JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

30 November 2009 *

In Joined Cases T-427/04 and T-17/05,

French Republic, represented initially by G. de Bergues, R. Abraham and S. Ramet, subsequently by G. de Bergues, S. Ramet and E. Belliard and finally by G. de Bergues, E. Belliard and A.-L. Vendrolini, acting as Agents,

applicant in Case T-427/04,

France Télécom SA, established in Paris (France), represented initially by A. Gosset-Grainville and L. Godfroid and subsequently by L. Godfroid, S. Hautbourg and M. van der Woude, avocats,

applicant in Case T-17/05,

* Language of the case: French.

Commission of the European Communities, represented by J. Buendía Sierra and C. Giolito, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2005/709/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ 2005 L 269, p. 30),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 18 November 2008,

gives the following

Judgment

Legal context

1. *State aid rules*

1 Under Article 87(1) EC, save as otherwise provided in the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

2 Article 88(2) EC provides that, if, after giving notice to the parties concerned to submit their comments, the Commission of the European Communities finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission.

3 Article 88(3) EC states:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87 [EC], it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

4 On the basis of Article 94 of the EC Treaty (now Article 89 EC), the Council adopted 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).

5 Article 1 of Regulation No 659/1999 lays down the following definitions:

'For the purpose of this Regulation:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87](1) [EC];

(b) "existing aid" shall mean:

...

(iv) aid which is deemed to be existing aid pursuant to Article 15;

...

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid ...

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) "individual aid" shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88] (3) [EC];

...

(h) "interested party" shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

6 Under Article 7(5) of Regulation No 659/1999, which is applicable to unlawful aid by virtue of Article 13(1) thereof, a 'negative decision' states that such aid is not compatible with the common market and prevents it from being put into effect.

7 Article 14 of Regulation No 659/1999, relating to the recovery of unlawful aid, provides as follows:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242 EC], recovery shall be effected 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 the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

8 The need to establish a limitation period after which unlawful aid can no longer be recovered is referred to in recital 14 in the preamble to Regulation No 659/1999, which 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.'

9 The rules relating to the limitation period and to the consequences of its expiry are laid down in Article 15 of Regulation No 659/1999:

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

2. Rules relating to the adoption of Commission decisions

10 Article 219 EC lays down the rules relating to the adoption of decisions by the Commission. It provides:

'The Commission shall act by a majority of the number of Members provided for in Article 213 [EC].

A meeting of the Commission shall be valid only if the number of Members laid down in its Rules of Procedure is present.'

11 Article 1 of the Rules of Procedure of the Commission (OJ 2000 L 308, p. 26), applicable in the present case, is worded as follows:

'The Commission shall act collectively in accordance with these Rules and in compliance with the political guidelines laid down by the President.'

12 Article 4 of the Rules of Procedure of the Commission states as follows:

'Commission decisions shall be taken:

(a) at meetings;

or ...

(c) by empowerment in accordance with Article 13 ...'

13 The second paragraph of Article 13 of the Rules of Procedure of the Commission provides:

'The Commission may ... instruct one or more of its Members, with the agreement of the President, to adopt the definitive text of any instrument or of any proposal to be presented to the other institutions the substance of which has already been determined in discussion.'

Facts

1. *Founding of France Télécom*

14 The applicant — France Télécom SA ('FT') — is a public limited company incorporated under French law. Its object is inter alia to provide all electronic communications services at national and international levels; to fulfil public service tasks and, in particular, to provide, where necessary, the universal public service of telecommunications and mandatory services; to establish, develop and operate all public electronic communications networks; and to establish and operate all networks distributing radio, television or multimedia broadcasting services.

15 Until 1990, FT's business activities were managed by a Directorate of the French Ministry of Posts and Telecommunications (ministère des Postes et Télécommunications (PTT)). FT was established, in the form of a *sui generis* legal person governed by public law, on 1 January 1991, by 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). Under Law No 96-660 of 26 July 1996 on the national company France Télécom (JORF of 27 July 1996, p. 11398), FT was converted, with effect from 31 December 1998, into a national undertaking in which, at the material time, the State held, directly or indirectly, more than half of the share capital. FT 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 limited companies.

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 Under Article 1447-I and Article 1478-I of the General Tax Code, business tax is payable each year by natural or legal persons regularly pursuing a self-employed occupation as at 1 January.

18 Under Article 1448 of the General Tax Code, 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 Thus, under Article 1467(1) of the General Tax Code, in the version in force 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 Under Article 1467 A of the General Tax Code, the reference period mentioned in paragraph 20 above 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 Article 1473 of the General Tax Code states that 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.

23 The tax bases must be declared by the taxpayer pursuant to Article 1477 of the General Tax Code.

24 The rates applied to the tax bases are voted each year by the deliberative assemblies of the bodies which collect the tax — that is, mainly, municipal councils, general councils and regional councils — as provided in Article 1636 Be et seq. of the General Tax Code.

Rules applicable to FT

Principle of liability to tax under the ordinary law

25 Chapter IV of Law No 90-568, by which FT (see paragraph 15 above) and La Poste were founded, lays down special tax provisions.

26 Article 18 of Law No 90-568 provides that, subject to the exceptions provided for in Articles 19 and 21, FT is to be subject to duties and taxes in accordance with the conditions laid down in Article 1654 of the General Tax Code. The effect of that provision is to make FT liable, in principle, in accordance with the conditions laid down by the general law, to pay all duties and taxes payable by private undertakings carrying out the same transactions.

Fixed levy

27 Article 19 provides for an initial, temporary derogation from that principle. Under that provision, 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 ('the fixed levy').

Special tax regime

28 Article 21 of Law No 90-568 concerned the local tax regime applicable to FT and La Poste from 1994.

29 It followed from Article 21.I of Law No 90-568 that, with effect from 1994, by derogation from Article 1473 of the General Tax Code (see paragraph 22 above), FT was to be liable to tax in its principal place of business.

30 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 (Article 21.I.2) — was established through the application of a national weighted average rate, based on the rates voted the previous year by all the local authorities (Article 21.I.4).

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) (Article 21.I.6).

33 Those special rules governing the business tax ('the special tax regime') were codified in Article 1635e of the General Tax Code. The special tax regime did not fix any end-date for its application.

34 Nevertheless, as regards FT, Article 29 of Law No 2002-1575 of 30 December 2002 establishing the 2003 Finance Law terminated the special tax regime with effect from the 2003 tax assessments.

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).

39 On 4 April 2003, and again on 15 May 2003, the French Republic submitted observations on the decision initiating the formal investigation. The French authorities contested in particular the estimate as to how much the aid was worth and claimed that the tax regime specific to FT had to be considered in its entirety and, consequently, that the Commission's analysis should take account of the fixed levy imposed on FT for the years 1991 to 1993. The French Republic also argued that, overall, FT's tax regime constituted not a tax exemption, but taxation organised in accordance with specific rules, a mechanism quite different from State aid. In the letter of 15 May 2003, the French authorities also submitted a first simulation ('the estimate of 15 May 2003'), based on statistical approximations, showing that FT had been overtaxed by at least EUR 1 400 million, exclusive of discounting, over the period from 1991 to 2002.

40 Between 21 March and 30 April 2003, the Commission received observations from 11 other interested parties in response to the decision initiating the formal investigation. FT, on the other hand, did not submit written observations at that stage. The observations from the other interested parties were communicated to the French Republic by letter of 16 May 2003. The French authorities submitted their comments on the observations by letters of 30 June and 29 July 2003.

41 The Commission subsequently received further information from a number of other interested parties. It requested additional explanations from the French authorities by letter of 11 September 2003. The French authorities responded by letter of 20 October 2003. A further request for information was sent to the French Republic by letter of 11 November 2003, to which a reply was sent by letter of 4 December 2003. The Commission made a further request for information by letter of 12 January 2004.

42 A meeting was held between the Commission representatives and representatives of the French Republic and FT on 22 January 2004.

43 By letter of 26 January 2004, the French Republic informed the Commission of the actual amount which FT had been made to pay by way of business tax for the year 2003. That amount proved to be lower than the assessments on the basis of which the estimate of 15 May 2003 had been calculated.

44 By letter of 2 February 2004, the Commission sent a further request for information to the French Republic, which replied by letter of 16 February 2004.

45 Interested third parties submitted further observations between 19 March and 26 May 2004. These observations were forwarded to the French Republic on 3 May and 14 June 2004.

46 On 1 June 2004, the Commission sent the French Republic a request for information relating to any taxes, other than business tax and corporation tax, from which FT had been exempted for the years 1991 to 1993.

47 At a meeting with the representatives of the Commission and of FT on 16 June 2004, the representatives of the French Republic gave preliminary replies to the question raised in the letter of 1 June 2004.

48 FT submitted observations on 22 June 2004.

49 A meeting between the representatives of the Commission, the French Republic and FT was held on 23 June 2004.

50 FT submitted additional written observations on 30 June and 2 July 2004.

51 By fax of 5 July 2004, the French Republic, while stressing that its estimates were approximate, submitted a new simulation of the financial consequences of applying the business tax regime specific to FT from 1991 to 2002 ('the estimate of 5 July 2004'). This new evaluation, calculated on the basis of the business tax which FT had actually had to pay for the year 2003, showed that FT had been overtaxed during that period by more than EUR 1 700 million exclusive of discounting.

52 On 13, 15, 16 and 19 July 2004, the French Republic submitted two explanatory notes and additional information relating inter alia to the method used to prepare the estimate of 5 July 2004.

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 Decision C(2004) 3061 final on the State aid implemented by France for FT ('the contested decision'). It was notified to the French Republic on 3 August 2004. There were a number of differences between the version of the contested decision notified to the French Republic and the version approved by the College of Commissioners on 20 July 2004.

55 On 8 September 2004, FT applied to the Commission for copies both of the draft contested decision approved by the College of Commissioners and of the version of the contested decision sent to the French Republic.

56 By letter of 14 September 2004, the staff of the Commission's Secretariat General acknowledged receipt of that application and informed FT that a reply would be sent to it within 15 working days, in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

57 On 28 October 2004, on receiving no reply from the Commission, FT submitted a confirmatory application on the basis of Article 7(4) of Regulation No 1049/2001.

58 The documents requested were sent to FT on 11 November 2004.

59 On 19 January 2005, the Commission notified the French Republic of a corrigendum by which it restored the text approved on 19 and 20 July 2004.

