay by way of business tax contributions if it had been subject to the tax under the general law and the amount which it was actually charged under the tax regime at issue. The General Court verified that there was a genuine tax differential at paragraphs 219 to 225 of the judgment, without its findings in that regard being called into question by FT.

33 As regards the purported substitution of grounds on the part of the General Court, it is sufficient to note that the court did not exceed its powers of review in substituting its own assessment for that of the Commission, since the tax differential in question and the fact that the business tax is paid annually, as provided for in the General Tax Code, form an integral part of the reasoning adopted by the Commission in the contested decision.

34 Recital 42 of the contested decision states that 'the difference between the business tax actually paid by FT 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 FT granted through resources which would otherwise have been incorporated in the budget of the State'. Recital 49 of the decision states that the professional tax was payable annually. Furthermore, the point is also made that business tax is payable annually at recital 25 of the decision initiating the formal investigation, to which recital 15 of the contested decision refers.

35 Consequently, the General Court's interpretation to the effect that the aid at issue consisted in the tax differential deriving from the application of the provisions establishing a special regime is consistent with the enacting terms of the contested decision, which categorises the regime applicable to FT between the years 1994 and 2002 as aid which is incompatible with the common market. Indeed, it is by virtue of that special regime that FT was not required to pay business tax in the amounts for which it would normally have been liable under the general law tax regime.

36 The second part of the second ground of appeal must therefore be rejected.

The first and third parts of the second ground of appeal, alleging that the General Court misconstrued the concept of State aid since it failed to carry out an overall analysis of the tax regime applicable to FT

— Arguments of the parties

37 FT submits that the General Court failed to have regard to the obligation to carry out a comprehensive examination of all the provisions under the regime which derogated from the general law. In order to determine whether there was an advantage, the General Court should have compared the charges imposed under the derogating regime with the level of taxation that would have been applied to it if the company had been taxed under the general law regime. However, it confined that comparison to the period from 1994 to 2002, without taking account of the tax burden borne by FT during the period from 1991 to 1993.

38 FT is of the view that neither the fact that the tax is paid annually nor the differences between the two tax periods under consideration could justify a partial analysis confined to the tax regime applicable as of 1994. The General Court was therefore incorrect in refusing to take account of the fact that the company was over-taxed as a result of the fixed levy during the period from 1991 to 1993 when compared with the level of taxation it would have had to bear if it had been subject to the general law on business tax during that period. Even if the General Court were entitled in its analysis to take account of the fact that the business tax is payable annually, it should have recognised that, as regards the initial tax years under the general derogating tax scheme, namely from the years 1991 to 1993, the company was over-taxed.

39 FT is also of the view that the General Court erred in law in relying, at paragraph 207 of the judgment under appeal, on Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901. The General Court was incorrect in concluding, in reliance on that judgment, that FT benefited from a reduction in charges for the period from 1994 to 2002 which could not be offset by a specific charge imposed on that company in respect of the period from 1991 to 1993.

40 Similarly, the French Republic maintains that the General Court misconstrued the concept of advantage when it adopted a restrictive approach as regards the link that must exist between an exemption and a charge established by the tax regime at issue. The General Court should have undertaken an overall analysis covering both the derogating scheme established by Law No 90-568 – in particular any advantages conferred on FT by that scheme – and the charges payable by FT under the general law.

41 The Commission submits that it is not possible to 'offset' aid by invoking charges of a different nature that are unconnected with the aid. That applies not only to the question of State resources but also that of the advantage conferred. A loss of State resources cannot be saved from categorisation as aid simply because such loss is 'set off' against other sums paid to the State in accordance with other obligations. Since

there is no sufficient connection between the tax scheme applicable between 1991 and 1993 and the scheme in force as of 1994, the 'offsetting' supposition underlying FT's argument is unfounded.

— Findings of the Court

42 In the light of the arguments put forward by the parties, it is necessary to consider whether the General Court erred in law in finding, at paragraph 218 of the judgment under appeal, that the Commission had been correct in refusing in the contested decision to offset the amounts paid by FT by way of fixed levy from 1991 to 1993 against the tax differentials arising from the special tax regime for the period from 1994 to 2002, in order to determine whether that company benefited from State aid for the purposes of Article 87(1) EC.

43 While recognising that, when examining a measure likely to constitute State aid, the Commission is entitled to take account of the specific charges imposed on an advantage, the General Court nevertheless found, at paragraph 207 of the judgment under appeal, that a measure cannot be saved from categorisation as aid where the aid beneficiary is subject to a specific charge which is different from and unconnected with the aid in question. That affirmation on the part of the General Court is based on a correct interpretation of Article 87(1) EC (see Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 34), notwithstanding the fact that it referred incorrectly in that regard to the judgment in Case C-66/02 *Italy* v *Commission*.

44 The General Court therefore did not err in law in finding, at paragraph 208 of the judgment under appeal, that the validity of the French Republic's and FT's argument that the over-taxation of FT between 1991 and 1993, attributable to the fixed levy to which it was subject, offset the tax differential from which that company benefited from 1994 to 2002 depends on the analysis of the objective characteristics of the fixed levy applicable between 1991 and 1993 and on whether it may be regarded as a charge which is connected with the advantage enjoyed by FT as a result of its being taxed under the special regime as of 1994.

45 It should be noted that the levy applicable to FT between 1991 and 1993 was determined by different parameters from those applied with effect from 1994 under the special tax regime. The two tax regimes were in fact based on different legal models and operating parameters.

46 As is apparent from recital 17 of the contested decision and paragraph 209 of the judgment under appeal, under the tax scheme applicable to FT from 1991 to 1993, it did not have to pay any tax or levy other than the fixed levy. The amount of the fixed levy was established not in accordance with the parameters used to determine the amount of business tax but by reference to the earnings paid to the State by the entity from 1989 to 1990. The fixed levy was also temporary.

47 On the other hand, under the special tax regime applicable from 1994 for an indefinite period, FT was required, in principle, to pay all the general law taxes. However, the rules governing its liability to business tax derogated from the general law and constituted the special tax regime.

48 In those circumstances, the General Court was entitled to find, at paragraph 213 of the judgment under appeal, that the fixed levy must be regarded not as a charge connected with the introduction of the special tax regime, but rather as a special tax mechanism for FT established for the years prior to 1994. In any event, as the General Court stated at paragraph 215 of the judgment under appeal, the mere fact that the fixed levy and the special tax regime were both introduced by Law No 90-568 does not prove that FT's liability to pay the fixed levy from 1991 to 1993 was connected with the creation of the special tax regime for the years after 1994.

49 The General Court did not, therefore, err in law in concluding, at paragraph 218 of the judgment under appeal, that the Commission was entitled to refuse to apply a set-off between, on the one hand, the amounts paid by FT between 1991 and 1993 by way of fixed levy and, on the other, the tax differentials arising as a result of the special tax regime established for that company for the years 1994 to 2002.

50 Lastly, even if it were the case that the tax regime applicable to FT consisted of two inextricably linked periods, the first entailing over-taxation and the second under-taxation, it is accepted that Law No 90-568 introduced with effect from 1994 a special tax regime intended to be of indefinite duration. That law did not contain any mechanism for offsetting amounts due by way of fixed levy for the period from 1991 to 1993 against amounts due as of 1994 under the special tax regime. It therefore provided no mechanism for determining the point at which over-taxation under the first regime should have been offset under the second regime. As the Advocate General observed at point 100 of his Opinion, that over-taxation should have exhausted its effects at a given time, which necessarily entailed the conferring of an advantage on FT under the special tax regime.

51 The first and third parts of the second ground of appeal cannot therefore be upheld. Accordingly, the second ground must be rejected in its entirety.

The third ground of appeal, alleging breach of the principle of the protection of legitimate expectations

52 The third ground of appeal put forward by FT comprises two parts.

The first part of the third ground of appeal, alleging an error of law as regards the circumstances in which the principle of the protection of legitimate expectations may be relied on

— Arguments of the parties

53 FT claims, with regard to whether it is possible for it to rely on the principle of the protection of legitimate expectations, that the General Court erred in confining the situations in which it is possible to take account of certain exceptional circumstances to cases in which aid has been notified. The fact that, in the present case, it was possible to identify the existence of an advantage only a posteriori, in the light of changing circumstances unrelated to the special tax regime, constitutes such exceptional circumstances.

54 FT states that the General Court did not identify either the legal act that should have been notified or the date on which notification should have occurred. If the advantage consisted in a tax differential established at the end of each tax year, it would be impossible to identify an obligation of prior notification of the tax regime at issue.