60 The corrected version of the contested decision was published in the *Official Journal of the European Union* on 14 October 2005 under the reference 2005/709/EC (OJ 2005 L 269, p. 30).

61 In the contested decision, the Commission found, first, that the fixed levy, provided for under Article 19 of Law No 90-568 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).

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).

66 Next, in recital 37 of the contested decision, the Commission stated that, according to the case-law, aid given to a company could not be offset by a specific charge imposed on the same company (Case 173/73 *Italy* v *Commission* [1974] ECR 709).

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 (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675).

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 Regulation No 659/1999 — found that the aid at issue was new aid, not existing aid (recital 45).

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).

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).

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, 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.

Procedure and forms of order sought by the parties

88 By application lodged at the Registry of the Court of First Instance on 13 October 2004, the French Republic brought an action, which was registered as Case T-427/04.

89 By application lodged at the Court Registry on 10 January 2005, FT brought an action, which was registered as Case T-17/05.

90 By document lodged at the Court Registry on 23 May 2008, FT requested that Case T-427/04 and Case T-17/05 be joined for the purposes of the oral procedure and the judgment, in accordance with Article 50(1) of the Rules of Procedure of the Court of First Instance.

91 The Commission and the French Republic submitted their observations on that request on 16 and 19 June 2008 respectively.

92 By order of the President of the Third Chamber of the Court of First Instance of 19 September 2008, Case T-427/04 and Case T-17/05 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure.

93 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) put written questions to the parties concerning the implications, for the present joined cases, of the judgment in *Commission* v *France*, paragraph 87 above, and concerning the action taken by the parties as a result of that judgment, and decided to open the oral procedure.

94 The parties replied to the written questions posed by the Court within the time allowed for that purpose. The French Republic stated, inter alia, that it was withdrawing the fifth plea in law raised in support of its action.

95 At the hearing on 18 November 2008, the parties presented oral argument and replied to the oral questions put by the Court.

96 By order of 24 March 2009, the Court of First Instance (Third Chamber) reopened the oral procedure in order to put questions to the Commission and to enable the

applicants to submit observations on the Commission's replies. The Commission and FT lodged their replies and their observations within the time allowed for that purpose.

97 The French Republic and FT claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

98 The Commission contends that the Court should:

— dismiss the actions as unfounded;

— order the applicants to pay the costs.

Law

1. *Summary of the pleas for annulment*

99 The French Republic relies on four pleas in law in support of its action, alleging respectively: (i) manifest error of assessment and error of law on the part of the Commission, in finding that the special tax regime, in force from 1994 to 2002, had conferred an advantage on FT; (ii) infringement of the rights of defence of the French Republic; (iii) infringement of Article 15 of Regulation No 659/1999, in so far as the contested decision ordered recovery of the aid at issue; and (iv) in the alternative, breach of the principle of the protection of legitimate expectations, in so far as the contested decision orders recovery of the aid at issue.

100 FT raises five pleas in law in support of its action, alleging respectively: (i) infringement of FT's rights of defence; (ii) vitiation of the contested decision by three manifest errors of assessment and one error of law, in so far as the Commission found that FT had benefited from an advantage, this plea being divided into four parts; (iii) infringement of Article 15 of Regulation No 659/1999; (iv) infringement of Article 14 of Regulation No 659/1999, this plea being divided into two parts: breach of the principle of protection of legitimate expectations, in that the measure in respect of which recovery is ordered did not constitute State aid, and breach of the principle of legal certainty, in that the amount of aid to be recovered cannot be calculated; and (v) infringement of the rules relating to the adoption of Commission decisions, in so far as the Commissioner responsible for competition made amendments, other than those relating to spelling or grammar, to the contested decision after that decision had been adopted by the College of Commissioners.

101 It is appropriate to examine first the fifth plea raised by FT, alleging infringement of the rules relating to the adoption of Commission decisions.

2. *Compliance with the rules relating to the adoption of Commission decisions*

Arguments of the parties

102 By its fifth plea, FT submits that, by empowering the Commissioner responsible for competition to carry out a 'legal linguistic revision' of the final text of the contested decision and by not checking the use made of that empowerment, the Commission acted in breach of the principle of collegiality.

103 According to FT, the principle of collegiality, which stems from Article 219 EC, is based on the equality of Commissioners in participating in the taking of decisions. As a consequence, only simple corrections of spelling and grammar may be made to the text of a decision after its formal adoption by the College of Commissioners, any further alteration being the exclusive province of the College (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 68).

104 FT claims that those rules have not been observed in the present case, since a comparison of the version approved by the College of Commissioners at its 1667th meeting, on 20 July 2004, and the version notified to the French Republic on 3 August 2004 reveals two significant amendments, which go far beyond simple corrections of spelling and grammar.

105 First, recital 55 of the notified version of the contested decision contains the following sentence, which did not appear in the version approved by the College:

'The Commission notes that the letter of 29 January 2004 confirms the validity of the method of calculation set out in the letter of 15 May 2003.'

106 Second, in recital 59 of the notified version of the contested decision, the term 'indicative' referring to the range within which the amount of aid at issue is situated, was removed.

107 As it is, those amendments relate to fundamental legal aspects of the contested decision, namely the question as to whether the method of calculation used by the Commission can be reliable when the College had not believed that it was able to establish an amount, or even a range, definitively. In reply to the written questions posed by the Court following the reopening of the oral procedure, FT observed that the term 'indicative' had been expressly added at the time of the College's deliberations. In contrast, the sentence added to recital 55 of the adopted version of the contested decision, which suggests that the French Republic had recognised that the methods used to calculate the advantage to FT were valid, is a factually incorrect piece of information which did not appear in the text approved by the College. Thus, the amendments made to the decision altered its meaning, in breach of the 'principle of collegiality'.

108 In its reply, FT states that, pursuant to the case-law of the Court of First Instance, after the application had been lodged, the Commission could not, by a simple rectification measure adopted retroactively, cause the disappearance of a substantive defect flawing the contested decision.

109 The Commission maintains that the differences found between the text approved by the College and the notified version of the contested decision are insignificant, since they do not affect the meaning of the decision. In any event, a corrigendum — adopted on 19 January 2005 and notified to the French Republic on the same day — brings the text of the notified version of the contested decision into line with the draft decision approved by the College of Commissioners at its 1667th meeting.

110 At the hearing, the Commission explained the differences between the draft decision approved by the College of Commissioners and the version notified to the French Republic by the fact that the 'legal linguistic revision' undertaken after the Members had approved the draft had been based, mistakenly, on a text which was not the same as the text which had been placed before the College.

111 In reply to written questions put by the Court after the oral procedure was reopened, the Commission stated first of all that, on 19 and 20 July 2004, the College had approved the text in principle and empowered the Commissioner for competition to formulate, with the agreement of the President, the final version of the contested decision and to adopt it.

112 The Commission then maintained that, since the technical differences between the draft decision approved at the meeting of 19 and 20 July 2004 and the version of the contested decision adopted on 2 August 2004 did not affect either the facts or the legal reasoning on which the contested decision was based, the Commissioner for competition had not exceeded the limits of the powers conferred on him by the College.

113 Lastly, the Commission stated that, since the contested decision, in the version of 2 August 2004, had been lawfully adopted, no correction was legally necessary. It was nevertheless permissible, the Commission argues, for it to reinstate the text of the draft approved by the College on 20 July 2004. According to the Commission, this is

precisely what it did by means of the corrigendum of 19 July 2005, which was specifically approved by the College.

Findings of the Court

114 It is common ground that, at its meeting on 19 and 20 July 2004, the College of Commissioners approved a reasoned draft decision finding that the aid at issue was unlawful and incompatible with the common market, and ordering its recovery. The College also authorised the Commissioner 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'. The contested decision was then adopted on 2 August 2004 and notified to the French Republic on 3 August 2004.

115 The parties all acknowledge that, as is apparent from the documents before the Court, there were a number of differences between the version of the contested decision notified to the French Republic on 3 August 2004 and the text approved by the College of Commissioners at the meeting of 19 and 20 July 2004. The parties also agree that those differences were corrected by a corrigendum, adopted on 19 January 2005. On the same day — that is to say, after the present actions had been brought — the Commission notified a consolidated version of the contested decision, incorporating those corrections, to the French Republic.

116 Under Article 219 EC, the Commission acts by a majority of the number of its members. The principle of collegiality thus established is based on equality in the decision-making process as between the members of the Commission and signifies that decisions must be deliberated on jointly and that all the Members of the College bear collective responsibility at political level for all decisions adopted (Case 5/85 *AKZO Chemie and AKZO Chemie UK* v *Commission* [1986] ECR 2585, paragraph 30).

117 Although the Commission may, without necessarily acting in breach of the principle of collegiality, empower one of its members to adopt specific categories of administrative or management measure (*AKZO Chemie and AKZO Chemie UK* v *Commission*, paragraph 116 above, paragraph 37), the decisions by which the Commission rules on the existence of State aid, on its compatibility with the common market and on the need to order its recovery involve an examination of complex factual and legal issues and cannot, in principle, be categorised as administrative or management measures (see, to that effect, Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraphs 103 to 114). It follows that, since the enacting terms and rationale of such decisions, for which reasons must be stated pursuant to Article 253 EC, constitute an indivisible whole, it is for the College alone, in accordance with the principle of collegiality, to adopt them both (see, by analogy, *Commission* v *BASF and Others*, paragraph 103 above, paragraphs 66 and 67).

118 In principle, therefore, it is for the College of Commissioners alone to adopt the definitive version of decisions ruling on the existence of State aid and on its compatibility with the common market. After that adoption, only small corrections of spelling or grammar may still be made to the text of that decision, since any further alteration is the exclusive province of the College (see, by analogy, *Commission* v *BASF and Others*, paragraph 103 above, paragraph 68).

119 However, it is possible — as provided under the second paragraph of Article 13 of the Rules of Procedure of the Commission, in the version applicable at the date of adoption of the contested decision (OJ 2000 L 308, p. 26) — for the College of Commissioners to instruct one or more of its Members to adopt the definitive text of any decision the substance of which has already been determined in discussion. Where the College exercises that power, it is for the Community judicature, when considering the question of the irregularity of the exercise of that power, to ascertain whether the College may be regarded as having adopted all the factual and legal elements of the decision in question (see, to that effect, *ASPEC and Others* v *Commission*, paragraph 117 above, paragraph 122).

120 In the present case, it is clear from the minutes of the 1 667th meeting of the College of Commissioners, which was held on 19 and 20 July 2004, that the College approved the decision relating to the aid at issue 'as referred to in document C(2004) 2651/12' and empowered [the Commissioner for competition] to adopt, with the agreement of [the President], the definitive version [of the decision] in question, in French, the [authentic] language, following 'legal linguistic revision'. However, the version of the contested decision which was adopted on 2 August 2004 and notified to the French Republic on the following day differed on at least two points from the draft approved by the College of Commissioners. Accordingly, it is necessary to determine whether, as FT maintains, those differences are so significant that the College of Commissioners cannot be regarded as having adopted all the factual and legal elements of the contested decision.

121 On the one hand, the contested decision as adopted on 2 August 2004 contained, at the end of recital 55, the following sentence, which did not appear in the text approved by the College of Commissioners:

'The Commission notes that the letter of 29 January 2004 confirms the validity of the method of calculation set out in the letter of 15 May 2003.'

122 On the other hand, in recital 59, the word 'indicative', which, in the text approved by the College of Commissioners, appears in the clause 'but what [the Commission] can say is that [FT] benefited from State aid the indicative amount of which is somewhere between EUR 798 million and EUR 1 140 million in capital' was omitted from the version of the contested decision adopted on 2 August 2004.

123 It should be noted, first of all, that the differences between the version of the contested decision adopted on 2 August 2004 and the draft decision approved by the College of Commissioners on 26 July 2006 arise — according to the statements made by the Commission at the hearing, as corroborated by the documents which the Commission appended to its replies to the questions put to it after the hearing (see paragraph 111 above) — from the fact that the 'legal and linguistic revision', undertaken

after deliberations within the College, was mistakenly based on a text which was not the same as the text which had been approved by the College. However, it emerges from the minutes of the 1 667th meeting of the College of Commissioners that the College did not intend to adopt the definitive text of the contested decision, but entrusted the finalisation of that text to the Member responsible for competition, acting with the agreement of the President of the Commission.

124 It should be pointed out in that regard that, viewed in context, the sentence introduced at the end of recital 55 of the version of the contested decision adopted on 2 August 2004 is merely a comment expanding the idea which had just been stated in the preceding sentence, according to which the French authorities had 'stressed that the back-calculation of this figure over previous years confirmed and strengthened their position as it would show the over-taxation of [FT] in relation to the ordinary-law position'. Accordingly, the addition of the sentence in question did not significantly alter the factual or legal grounds of the contested decision.

125 Similarly, the omission of the word 'indicative' from recital 59 of the version of the contested decision adopted on 2 August 2004 is in itself irrelevant. Despite the presence of the word 'indicative' in recital 59 of the corrected version of the contested decision, the Court held that the minimum amount quoted in Article 2 of the decision had to be considered to be the minimum aid amount to be recovered. Accordingly, the Court rejected the argument that the amounts set out in paragraph 59 of the grounds for the contested decision were only indicative and lacking binding legal force (*Commission* v *France*, paragraph 87 above, paragraphs 31, 33 and 35).

126 Furthermore, FT is wrong to claim, in its observations on the Commission's replies, that the College had 'introduced' the word 'indicative' into the text which it had approved. In fact, that word was already included in the version of the text placed before the College, as is attested by the documents submitted by the Commission following the questions from the Court.

127 In those circumstances, the omission of the word 'indicative' in recital 59 of the adopted version of the contested decision is not inconsistent with the express intention of the College of Commissioners and in no way alters the implications of the grounds of the contested decision.

128 Accordingly, since the technical differences between the version of the contested decision adopted on 2 August 2004 and the text which had been approved by the College of Commissioners on 19 and 20 July 2004 did not affect the implications of the contested decision, the College may be regarded as having adopted all the factual and legal elements of the contested decision (see, to that effect, *ASPEC and Others* v *Commission*, paragraph 117 above, paragraph 122). It follows that FT is not justified in maintaining that the Member responsible for competition, acting with the agreement of the President, exceeded the limits of the power conferred on him by the College and that, in consequence, the contested decision was adopted in breach of the principle of collegiality.

129 In those circumstances, and even though it was not required to do so, the Commission was entitled to act as it did, that is to say, to reinstate, by means of a corrigendum adopted by the College, the original text approved at the meeting of the College on 19 and 20 July 2004 and to notify a consolidated version of the contested decision including those corrections, even after the present actions had been brought by the applicants.

130 The fifth plea raised by FT must therefore be rejected.

3. *Respect for the French Republic's rights of defence*

Arguments of the parties

131 The French Republic maintains, by its second plea, that the Commission adopted the contested decision in breach of the *audi alteram partem* rule and, as regards the French Republic, in breach of the rights of the defence.

132 The French Republic states that, according to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. Under that principle, the person against whom the Commission has initiated an administrative procedure must have been afforded the opportunity to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law (Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28).

133 The French Republic claims that, after classifying the regime set up by Articles 18 to 21 of Law No 90-568 as a 'derogating tax scheme' in the decision initiating the formal investigation, the Commission used the partly non-fiscal nature of the fixed levy as the basis for its refusal to offset the period between 1991 and 1993 against the period between 1994 and 2002. However, the argument that the fixed levy consisted in part in a participation in the earnings had not been raised during the administrative procedure and the French Republic was unable to comment on it. Since that argument forms the basis for the contested decision, the decision should be annulled.

134 According to the French Republic, the fact that, during the administrative procedure, it could have discussed the Commission's provisional view that the fixed levy could be wholly categorised as a participation in the earnings does not give grounds for rejecting the plea relating to the rights of the defence, since, in the contested decision, the Commission did not categorise the levy as earnings participation — treating it, instead, as being in part a tax and in part a form of earnings participation — and, also, that dual categorisation, which it was unable to discuss before the contested decision was adopted, had a decisive effect on the outcome of the procedure.

135 The Commission contests those claims.

Findings of the Court

136 It is settled law that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law. That principle requires that the person against whom the Commission has initiated an administrative procedure must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law (*Belgium* v *Commission*, paragraph 132 above, paragraph 28; Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 32; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 121).

137 It should be pointed out that the Commission must initiate a formal investigation procedure if, following a preliminary investigation, it has serious doubts as to the

compatibility of the measure in question with the common market. It follows that the Commission cannot be required to present a complete analysis on the measure in question in its notice of intention to initiate that procedure. The Commission must, however, define sufficiently the framework of its investigation in order to enable the Member State against which the procedure is opened to put forward its comments on all the matters of law or fact constituting the grounds of the final decision by which the Commission rules on the compatibility of the measure in question with the common market (see, to that effect and by analogy, Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 85).

138 Accordingly, the mere fact that, in the contested decision, the Commission altered its analysis as regards the nature of the fixed levy cannot entail, with regard to the French Republic, infringement of the rights of the defence unless the information contained in the decision initiating the formal investigation or, subsequently, provided during the exchange of arguments during the administrative procedure, had not enabled the French authorities to discuss properly all the matters of law or of fact contained in the contested decision. On the other hand, the differences between the contested decision and the decision initiating the formal investigation, arising as a result of the Commission's review, on its own initiative, of the arguments, in whole or in part, put forward by the French Republic, cannot give rise to an infringement of that Member State's rights of defence.

139 It must be held that, by stating, in recital 63 of the decision initiating the formal investigation, that the fixed levy 'appears to be a levy on the operating results of [FT], rather than a special way of imposing business tax on [FT]', the Commission gave the French Republic an opportunity to discuss, during the administrative procedure, the nature of that levy. It also emerges from the statements made by the French Government at the hearing that, during the procedure, consideration was given to the possibility of offsetting the over-taxation, alleged to have occurred because of that levy imposed by the Member State, against the exemption from business tax from which FT benefited between 1991 and 1993 and also the tax differentials from which it benefited between 1994 and 2002. However, in the decision initiating the formal investigation, the Commission had specifically used the non-fiscal nature of the fixed levy as the basis for its refusal to allow the levy to be offset against the business tax payable by

FT for the years 1991 to 1993. The information contained in the decision initiating the formal investigation accordingly enabled the French Republic to contest the category in which the Commission therefore intended to place the fixed levy.

140 In those circumstances, the fact that, although, in the decision initiating the formal investigation, it intended to dispute the argument that the levy was in any way fiscal in nature, the Commission altered its analysis in the contested decision, in which it found that that levy had a dual nature, being in part fiscal and in part non-fiscal, does not demonstrate that the Commission fell short of discharging its obligation to define sufficiently the framework of its investigation in order to enable the French Republic to put forward its comments on all the matters of law or fact constituting the grounds for the contested decision

141 Moreover, as has just been stated, because it denied, in the decision initiating the formal investigation, that the fixed levy could be regarded as a tax, the Commission found, initially, that the substitution of that levy for the business tax payable for the years 1991 to 1993 could not, prima facie, be accepted and that, consequently, the total exemption from business tax from which FT had benefited in respect of those years could be categorised as State aid. On the other hand, the 'dual' categorisation ultimately adopted in the contested decision led the Commission to acknowledge that the fixed levy had replaced the business tax payable by FT for the years 1991 to 1993. The differences between the contested decision and the decision initiating the formal investigation thus arise from the part-acceptance of the arguments presented by the French Republic during the administrative procedure, which cannot constitute an infringement of that Member State's rights of defence.

142 It follows that the French Republic has no grounds for maintaining that its rights of defence were infringed and, in consequence, its second plea must be rejected.

4. *Respect for FT's procedural rights*

Arguments of the parties

143 Although FT recognises that parties interested in State aid proceedings initiated by the Commission do not have the same rights as the Member State to which the decision is addressed, it submits that the rights of the defence — respect for which constitutes, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules — have been infringed in its regard.

144 By its first plea, FT maintains that it was not afforded the opportunity to make known its views on the 'dual' nature of the fixed levy, which the Commission used as a basis, in the contested decision, for establishing the existence of the aid at issue (recitals 31 to 33 of the contested decision). The Commission had never suggested earlier — whether in the opening decision, or in its subsequent pleadings, or at the meetings which took place in connection with the procedure — that it might regard that levy as being in part a tax and in part a transfer to the owner. On the contrary, the fixed levy was categorised as fiscal in the decision initiating the formal investigation and the Commission therefore found that Law No 90-568 had set up a single tax regime for the period from 1991 to 2002 (paragraph 33 of the decision initiating the formal investigation). The contested decision is therefore based on facts and assessments on which FT was unable to express its views. Accordingly, the Commission cannot take issue with FT for not submitting written observations in response to the decision initiating the formal investigation, and the meetings held in June 2004 were devoted not to the question of offsetting but to calculation of the alleged State aid.