55 FT adds that the General Court disregarded the fact that the intentions of the national legislature were among the factors to be taken into consideration for the purpose of determining whether that company could have entertained a legitimate expectation that the tax measure at issue complied with the rules on State aid.

56 The Commission states that undertakings receiving aid can, in principle, have a legitimate expectation that the aid will be deemed lawful only if it is granted in accordance with the procedure laid down in the EC Treaty.

57 It submits that the special tax regime applicable to FT during the period from 1994 to 2002 was introduced by way of derogation, was selective, attributable to the State and applied to a company active in markets open to competition and to trade between Member States. Consequently, the national authorities should have notified the special business tax regime applicable to that company before the date on which that tax became chargeable.

— Findings of the Court

58 It should be recalled, first, that the obligation to notify is one of the fundamental features of the system of control put in place by the Treaty in the field of State aid. Under that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 87(1)

EC and, second, not to implement such a measure, in accordance with Article 88(3) EC, until that institution has taken a final decision on the measure.

59 Consequently, in view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC and a diligent business operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 88(3) EC, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraphs 44 and 45 and case-law cited).

60 Moreover, the Court has held that, where aid has not been notified to the Commission, any apparent failure to act on its part in relation to the measure is irrelevant (see *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 52).

61 With regard to the present dispute, it is accepted that the tax regime at issue, which was introduced by Law No 90-568, was not notified to the Commission.

62 In so far as FT argues that there was no obligation to notify, because it had not been established that there was an advantage, it should be noted that neither the purported complexity of the tax regime at issue nor the periodic nature of the aid measure can release the Member State from its obligation to notify or give rise to any legitimate expectation on the part of the company receiving the aid.

63 As regards the possible relevance of exceptional circumstances which may give rise, notwithstanding the considerations set out in the preceding paragraph, to a legitimate expectation that aid is lawful, it is sufficient to note that the General Court did not err in law in assessing such circumstances in the course of its detailed examination, at paragraphs 263 to 269 of the judgment under appeal, of all the arguments relied on before it in that regard.

64 Consequently, the General Court concluded correctly, at paragraph 270 of the judgment under appeal, that the French Republic and FT had failed to prove the existence of exceptional circumstances enabling them to rely on the principle of the protection of legitimate expectations.

65 It must therefore be concluded that the first part of the third ground of appeal is unfounded.

The second part of the third ground of appeal, alleging an error in law as to the legal consequences flowing from another Commission decision on State aid

— Arguments of the parties

66 FT is of the view that the General Court misinterpreted the legal consequences flowing from the Commission's decision of 8 February 1995 on La Poste (OJ 1995 C 262, p. 11) ('the La Poste decision').

67 FT submits that that decision was a positive act capable of producing legal effects and giving rise to a legitimate expectation that the tax regime at issue complied with the rules on State aid.

68 The Commission states that, since the special tax regime constituted a procedure for imposing business tax which derogated from the general law, it was capable of conferring an advantage on FT. In view of that regime's particular characteristics, notification should have taken place no later than the date on which the business tax for which that company was liable for 1994 became chargeable.

69 The Commission considers that another State aid investigation procedure could not give rise to a legitimate expectation on the part of FT concerning the special tax regime from which it benefited.

— Findings of the Court

70 As stated at paragraphs 59 and 60 above, the recipient of aid cannot, in principle, rely on considerations based on the principle of the protection of legitimate expectations where the aid in question has not been notified to the Commission.

71 The argument based on the La Poste decision does not contain any analysis of the special business tax regime applicable to FT. Accordingly, the General Court could do no other than point out, at paragraph 266 of the judgment under appeal, that the

Commission had expressed no opinion at all on that special tax regime and had not, therefore, taken a view on whether it constituted aid.

72 As regards the argument that FT could have interpreted the context in which the La Poste decision was adopted as a definition of the Commission's opinion on the tax regime at issue, it must be noted that the General Court, without erring in law, rejected that argument at paragraphs 265 to 269 of the judgment under appeal.

73 Consequently, the General Court was entitled to find that there was nothing of relevance in the La Poste decision that could have given rise to any legitimate expectation on the part of FT that the tax regime at issue was lawful in the light of the rules on State aid. The second part of the third ground of appeal is, therefore, unfounded.