145 The Commission contests those claims.

Findings of the Court

146 It is settled law that the administrative procedure regarding State aid is opened only against the Member State concerned. Undertakings which receive aid are considered only to be 'interested parties' in the context of this procedure (see, to that effect, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 136 above, paragraph 122, and *Kuwait Petroleum (Nederland)* v *Commission*, paragraph 137 above, paragraph 80).

147 That case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure initiated under Article 88(2) EC. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having (see paragraph 136 above), the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 59 and 60, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 136 above, paragraph 125).

148 It has also been held that the Commission cannot be required to present a complete analysis of the aid at issue in its notice of intention to initiate that procedure. It must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments (*Kuwait Petroleum (Nederland)* v *Commission*, paragraph 137 above, paragraph 85).

149 For that reason, the right of the interested parties to information does not go beyond the right to be heard by the Commission. In particular, it cannot extend to the general right to comment on all the potentially key points raised during the formal

investigation procedure (see the order of the President of the Court in Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 84 and the case-law cited).

150 In the light of those principles, it must be stated that the decision initiating the formal investigation, which specifically identified the aid at issue, was published in the Official Journal (see paragraph 38 above). Accordingly, FT was properly informed of the existence of an investigation procedure and given the opportunity to present any observations which it considered useful.

151 Moreover, by stating in the decision initiating the formal investigation that it intended to regard the fixed levy as a sharing of the operating results, the Commission gave FT the opportunity to discuss the nature of that levy effectively (see paragraph 139 above).

152 By the same token, the argument that there is a contradiction between paragraphs 29 and 33 of the decision initiating the formal investigation, on the one hand, and paragraph 63 of that decision, on the other, cannot succeed. Although it is true that, in paragraph 29 of the decision initiating the formal investigation, the Commission used the expression 'tax regime departing from the ordinary law', the Commission's intention to exclude, at the stage of the formal investigation procedure, the possibility of setting off the fixed levy against the business tax payable by FT for the years 1991 to 1993 is clear from the decision as a whole. FT was therefore given an opportunity to make any observations with a view to obtaining that set-off.

153 FT's first plea must therefore be rejected.

5. *Existence of State aid*

Arguments of the parties

Existence of justifications relating to the overall structure of the tax system

154 By the first part of its second plea, FT claims that the special tax regime was justified by considerations relating to the overall structure of the tax system and that, consequently, the condition relating to the selectivity of the measure in question is not met (Joined Cases T-346/99 to T-348/99 *Diputación Foral de Álava* v *Commission* [2002] ECR II-4259, paragraph 58). In the Notice on the application of the State aid rules to measures relating to direct business taxation, which it published in 1998 (OJ 1998 C 384, p. 3), the Commission also recognised that measures 'whose economic rationale makes them necessary to the functioning and effectiveness of the tax system' were not necessarily to be regarded as State aid.

155 However, the sole objective of the special tax regime was to preserve the level of resources which the management of the PTT gave to the State before the PPT was converted into a public body and to prevent those resources from being transferred from the State to local authorities, while at the same time taking into account the difficulty after 1991 of establishing a tax per municipality. Those measures were therefore justified by the overall structure of the tax system and do not constitute State aid.

156 The Commission argues that the question whether a measure introducing a selective advantage, such as the special tax regime, can be justified by considerations relating to the nature or organisation of the tax system requires an objective analysis of the overall structure of taxation in France and of the business tax system in particular. On that point, the burden of proof lies with the Member State. The Commission relies in that regard on the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, I-2983).

157 However, according to the Commission, the French Republic has never maintained, either during the administrative procedure or in its action before the Court of First Instance, that a justification such as that put forward by FT in connection with the first part of its second plea could exist in the present case. The Commission, for its part, sees nothing to support a claim that the advantageous treatment afforded to FT can be traced back to any requirement of the business tax system in France.

The nature of the fixed levy

158 First, the French Republic maintains — as does FT, by the second part of its second plea — that the levy payable by FT, for the years 1991 to 1993, under Articles 18 and 19 of Law No 90-568, is purely fiscal in nature.

159 The French Republic and FT claim, first of all, that the provisions of Law No 90-568 relating to the levy, accruing to the general budget of the State, which FT had to pay from 1991 to 1993 — namely, Articles 18 and 19 of Law No 90-568 — were placed in Chapter IV, entitled 'Taxation', and had no purpose other than to obtain tax revenue comparable to the resources accruing to the State budget from the surpluses shown by the administration of the PTT before FT was created.

160 They refer to Report No 1229 of Mr Fourré, Rapporteur of the Production and Trade Committee of the National Assembly, of 11 April 1990, relating to the draft bill for Law No 90-568. According to that report, the derogation from the general law regime provided for in Article 19 of Law No 90-568 was justified by the concern to procure, by means of a special tax, resources for the State budget which were comparable to the levy paid by the administration of the PTT up until the time that FT was created. Furthermore, the duration of that special tax regime was to be limited to the time needed, in the light of the expected expansion in turnover, for the taxation of FT under the general law to bring in revenue of an amount similar to the amount generated by the special levy.

161 The fixed levy, provided for in Article 19 of Law No 90-568, was therefore fiscal in nature, owing to the position in which it had been placed in the enacting terms of that law and to its purpose. It replaced all the general law taxes which, were it not for that special tax regime, FT would have had to pay. Moreover, in recitals 28, 29 and 36 of the contested decision, the Commission acknowledged that the special levy possessed 'features which are typically those of a tax'.

162 The French Republic and FT also take issue with the Commission's categorisation of the levy as 'a participation in the operating results', in recital 27 of the contested decision.

163 The French Republic disputes the relevance of the connection made, in recital 24 of the contested decision, between the 'profit which the PTT paid to the State in 1989 and 1990' and the fixed levy.

164 The contribution of the profits made by the administration of the PTT to the State budget was a consequence of national budgetary rules, according to which the balance of the additional budgets — such as the budget for the PTT — is applied towards the general budget, without the need for any management decision, such as the payment of a dividend, or taxation. On the other hand, the position of FT, a public-law body with legal autonomy, cannot be compared with the previous situation, in which the PTT were an administrative public service of the State.

165 Also, the fixed levy is by its nature entirely fiscal and, as such, it cannot, even in part, constitute a 'participation in the operating results'.

166 First, the decision which introduced the levy is a legislative measure, since the principle of the tax was established in Article 19 of Law No 90-568 and the annual amount

of the levy was fixed each year by a finance law. In contrast, a simple distribution of dividends does not require the adoption of a law.

167 Secondly, the amount of a dividend or a 'participation in the operating results' could not have been determined before the results for the financial year were known. However, the maximum amount of the fixed levy was fixed from the time Law No 90-568 came into force and the amount actually charged to FT by the finance acts for the years 1991 to 1993 was, each year, equal to the maximum laid down in Article 19 of Law No 90-568. In contrast, the amount of a dividend depends on the results actually achieved during the financial year.

168 Thirdly, the fixed levy was entered in FT's accounts as expenditure, which is compatible with the fiscal nature of that levy. In contrast, the payment of a participation in the earnings would not have affected the operating results but would have reduced capital and reserves.

169 Fourthly, during the period from 1994 to 1996, in which FT was converted into a limited liability company, its earnings (FRF 21 200 million) doubled as compared with the period from 1991 to 1993 (FRF 10 100 million). However, during that same period, FT never had to pay a share of the earnings.

170 Fifthly, the Commission did not even begin to prove the claim made in recital 31 of the contested decision, to the effect that the special levy was of a dual nature, being partly fiscal and partly in the nature of payment of the State's share.

171 According to the Commission, the question whether the fixed levy was fiscal in nature is irrelevant since, even if it were, it would not be possible to offset that levy

against the tax differential established each year between 1994 and 2002. On the one hand, the levies imposed on FT for the years 1991 to 1993 replace all the taxes which would normally have been imposed on FT and, on the other hand, they cannot be regarded as interim payments of the business tax contributions for which FT was to be liable from 1994 onwards.

172 As regards the nature of the fixed levy, the Commission argues that, in any event, it was at most only partly fiscal in nature and the Commission contests all of the applicants' arguments on this point.

The indivisible nature of the tax regime applicable to FT during the period from 1991 to 2002

173 Secondly, the French Republic claims — as does FT maintains by the third part of its second plea — that the tax regime specific to FT introduced by Law No 90-568 was a block arrangement, covering the entire period from 1991 to 2002, and did not reflect the intention of the public authorities to grant FT the slightest advantage.

174 The fact is that Law No 90-568 established, right from the start, a single set of block tax arrangements, implemented in two stages: (i) from 1991 to 1993, the establishment of a contribution replacing all the direct taxes payable under the general law — in particular, business tax – was designed solely to prevent a loss of revenue for the State budget; and (ii) from 1994 to 2002, when — as the French authorities stated in their reply dated 26 September 2001 to the Commission's first request for information (see paragraph 37 above) — the sole purpose of making FT liable to business tax in its principal place of business was to prevent revenue for the State budget being diverted to the budget of the local authorities of places in which FT had premises,

certainly not to confer an advantage on FT. Moreover, the existence of a tax differential during the period from 1994 to 2002 was not discovered until afterwards.

175 Since Law No 90-568 introduced a single tax regime, the successive rules governing the liability of FT to business tax are indissociable and must accordingly be analysed in relation to each other. Moreover, that was the approach taken by the Commission, when it indicated, in the decision initiating the formal investigation, that, when it referred to the 'regime' or to the 'derogating regime', it meant by that 'the transitional regime and the definitive regime'. Since the substance of the original regime was not altered, the circumstances of the present case differ from the situation in the cases which gave rise to the judgment in Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

176 The Commission argues that the question whether FT was subject to a single tax regime implemented in two stages or to two successive and distinct regimes is irrelevant, since it cannot be disputed that the rules applicable between 1991 and 1993 were different from those applicable between 1994 and 2002 and that, in any event, even if these tax arrangements constituted a single regime, the set-off recommended by the French Republic could not be contemplated.

The need to apply a set-off

177 Thirdly, the French Republic submits — as does FT, by the fourth part of its second plea — that the Commission should have applied a set-off between the excess tax which FT had had to pay between 1991 and 1993 and the tax differential from which it had benefited between 1994 and 2002.

178 First, the French Republic and FT dispute the reasons given by the Commission in recitals 38 and 41 of the contested decision for refusing to apply a set-off between the over-taxation to which FT was subject between 1991 and 1993 and the tax differential from which it benefited between 1994 and 2002. FT claims that the Commission's reference to *Italy* v *Commission*, paragraph 156 above, and to Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (OJ 2002 L 184, p. 27) is irrelevant since, in the present case, the fixed levy was of the same nature as the business tax for which FT was liable between 1994 and 2002 and all those measures were introduced by a single statute.

179 Furthermore, in paragraphs 28, 33 and 116 of the decision initiating the formal investigation, the Commission itself acknowledged that Law No 90-568 had introduced a single 'derogating' regime, by which the Commission itself stated that it meant both the 'transitional' regime (the rules applicable to the fixed levy) and the 'definitive' regime (the special tax regime).

180 Secondly, the French authorities and FT maintain that the Commission was required to undertake an overall analysis of the affect of a measure likely to be categorised as State aid.

181 The French Republic and FT make the preliminary point that the Commission has already applied a multi-annual set-off, by taking into account all the income and expenditure relating to the Livret bleu system, in Commission Decision 2003/216/EC of 15 January 2002 on State aid granted by France to Crédit Mutuel (OJ 2003 L 88, p. 39).

182 Similarly, in Decision 2000/735/EC of 21 April 1999 on the treatment by the Netherlands tax authorities of a 'technolease agreement' between Philips and Rabobank

(OJ 2000 L 297, p. 13), the Commission considered the overall effects in time of the tax regime which it was examining, without using the term 'tax credit'.

183 The Commission itself even applied a set-off between charges of different kinds in Decision 1999/676/EC of 20 July 1999 concerning presumed aid allegedly granted by France to Sécuripost (OJ 1999 L 274, p. 37) and even in the contested decision, by allowing the fixed levy, which it regarded as being of a dual nature — fiscal and non-fiscal — to be offset against the business tax contributions payable by FT for the years 1991 to 1993.

184 More generally, the French Republic maintains that the Commission has an obligation to conduct an overall examination of measures likely to be categorised as State aid in the light of the criteria laid down in Article 87(1) EC. That obligation arises from the purpose of that provision. An overall examination is necessary, in particular, in order to assess whether the measure in question is likely to distort competition and whether it constitutes an advantage. The obligation to conduct an overall examination of the scheme established by Law 90-578 for the entire period between 1991 and 2002 also stems from the case-law of the Court of First Instance (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 76).

185 Thirdly, the French Republic and FT claim that, in the present case, a set-off between the two stages of the tax regime reveals over-taxation as compared with the general law situation over the entire period between 1991 and 2002 and that, consequently, FT did not benefit from any advantage.

186 After pointing out that the Commission had acknowledged that FT had been over-taxed over the entire period from 1991 to 2002, the French Republic estimated the amount to be at least EUR 1 400 million and probably in excess of EUR1 700 million. In finding that FT had benefited from an advantage constituting State aid, the

Commission therefore erred in law and made a manifest error of assessment which provide the Court with grounds for annulling the contested decision.

187 As regards the set-off between the periods, FT states, however, that 'the alleged amount of under-taxation during the period 1994 to 2002 is the result merely of a simulation and by no means makes it possible to establish definitively the amount of aid from which it allegedly benefited over the period 1994 to 2002'.

188 The Commission argues that the set-off requested by the French Republic and FT would have the effect of removing the necessary distinction between the obligations which the State must assume as shareholder and the obligations which it may have as a public legal person.

189 According to the Commission, if the possibility of such a set-off were accepted, it would be impossible, in practice, to monitor aid paid to public undertakings. The set-off requested in the present case by the French Republic and FT would go far beyond the set-off between the expenditure and income connected with a public service, that is to say, the issue in the case which gave rise to Decision 2003/216. The French Republic's theory amounts to allowing a lesser charge to be set off by a charge which is higher but of a different nature. However, such a set-off is precluded by the case-law (*Italy* v *Commission*, paragraph 66 above, paragraph 34).

190 In the rejoinder, the Commission disputes the interpretation adopted by the French Republic to the effect that, in Decision 2003/735, the Commission has already applied a set-off between the short-term and the long-term effects of a fiscal measure. The Commission states that, in that case, it ruled out the possibility of the measure in question being regarded as State aid after pointing out that the scheme at issue consisted in the straightforward application of the general law tax rules. Consequently, in that case, the condition relating to selectivity was not met.

Findings of the Court

Existence of an advantage

191 In the present case, the parties disagree as to whether the special tax regime gave FT an advantage.

192 In recital 42 of the contested decision, the Commission defined the advantage from which it considers that FT benefited as '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'.

193 In their pleadings, the applicants do not expressly contest the existence of a tax differential to the benefit of FT during the period from 1994 to 2002, but take issue with the Commission for having unreasonably disassociated that period from the period during which FT had had to pay the fixed levy (1991 to 1993) and for having, consequently, wrongly refused to apply a set-off between the tax variations relating to those two periods. At the hearing, on the other hand, FT claimed that the calculations on which the Commission had based its conclusion that, during the period from 1994 to 2002, FT had benefited from a tax differential, were inaccurate.

194 Under Article 87(1) EC, save where provision is made under the Treaty for derogations, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. In accordance with established case-law, categorisation as aid requires all the conditions set out in Article 87(1) EC to be fulfilled cumulatively (see Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75 and the case-law cited).

195 As regards the concept of advantage for the purposes of Article 87(1) EC, this extends to any measure which exempts an undertaking from a charge which it would otherwise have to bear. According to consistent case-law, the concept of aid is wider 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 which are normally included in the budget of an undertaking and which, without being subsidies in the strict sense of the word, are therefore similar in character and have the same effect (see Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 77 and the case-law cited).

196 Accordingly, 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 persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid for the purposes of Article 87(1) EC (see Case C-6/97 *Italy* v *Commission*, paragraph 156 above, paragraph 16, and Case C-66/02 *Italy* v *Commission*, paragraph 195 above, paragraph 78 and the case-law cited).

197 Moreover, the nature of the objectives pursued by State measures and their justification has no bearing on their categorisation as aid. Indeed, according to settled case-law, Article 87 EC does not distinguish between the causes or the objectives of State aid, but defines them in terms of their effects (see Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 46 and the case-law cited).

198 For the purposes of assessing, in the present case, the validity of the Commission's conclusion relating to the existence of an advantage to FT represented by the tax differential from which it benefited between 1994 and 2002, it is necessary, first, to consider whether the Commission could examine the special tax regime separately

from the fixed levy. Secondly, it is necessary to determine whether the Commission was justified in refusing to apply a set-off between the tax differential from which FT benefited in respect of the years 1994 to 2002 and the over-taxation which, according to the applicants, the undertaking was charged for the years 1991 to 1993. Thirdly, it will be necessary to assess whether the existence of a tax differential in respect of the period 1994 to 2002 is substantiated.

— Whether the special tax regime can be examined separately from the fixed levy

199 According to the case-law, the Commission has a duty to consider complex measures in their entirety in order to determine whether they confer on the recipient undertaking an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; see also, to that effect, Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 169 and 170).

200 It is not disputed that Law No 90-568 introduced by way of derogation a tax regime, applicable in particular to FT, which was characterised by being implemented in two stages. During the first stage, from 1991 to 1993, FT did not have to pay any tax or levy other than the fixed levy. During the second stage, which began in 1994 and initially had no specific end date, FT had to pay all the general law taxes, but in the case of local taxes such as business tax, the rules governing this derogated from the general law and constituted the special tax regime. The applicants are therefore right in claiming that all the provisions relating to the rules applicable to FT's tax liability for the years 1991 to 2002 are contained in the same Chapter of Law No 90-568 and were introduced by a single legal measure.

201 However, it is apparent from the contested decision that the Commission did not regard the aid at issue as consisting in the special tax provisions applicable to FT, but in the tax differential representing the difference between the amount which the

undertaking 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 special tax provisions to which it was subject (see recital 42 of the contested decision).

202 It follows that, because the business tax provided for in Articles 1447.I and 1478.I of the General Tax Code is charged annually (see paragraph 17 above), an advantage such as that defined in recital 42 of the contested decision could not be identified once and for all at a specific moment, but had to be identified in respect of each year for which the business tax was payable by FT. Accordingly, the Commission could not contemplate carrying out an overall a priori analysis of all the relevant provisions of Law No 90-568 in force between 1991 and 2002 and, on the contrary, it was right to give its reasons year by year (see recitals 54 and 58 of the contested decision).

203 The Commission was also right to point out, in recital 36 of the contested decision, that the rules applicable to FT during the period from 1991 to 1993 (fixed levy) were different from those in force during the period from 1994 to 2002 (special tax regime). Accordingly, the Commission found that, during the period from 1991 to 1993, the fixed levy wholly replaced the business tax contribution which would have been payable annually by FT under the general law (recital 33 of the contested decision). On the other hand, according to the Commission, FT's liability to tax under the special tax regime resulted, each year during the second period, in a tax differential to its benefit.

204 In those circumstances, the Commission was able, without acting in breach of its obligation to undertake an overall examination of the measures likely to establish State aid, to distinguish, in its analysis, between the special tax regime and the fixed levy.

— The possibility of a set-off

205 The applicants claim that the advantage consisting in the tax differential in favour of FT between 1994 and 2002 is more than offset by the amount paid by FT by way of fixed levies from 1991 to 1993. In order to justify the application of that set-off, the French Republic and FT maintain that Law No 90-568 introduced a single tax regime and that the fixed levy was exclusively fiscal in nature.

206 According to the case-law, where the Commission examines a measure likely to constitute State aid, it 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 (Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 7).

207 On the other hand, the mere fact that a specific exemption measure is offset, from the recipient's point of view, by an increase in a specific charge which is different from and unconnected with the former does not save the former from categorisation as State aid (Case C-66/02 *Italy* v *Commission*, paragraph 195 above, paragraph 34).

208 The validity of the applicants' argument that the over-taxation of FT between 1991 and 1993, by reason of the fixed levy, offsets the tax differential from which it benefited from 1994 to 2002 therefore depends on the analysis of the objective characteristics of the fixed levy and on whether it may be regarded as a charge which is connected with the advantage for FT as a result, in certain circumstances, of its liability to tax under the special tax regime.