74 In the light of the foregoing considerations, the third ground of appeal must be rejected in its entirety.

The fourth ground of appeal, alleging a failure to state reasons in the judgment under appeal with regard to the response to the arguments relating to the principle of limitation

Arguments of the parties

75 FT states that the French authorities explained, in the course of the administrative procedure, that any under-taxation during the period from 1994 to 2002 could not, in any event, be recovered, given that the tax regime at issue was introduced more than

10 years previously. Article 15 of Regulation No 659/1999 provides that Commission's powers to recover aid are subject to a limitation period of 10 years.

76 According to FT, the General Court failed to adjudicate on the principle of limitation thus relied on before it. Instead, it substituted its own grounds in that regard for those of the contested decision. Moreover, the judgment under appeal did not specify the binding legal act which determined the point at which the limitation period began to run. The act which triggered the limitation period was Law No 90-568.

77 The French Republic maintains that the General Court erred in law in finding that the limitation period in respect of the aid at issue could not have started to run before 1994. Even if it were accepted that the special tax regime constituted State aid, the only binding legal act identifiable for the purpose of determining the point at which the limitation period started to run as regards the measure in question was Law No 90-568, which entered into force on 2 July 1990. The Commission decided to initiate the preliminary investigation procedure relating to FT's special tax regime by sending a request for information to the French authorities on 28 June 2001. By that date, the limitation period pertaining to the Commission's duty to recover aid had expired.

78 The Commission submits that the General Court was required to determine only whether recovery of the aid granted to FT under the special business tax regime in force from 1994 was time-barred. Consequently, the complaint that the General Court substituted its own grounds for those of the contested decision cannot be accepted.

79 The Commission states that the rules on limitation relating to State aid concern the recovery of such aid. Aid may be recovered only if it is possible to determine the aid amount. As regards the tax regime at issue, it was possible to identify the advantage only on an annual basis and a posteriori.

Findings of the Court

80 As regards the principle of limitation, Article 15(1) of Regulation No 659/1999 provides that the powers of the Commission to recover aid are to be subject to a limitation period of 10 years. It is apparent from Article 15(2) of the regulation that the limitation period does not begin to run until on the day on which the unlawful aid is awarded to the beneficiary. Consequently, the decisive factor in determining the starting point of the limitation period referred to in Article 15 is when the aid was in fact granted.

81 It is apparent from Article 15(2) of Regulation No 659/1999 that, for the purpose of determining the date on which the limitation period starts to run, that provision refers to the grant of aid to a beneficiary, not the date on which an aid scheme was adopted.

82 The determination of the date on which aid was granted may vary depending on the nature of the aid in question. Thus, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded

as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary.

83 It should be noted that, at recital 49 of the contested decision, the Commission stated that the limitation period started to run each year on the date on which the business tax was due from FT.

84 As is apparent from paragraph 320 of the judgment under appeal, the limitation period starts to run afresh each time an advantage is actually granted, which may be on an annual basis, so that the calculation of the limitation period may depend on how the advantage is identified.

85 In the present case, since the finding as to whether aid existed depended on the different rates applicable in each municipality within whose territory FT's establishments were situated, the General Court carried out an analysis, at paragraph 323 of the judgment under appeal, of the fact that business tax is charged annually and the consequences flowing from this.

86 The General Court was therefore correct in finding, at paragraph 324 of the judgment under appeal, that, in view of the annual nature of business tax, the aid at issue could not be regarded as having been awarded before the year 1994, because that was the year in which the binding legal acts were adopted which made it possible, for the first time, to establish the existence of a tax differential.

87 Moreover, the approach adopted by the General Court is confirmed by the wording of Article 15(1) of Regulation No 659/1999, from which it is apparent that it is the Commission's powers to recover aid which are subject to a limitation period.

88 Lastly, as regards the argument that the General Court failed to have regard to the obligation to state reasons in relation to the principle of limitation, it is settled case-law that that court is not thereby required to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review (see Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Electrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 72; and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 46).

89 It should be noted in that connection that, at paragraphs 323 and 324 of the judgment under appeal, the General Court provided a clear assessment of the characteristics of the business tax scheme, which enabled it to conclude, at paragraph 325 of the judgment, that the limitation period provided for under Article 15 of Regulation No 659/1999 had not expired by 28 June 2001, the date on which a request for information was sent to the French Republic.

90 In those circumstances, the Court finds that the General Court responded to the requisite legal standard to the arguments relating to the principle of limitation relied on by FT and did not disregard the requirement to state reasons established in the case-law cited at paragraph 88 above.