209 In that regard, it should be recalled that Law No 90-568 introduced by way of derogation a tax regime, applicable in particular to FT, which was characterised by being implemented in two stages. During the first stage, from 1991 to 1993, FT did not have to pay any tax or levy other than the fixed levy. During the second stage, which began in 1994 and initially had no specific end date, FT had to pay all the general law taxes, but in the case of local taxes such as business tax, the rules governing this derogated from the general law and constituted the special tax regime.

210 Also, it is apparent from the arguments put forward by the French Republic, which refers to the report on the draft bill for Law No 90-568, presented to the French National Assembly on 11 April 1990, that the derogation from the general law regime provided for under Article 19 of that law — that is to say, the fixed levy — was justified by the concern to procure, by means of a special tax, resources for the State budget which were comparable to the levy paid by the administration of the PTT up until the time that FT was created, during the time needed, in the light of the expected expansion in turnover, for the taxation of FT under the general law to bring in a similar amount of revenue (see paragraph 160 above). Each year, amount set for the fixed levy matched the amount of the resources which had been released annually under the additional budget for PTT until FT was created.

211 It is therefore apparent from the nature, objectives and transitional character of the fixed levy, that it replaced, each year for which it was charged to FT, all the levies normally payable by FT for the year in question. Those levies included all the direct taxes normally payable by undertakings: that is to say, inter alia not only business tax, but also corporation tax and property tax.

212 On the other hand, since the fixed levy was charged annually and was of a temporary nature, it did not have the effect of replacing the taxes otherwise payable during the subsequent years. The disappearance of the fixed levy, from 1994, is a consequence of the fact that, according to the forecasts confirmed by the legislature, FT's liability to the general law taxes and to the special tax regime, in respect of business tax, would

give the State resources comparable to those released until 1990 by the additional budget for the PTT, resources which the fixed levy was designed to guarantee between 1991 and 1993.

213 Consequently, the fixed levy cannot be regarded 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. Accordingly, the Commission could not take into consideration the set-off requested by the applicants and it correctly carried out a year-by-year analysis of the consequences of FT's liability to special taxation.

214 Indeed, even if — as the French Republic maintains — the fixed levy was exclusively fiscal in nature under French law, it should be pointed out that, between 1991 and 1993, it replaced any payment to the State by FT, not only business tax. A mitigation of charges, such as the special tax regime — under which the business tax contributions which FT had to pay between 1994 and 2002 were lower than those which it would have had to pay under the general law — cannot be offset by a different specific charge, that is to say, in the present case, by a payment replacing taxes other than the business tax and, depending on the circumstances, replacing the payment of dividends (see, to that effect, Case C-66/02 *Italy* v *Commission*, paragraph 195 above, paragraph 34).

215 Moreover, 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 was connected with the creation of the special tax regime. The fact that the fixed levy and the special tax regime were introduced by the same legislative measure, as was pointed out in paragraph 200 above, is not enough to prove that the creation of the special tax regime from 1994 made it necessary to impose the fixed levy between 1991 and 1993, or that the application of the fixed levy during the years 1991 to 1993 required the application of the special tax regime for the years subsequent to 1994.

216 Also, in light of the rules for determining the amount of the fixed levy, equal each year to the resources previously paid annually under the additional budget for the PTT, the French Republic has also failed to show that the tax rules for the period 1991 to 1993 were introduced in anticipation of a reduced tax burden during the subsequent period. On the contrary, the fact that, in the beginning, no end-date was set for application of the special tax regime suggests that the Member State considered the level of tax revenue provided by the special tax regime to be adequate and is in itself inconsistent with the premiss that the fixed levy was designed to replace inadequate taxation from 1994.s

217 That argument also contradicts the applicants' argument that the special tax regime was not designed to place FT under a tax burden less onerous than under the general law. In any event, it should be pointed out in that regard that State aid is not characterised by its causes or objectives, but is defined in relation to its effects (*Spain* v *Commission*, paragraph 197 above, paragraph 46 and the case-law cited).

218 It follows that the Commission was right 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, any tax differentials arising as a result of the special tax regime, for the years 1994 to 2002.

— Existence of a tax differential

219 It emerges from recitals 54 to 59 of the contested decision that, in order to establish that FT bore a lower tax burden than if it had been liable to business tax under the general law, the Commission relied on figures communicated to it by the French Republic during the administrative procedure.

220 It is common ground that, on at least three occasions during the administrative procedure (see paragraphs 39, 43 and 51 above), the French Republic sent data to the Commission showing that, each year between 1994 and 2002, FT had benefited from a tax differential. The specific amount of the aid at issue could not be determined by the Commission owing to the discrepancies in the data supplied by the Member State but, in recital 59 of the contested decision, the range within which the Commission stated that that amount would lie was fixed by reference to minimum and maximum amounts which are simply taken from the information provided by the French authorities (see, also to that effect, *Commission* v *France*, paragraph 87 above, paragraphs 31 to 35).

221 It is true that, during the administrative procedure, the French authorities stressed that the estimates of 15 May 2003 and 5 July 2004 were approximate. Nevertheless, both during the administrative procedure and in their pleadings before the Court, they relied on those figures in an attempt to prove that FT had been subject to heavier taxation than that which would have resulted from application of the general law during the period from 1991 to 2002, taken overall.

222 Accordingly, in response to the decision initiating the formal investigation, the French authorities stated as follows in their letter of 15 May 2003 (see paragraph 39 above):

'This definitive analysis, without prejudice to the Commission's examination of the files and the observations of third parties, confirms that FT did not benefit, under the tax regime applied to it between 1991 and 2002, from [an] advantage likely to constitute State aid.

Indeed, far from benefiting from State aid under the special tax regime to which it was subject, FT, on the contrary, was significantly overtaxed, by more than EUR 1 400 million exclusive of discounting.'

223 It must therefore be held that, during the administrative procedure, the information communicated to the Commission was presented as approximate, but not as uncertain in so far as the existence of a tax differential in favour of FT between 1994 and 2002 was concerned.

224 In those circumstances, it was pointless for FT to claim at the hearing that the data used by the Commission in the contested decision came from extrapolations and in no way reflected the true position. The lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission at the time when the decision was adopted (Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54 and the case-law cited).

225 Consequently, the Commission was justified in finding that, between 1994 and 2002, FT had benefited, each year, from a selective advantage consisting in the existence, in its favour, of a tax differential.

Justification in terms of the cohesion of the tax system

226 FT maintains that the differential from which it benefited is justified by the overall structure of the tax system and therefore does not constitute State aid.

227 Article 87(1) EC prohibits State aid which favours certain undertakings or the production of certain goods, that is to say, selective aid (Case C-66/02 *Italy* v *Commission*, paragraph 195 above, paragraph 94; see also, to that effect, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 34).

228 For the purposes of applying Article 87(1) EC, the question to be decided is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure at issue (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 227 above, paragraph 41 and the case-law cited).

229 However, according to established case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are therefore prima facie selective, where that differentiation arises from the nature or the overall structure of the system of charges of which they form part (Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52; see also, to that effect, Case 173/73 *Italy* v *Commission*, paragraph 66 above, paragraph 33, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51.

230 Justification based on the nature or overall structure of the tax system reflects the consistency of a tax measure with the internal logic of the tax system of which it forms part (see *Diputación Foral de Álava* v *Commission*, paragraph 154 above, paragraph 59 and the case-law cited).

231 In the present case, the a priori selective nature of the aid at issue is hardly in doubt, since it is apparent from Law No 90-568 that the special tax regime was applicable to FT and to only one other undertaking. It is not disputed that the special tax regime is a fiscal regime which derogates from the business tax rules applicable to all the undertakings which are in a legal and factual situation comparable to that of FT, in the light of the objectives pursued by that tax, imposed according to the taxable person's tax liability, which is assessed on the basis of the extent of the business activities it exercises in the territory of the local authorities in which it has establishments (see paragraphs 16 to 24 above).

232 With regard to the question whether the special tax regime finds its justification in the nature or overall structure of the tax system, it should be pointed out, first, that that argument was not put forward by the French Republic either during the administrative procedure or during the present proceedings. However, as the Commission rightly pointed out, the burden of proving the existence of such justifications lies in principle with the Member State. It follows that FT cannot, in these proceedings, rely in support of its arguments on facts of which the Commission was unaware at the time when it adopted the contested decision (see, to that effect, *Nuova Agricast*, paragraph 224 above, paragraph 54 and the case-law cited).

233 In order to maintain that the special tax regime is justified by the internal logic of the tax system applicable to undertakings exercising their activities in France, FT claims that there are two grounds for justification.

234 First, the special tax regime was designed to prevent the proceeds of the business tax payable by FT being 'transferred' from the State to the local authorities.

235 In that regard, FT has by no means established that it was impossible for the State to foresee that, from 1994, the business tax charged to the undertaking would be paid in accordance with the conditions laid down by the general law, and then allocated to the State budget rather than to the budget of each local authority in which the undertaking had an establishment.

236 Accordingly, even if the objective of allocating to the State the business tax payable by FT could justify the derogating measures applied to that undertaking and even though business tax is a charge the proceeds of which are allocated to the local authorities, it must be stated that the applicants have not shown that the same objective could not have been be achieved by measures which did not confer an advantage on FT.

237 Consequently, FT is not justified in maintaining, in any event, that the selective advantage from which it benefited is the necessary consequence of the allocation to the State budget of the proceeds from the business tax which it had to pay under the special tax regime.

238 Secondly, according to FT, that derogating system was made necessary because of the difficulty of establishing, from 1994, taxation per municipality, owing, principally, to the lack of accounts adapted to a division of the business tax bases.

239 It should be pointed out, however, that the special tax regime entered into force in 1994, that is to say, during the fourth year following the conversion of the administration of the PTT into an undertaking. Now, although FT stated that, in 1990, the accrual-based accounting data needed to impose business tax per establishment was not immediately available, it did not, on the other hand, give any reasons showing that the division per municipality of the business tax bases, which it eventually carried out for the purposes of the tax imposed for the year 2003, could not be undertaken from the early 1990s. The relevant data for the tax charged for the year 1994 were, in fact, those relating to 1992, which was the reference period for that tax (see paragraph 21 above).

240 Consequently, none of the arguments put forward by FT proves that the derogating tax regime which was applied to it and which conferred an advantage on it was justified by the nature and overall structure of the tax system.

241 It is apparent from the foregoing that the arguments put forward by the applicants cannot succeed and that the first plea raised by the French Republic and the second plea raised by FT must be rejected.