91 In the light of all the foregoing considerations, the fourth ground of appeal cannot be accepted.

The fifth ground of appeal, alleging an error of law and failure to state reasons in the judgment under appeal in relation to the arguments alleging breach of the principle of legal certainty

92 The fifth ground of appeal relied on by FT comprises two parts.

Arguments of the parties

— The first part of the fifth ground of appeal, alleging failure to state reasons and error of law on account of the fact that it is impossible to establish the amount of aid to be recovered

93 FT claims that the General Court failed to respond to its argument that, where the Commission examines an advantage the true amount of which cannot be established, it cannot order recovery of such an advantage.

94 FT infers from this that the General Court infringed the principle of legal certainty since any amount to be recovered remains hypothetical and the quantification of recoverable aid cannot be based on approximate estimates.

— The second part of the fifth ground of appeal, alleging failure to state reasons and error of law as regards the assessment of the methods of obtaining an approximate amount of the aid

95 FT submits that the General Court erred in law by finding, at paragraphs 297 and 305 of the judgment under appeal, that the Commission was justified in establishing a range encompassing the amount of aid to be recovered on the basis of estimates provided by the French authorities and that breach of the principle of legal certainty could not therefore be established.

96 FT explains that the estimates in question were not forwarded by the French authorities with a view to determining the actual extent of the tax differential during the period from 1994 to 2002. Those calculations were provided to demonstrate that any under-taxation of the company during that period was offset by the over-taxation which occurred during the first years of the special tax regime, namely during the period from 1991 to 1993.

97 In its response to the two parts of the fifth ground of appeal, the Commission submits that, in its findings concerning the principle of legal certainty, the General Court simply drew the appropriate conclusions from a number of elements in the judgment in Case C-441/06 *Commission* v *France* [2007] ECR I-8887.

98 The Commission therefore considers that the General Court gave appropriate reasons for its conclusion that FT was not justified in its submission that the principle of legal certainty had been infringed on the sole ground that, in order for the aid at issue to be recovered, it was necessary to specify the amount of aid.

Findings of the Court

99 On account of the connection between them, it is appropriate to examine both parts of the fifth ground of appeal together.

100 The principle of legal certainty – which is one of the general principles of European Union law – requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law (see, to that effect, Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79; and Case C-158/07 Förster [2008] ECR I-8507, paragraph 67).

101 As regards the argument relied on in support of the fifth ground of appeal, it should be observed that the General Court pointed out, at paragraph 301 of the judgment under appeal, that, on the basis of the Commission's estimates, the aid at issue amounted to between EUR 798 million and EUR 1 140 million. Since those figures delimit the range within which the final amount was to be established, the General Court found, referring in particular to paragraphs 31 to 40 of *Commission* v *France,* that the contested decision contained the appropriate information to enable that amount to be determined without too much difficulty.

102 It should also be noted that the Court of Justice held, at paragraph 29 of *Commission* v *France*, that no provision of European Union law requires 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 enabling the recipient to calculate the amount itself, without overmuch difficulty (see also 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).

103 Thus, the General Court stated, at paragraphs 302 and 303 of the judgment under appeal, that that range was based on estimates provided by the French authorities during the administrative procedure and that, since that Member State had been unable to calculate exactly the amount of the advantage from which FT had benefited under the regime at issue, the Commission was entitled to rely on the data thus provided.

104 In those circumstances, the General Court correctly concluded, at paragraph 305 of the judgment under appeal, that the contested decision did not constitute a breach of the principle of legal certainty.

105 It follows from the foregoing that neither the French Republic nor FT can rely on that principle in order to prevent recovery of unlawful aid (see Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 104).

106 The General Court was therefore entitled to find that the contested decision is not vitiated by unlawfulness because it simply refers to an indicative range as regards the amount of aid to be recovered.

107 Moreover, it is apparent from paragraphs 301 to 305 of the judgment under appeal that the judgment is not vitiated by an inadequate statement of reasons as regards the assessment of the plea alleging breach of the principle of legal certainty raised by FT and the French Republic.

108 The fifth ground of appeal relied on by FT cannot succeed and it must therefore be rejected in its entirety.

Costs

109 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs against FT and the latter has been unsuccessful, the appellant must be ordered to pay the costs. The French Republic must bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders France Télécom SA to pay the costs;

3. Orders the French Republic to bear its own cost.

[Signatures]