6. *The principle of the protection of legitimate expectations*

Arguments of the parties

242 The French Republic — by its fourth plea, submitted in the alternative — and FT — by the first part of its fourth plea — state that, under Article 14 of Regulation No 659/1999, the Commission cannot require recovery of the aid if this would be contrary to a general principle of Community law and that the principle of the protection of legitimate expectations and the principle of legal certainty are general principles of Community law. Moreover, in Report C(2004) 434 of 9 February 2004 on the implementation of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation, the Commission acknowledged that the principle of protecting legitimate expectations might preclude a recovery decision in exceptional circumstances, inter alia where a similar scheme had been regarded as falling outside the scope of Article 87(1) EC, or had been declared compatible with the common market in the past.

243 As regards the scope of that principle, FT maintains that it is apparent from the settled case-law of the Court of Justice and the Court of First Instance that any trader with regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* (*Lopik)* v *EEC* [1987] ECR 1155, paragraph 44).

244 FT concedes that, in principle, undertakings to which aid has been granted may not 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 that a diligent trader should normally be able to determine whether that procedure has been followed. However, the case-law does not preclude a recipient of aid from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16) and

the Commission recognises that possibility in its decisions (recital 80 of Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres (OJ 2004 L 23, p. 1).

245 In the present case, FT maintains that there are exceptional circumstances on the basis of which it had legitimately assumed that the special tax regime did not constitute an advantage which could be categorised as State aid.

246 The French Republic and FT state that the tax regime examined by the Commission in this case is the regime introduced by Articles 18 to 21 of Law No 90-568, as is apparent in particular from paragraphs 28, 32 and 61 of the decision initiating the formal investigation and recitals 17 and 21 of the contested decision.

247 Article 21 of Law No 90-568 has already been examined by the Commission, following a complaint lodged on 4 May 1990 relating to the special rules for La Poste's liability to business tax. By decision of 8 February 1995 (OJ 1995 C 262, p. 11; 'the La Poste decision'), the Commission conceded that the tax advantage introduced for the benefit of La Poste by Article 21 of Law No 90-568 did not constitute State aid for the purposes of Article 87(1) EC. That decision was confirmed by the Court in Case T-106/*95 FFSA and Others* v *Commission* [1997] ECR II-229. When examining that provision, the Commission could not fail to read the rules relating to the business tax regime applicable to FT. If it had harboured any doubts as to whether that regime constituted State aid for the purposes of Article 87(1) EC, it should have initiated an investigation procedure pursuant to Article 88(3) EC, in accordance with its duty of diligence. Since it did not initiate such a procedure, and given the exceptional circumstances, FT and the French authorities could legitimately assume that the business tax regime under Law No 90-568 was compatible with Article 87(1) EC.

248 The French Republic and FT put forward four additional arguments in support of their submission that, in the present case, the principle of the protection of legitimate expectations precludes recovery of the State aid identified by the Commission.

249 First, the circumstances of this case are similar to those in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933.

250 Secondly, the French authorities and FT were all the more convinced because the objective of the special tax regime was not to grant the slightest advantage to FT but only to ensure that the gradual submission of FT to the general law tax rules had a neutral effect on the State budget. Unlike tax aid, which usually consists in tax exemption or tax relief, there is no exemption or relief in the present case. On the contrary, until 1999, FT and the French authorities were persuaded that the special tax regime involved over-taxation as compared with the general law. Accordingly, FT could not have suspected that the special tax regime might constitute State aid.

251 Thirdly, in Decision 2006/621/EC of 2 August 2004 on the State Aid implemented by France for FT (OJ 2006 L 257, p. 11), the Commission found that '[FT] could legitimately have had confidence in [the French Republic's] conduct not constituting state aid' and that 'ordering the aid's recovery would be contrary to the general principles of Community law' (recital 264). As it is, in the present case, FT was unaware of the fact that it enjoyed an advantage until the first simulations were drawn up by the French authorities. Up to then — that is to say, at least until 2000 — FT thought rather that the special rules applying to its liability to business tax placed it at a competitive disadvantage in its relations with the local authorities. Moreover, it requested that its special tax regime be brought into line with the general law.

252 Fourthly, at the time when the contested decision was adopted, the Commission did not have a sufficiently established decision-making practice, and no tax regime comparable to the measures at issue had been regarded as State aid.

253 In its reply, the French Republic contests the Commission's argument that the French Republic cannot rely on the principle of the protection of legitimate expectations because it did not notify the regime in question. Accordingly, both the recipient of aid and the Member State which granted it are able to invoke that principle. The scope of the case-law relied on by the Commission is limited to an action for failure to fulfil obligations and that case-law does not preclude a Member State from relying on that principle in so far as concerns the recipient of the aid in an action for annulment.

254 The Commission points out, first, that a Member State cannot invoke the principle of the protection of legitimate expectations either with regard to itself or to the recipient of the aid if it fails to notify the Commission of new aid. Consequently, since the measures at issue were not notified by the French Republic, the principle of the protection of legitimate expectations cannot preclude the obligation to recover aid unlawfully granted (Case C-5/89 *Commission* v *Germany*, paragraph 244 above, paragraphs 14 and 17; 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; Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69; and Case T-366/00 *Scott* v *Commission* [2003] ECR. II-1763, paragraph 61).

255 The Commission points out, secondly, that, in the La Poste decision, it neither examined nor adopted a position on the provisions of Law No 90-568 relating to the business tax regime applicable to FT. However, since those provisions were not notified, the Commission's silence cannot be interpreted as approval (*Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 254 above, paragraph 52).

256 In any event, the Commission argues that, since the Court held in *FFSA and Others* v *Commission*, paragraph 247 above, that the provisions of Law No 90-568 concerning La Poste constituted aid compatible with the common market, the French Republic could not entertain a legitimate expectation that the provisions applicable to FT did not constitute aid. In those circumstances, the French authorities should have notified the measures in question (*Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 254 above, paragraphs 48 to 50).

257 The Commission maintains, thirdly, that the reference to Decision 2006/621 is ineffective, since the circumstances of the present case and those of the case in which that decision was adopted are different.

258 The Commission argues, fourthly, that, in adopting the contested decision, it did not effect a change in policy with regard to aid of a fiscal nature, but applied to the circumstances relevant for present purposes the objective rules laid down in Article 87(1) EC.

Findings of the Court

259 It is settled law that, even in the absence of legislation, the right to rely on the principle of the protection of legitimate expectations extends to any individual where, by giving him precise assurances, an institution has led him to entertain reasonable expectations (see *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *EEC*, paragraph 243 above, paragraph 44, and Joined Cases T-66/96 and T-222/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraph 104 and the case-law cited).

260 In whatever form they are given, precise, unconditional and consistent information from authorised and reliable sources constitute such assurances. However, a person

may not plead breach of the principle unless the administration has given him precise assurances (Joined Cases T-376/05 and T-383/05 *TEA-CEGOS and Others* v *Commission* [2006] ECR II-205, paragraph 88 and the case-law cited).

261 It follows from that principle, which is especially applicable in relation to the review of State aid pursuant to Article 14 of Regulation No 659/1999, that the protection of the legitimate expectations of the recipient of the aid can be relied upon (*Commission* v *Germany*, paragraph 244 above, paragraph 16), provided that the recipient has sufficiently precise assurances, arising from a positive action taken by the Commission, which leads him to believe that a measure does not constitute State aid for the purposes of Article 87(1) EC. If the Commission does not give an express opinion on a measure which has been notified to it, on the other hand, its silence cannot, on the basis of the principle of the protection of the legitimate expectations of the recipient undertaking, preclude recovery of that aid (see, to that effect, *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 254 above, paragraph 44).

262 For that reason, in view of the mandatory nature of the review of State aid carried out by the Commission pursuant to Article 88 EC, recipient undertakings 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. A diligent businessman should normally be able to determine whether that procedure has been followed. Accordingly, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 88 EC may not plead the legitimate expectations of the recipients in order to justify failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid (*Commission* v *Germany*, paragraph 244 above, paragraphs 14 and 17, and the judgment of 19 June 2008 in Case C-39/06 *Commission* v *Germany*, not published in the ECR, paragraph 24 and the case-law cited).

263 It is true that a recipient of aid which is granted unlawfully is not precluded from relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful and therefore opposed its repayment (see, to that effect, *BFM and EFIM* v *Commission*, paragraph 254 above, paragraph 70, and Joined Cases T-116/01

and T-118/01 *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2003] ECR II-2957, paragraphs 201 and 204).

264 In the present case, the parties agree that the aid at issue was not notified, since it was examined by the Commission following a complaint brought after the first element of the aid — namely, the tax differential which benefited FT in respect of the year 1994 — had been granted. It must therefore be concluded that, in principle, neither the French Republic nor FT can rely on the principle of protection of the legitimate expectations of the recipient of the aid at issue in order to avoid the recovery decision, unless they can prove the existence of exceptional circumstances which might have led FT legitimately to assume that the aid at issue was lawful.

265 By way of such exceptional circumstances, the French Republic and FT rely on the Commission's examination of Article 21 of Law No 90-568, at the end of which it concluded, in the La Poste decision, that the reduction of the tax bases to 85% of their value, applicable to La Poste — but not to FT — under Article 21.I.3, did not constitute State aid. The applicants point out that the special tax regime was introduced by the same provision and that it was also applicable to La Poste. However, the Commission, when it carried out the examination, did not consider that that regime constituted State aid.

266 First, it should be pointed out in that regard that, as the applicants concede, the Commission expressed no opinion at all on the special tax regime. Yet the possibility of relying on the principle of protection of legitimate expectations presupposes that the recipient is able to claim that it received precise assurances from the administration (see paragraph 260 above).

267 Secondly, it is apparent from the very wording of the La Poste decision that the other provisions of Article 21 of Law No 90-568 — such as those relating to the business tax

and to the special tax regime — were not examined. Consequently, the Commission's silence regarding the special tax regime in the La Poste decision was not a sufficient basis for La Poste — or, *a fortiori*, for FT — legitimately to assume that that tax regime did not constitute State aid (see, to that effect, *Demesa and Territorio Histórico de Álava* v *Commission,* paragraph 254 above, paragraph, 44).

268 Thirdly, as the Commission argues in defence, the assessment in the La Poste decision to the effect that the reduction of the tax bases at issue in that case did not constitute State aid was called into doubt by the Court of First Instance in *FFSA and Others* v *Commission*, paragraph 247 above. In paragraphs 167 and 168 of that judgment, the Court held that the relevant provisions of Article 21 of Law No 90-568 established State aid falling within the scope of Article 87(1) EC, although the aid is compatible with the common market on account of the derogation provided for in Article 86(2) EC for public undertakings. The appeal against that judgment was dismissed by the Court of Justice (order in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303). Accordingly, even if the La Poste decision may have led the French Republic and FT to expect that the measures laid down in Article 21 of Law No 90-568 do not constitute State aid, those expectations proved to be unfounded and were therefore not among those which must be honoured in accordance with the principle of the protection of legitimate expectations.

269 Fourthly, it should be pointed out that, in any event, at the date on which notification of the aid at issue should have been given — that is to say, before the date on which the business tax contribution charged to FT for the year 1994 became payable — the Commission had not yet adopted the La Poste decision.

270 Consequently, it must be held that the French Republic and FT have failed to prove the existence of exceptional circumstances enabling them to rely on the principle of the protection of legitimate expectations.

271 None of the other arguments put forward by the applicants affects that assessment.

272 First, the French Republic refers to Report C(2004) 434 of 9 February 2004 on the application of the State aid rules to measures relating to direct business taxation. Assuming that the applicant seeks to maintain that that report is binding upon the Commission, it need only be pointed out that the report states, in particular, that 'authorisation of part of the scheme does not mean that other aspects of the same scheme will necessarily be regarded as being in line with the Treaty'. Thus, the very wording of that report precludes the inference that authorisation of the measure introduced by Article 21.I.3 of Law No 90-568 gives grounds for finding that measures introduced by any of the other provisions of that article are authorised.

273 Nor, secondly, can the French Republic's argument that the circumstances of the present cases are similar to those in *Salzgitter* v *Commission*, paragraph 249 above, be accepted. In *Salzgitter* v *Commission*, the Court held that the fact that the recipient of aid could not rely on the principle of the protection of legitimate expectations — since the aid had not been notified — did not deprive it of the possibility of pleading breach of the principle of legal certainty.

274 However, the case which gave rise to the judgment in *Salzgitter* v *Commission*, paragraph 249 above, was characterised by special circumstances, including the taking of a decision not to raise objections against the provision on the basis of which the aid at issue had been granted; the partial and implicit withdrawal of that decision; a change of analysis on the part of the Commission; uncertainty as to whether new applications of the provision in question had to be notified; and a prolonged period of inaction on the part of the Commission when it was perfectly well aware of the existence of the aid at issue.

275 In the present cases, by comparison, the provisions of Law No 90-568 on which the special tax regime was based were not notified to the Commission and, accordingly, could not have been the subject of a decision not to raise objections.

276 In that regard, and thirdly, the applicants' argument that it was open to the French Republic to refrain from notifying the special tax regime, since it was not clear that the French legislature intended to grant State aid to FT, cannot be upheld. In the first place, the intention of the Member State has no bearing on the existence of State aid (see paragraph 198 above). In the second place, notification of a measure which may afford an advantage to an undertaking is the mechanism, provided for under the Treaty, which makes it possible for Member States to ensure that they do not grant unlawful State aid and for undertakings to ensure that they do not benefit from such aid. However, since the special tax regime constituted a procedure for imposing business tax which derogated from the general law and related to two undertakings, the possibility of it being State aid could not be ruled out automatically. It is common ground, however, that the special tax regime was not notified to the Commission. In that regard, it should be pointed out that, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 88(3) EC, the recipient of the aid then cannot, in the absence of special circumstances, have a legitimate expectation that the aid is lawful (see, to that effect, *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 254 above, paragraph 45).

277 Fourthly, as the Commission argues, the circumstances in which reliance on the protection of legitimate expectations can be vindicated are specific to each case. Accordingly, the fact that the Commission acknowledged that FT could rely on that principle in the case which gave rise to Decision 2006/621 has, in itself, no bearing on the question whether the undertaking may be acknowledged that protection in the present case.

278 Fifthly and lastly, the French Republic's argument that the Commission did not have an established decision-making practice in the matter falls also to be rejected. The lack of such practice, even if it were proved, could not support the argument that the applicants could legitimately assume that the special tax regime does not establish State aid.

279 It follows from the above that the applicants' arguments cannot be upheld and that it is therefore necessary to reject the fourth plea raised by the French Republic and the first part of the fourth plea raised by FT.

7. *The possibility of ordering recovery of an indefinite amount and observance of the principle of legal certainty*

Arguments of the parties

280 By the second part of its fourth plea, FT maintains that the possibility of determining the exact amount of aid incompatible with the common market is a condition for its recovery and that the hypothetical nature of the amount to be recovered is inconsistent with the principle of legal certainty.

281 FT states that the principle of legal certainty does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the aid recipient (*Salzgitter* v *Commission,* paragraph 249 above) and that that principle requires that every act of the administration which produces legal effects should be clear and precise, so that the person concerned is able to know without ambiguity what his rights and obligations are and to take steps accordingly (Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraph 78). As a consequence, in accordance with that principle, the Commission was required to provide the French Republic with information enabling it to work out without overmuch difficulty the exact amount of the aid to be recovered and, in particular, to set a parameter enabling the extent of the anticompetitive advantages from which FT had benefited to be gauged (Case 70/72 *Commission* v *Germany* [1973] ECR 813; Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 33; and Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25).

282 However, the Commission merely set out a range which was of an indicative nature, without setting the parameters necessary for calculating the amount of aid to be recovered. Contrary to the principle of legal certainty, therefore, the contested decision cannot be regarded as having clear and precise legal effects.

283 Indeed, it is impossible to calculate exactly the amount of the difference between the business tax contribution charged to FT for the years prior to 2003 and the amount which FT would have had to pay in taxes if it had been taxed in accordance with the general law.

284 FT did not have cost accounting enabling it to apportion the tax bases municipality by municipality, since the earliest available data related to the year 2001, which constitutes, under Article 1467 A of the General Tax Code, the reference period for determining the tax payable for 2003 (see paragraph 21 above). FT has approximately 19 000 sites, which varied considerably between 1991 and 2000, which makes any effective division of tax bases for the years prior to 2001 impossible.

285 Also, the consequence of the impossibility of dividing the tax bases in order to calculate the amount of tax which FT would normally have had to pay is that it is also impossible to determine the actual local tax rates applicable, which, moreover, are no longer available. The amounts communicated to the Commission in May 2003 were accordingly obtained, for the years 1994 to 1999, from a national average tax rate for FT calculated by straight line extrapolation from the national weighted average rate.

286 The data forwarded in July 2004 are more reliable, because they are drawn from the amount actually charged to FT, in accordance with the general law, for the year 2003 but, for the previous years, they are also based on a fictitious reconstruction by extrapolation.

287 In those circumstances, the data forwarded by the French Republic during the administrative procedure could only be indicative and very approximate in nature, a situation which was duly brought to the Commission's attention. The administration also took this into account, as is shown by the minutes of the meeting of the College of the Members of the Commission during which the contested decision was adopted. It is therefore impossible to calculate, on the basis of the parameters set out in the contested decision, the exact amount of the advantage from which FT is deemed to have benefited. In Decisions 2003/216 and 2006/621, however, the Commission inferred from the fact that it was impossible to calculate the amount of the aid which it had identified that it was not possible to order its recovery.

288 The Commission maintains, first, that, according to established case-law, it may confine itself to declaring that there is an obligation to repay the aid and leave it to the national authorities to calculate the exact amounts to be repaid.

289 The Commission goes on to argue that the lack of definite accounting data does not preclude the recovery of aid, where the aid can be precisely identified. In the contested decision, the aid at issue was precisely identified as the tax differential corresponding to the difference between the business tax charge which FT would have borne if it had been subject to the general law and the tax actually borne by that undertaking, from 1994 to 2002. The exact quantification of the aid at issue has no bearing on the legality of the contested decision, but is part of its implementation, which is based on the duty of the Commission and the Member States to cooperate in good faith, as laid down in Article 10 EC.

290 In that regard, first, the use of a method of extrapolation from available data is acceptable. Furthermore, this method was used by the French Republic during the administrative procedure and it culminated in the two series of figures given in the contested decision to establish the indicative range within which the amount to be recovered is situated.

291 The indicative nature of the amount was duly taken into consideration by the College of the Members of the Commission [PV(2004) 1667 final of 19 and 20 July 2004, paragraph 20.1, p. 34] and, in consequence, the word 'indicative' was inserted in recital 59 of the contested decision by a corrigendum adopted on 19 January 2005 [C(2005) 75 final] and notified on the same day to the French Republic.

292 Secondly, it cannot seriously be claimed that it was impossible to reconstruct the amount of tax which FT would have had to pay if it had been subject to the general law.

293 In the first place, the French authorities based their arguments successively on two series of data — submitted on 15 May 2003 and 29 January 2004 — which they described as sufficiently reliable, in order to try to establish that there had been no advantage to FT during the period from 1991 to 2002. It was not until the French authorities learned that the Commission was preparing to refuse to accept the argument relating to the set-off between the fixed levy charged to FT during the period from 1991 to 1993 and the tax differential resulting from the special tax regime for the years 1994 to 2002, that the French Republic maintained, for the first time, that its estimates were not reliable.

294 In the second place, there is no basis whatsoever for the claims that the information needed for determining the amount of the business tax contributions which would normally have been charged to FT for the years 1994 to 2002 is not available.

295 It is unlikely that FT cannot know with sufficient accuracy the geographic location of its assets over a not very distant period. As for the tax rates voted for the years in question by the local authorities in the territory in which FT had premises, this is public information and its disappearance is wholly inexplicable.

Findings of the Court

296 It should be pointed out, first of all, that, in reply to the questions put to it by the Court, the French Republic stated that, following the judgment in *Commission* v *France*, paragraph 93 above, it was withdrawing the fifth plea which it had raised in support of the present action, by which it maintained that the fact that it was impossible to calculate the exact amount of the aid at issue meant that it was impossible to discharge the obligation to recover it and that it had provisionally implemented Article 2 of the contested decision. That being so, only the arguments put forward by FT will be taken into consideration.

297 According to established case-law, the Commission is not required, in the decision ordering the recovery of unlawful aid, to state the exact amount of the aid to be recovered. In this area, Community law requires merely that recovery of aid granted unlawfully restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law, subject to the requirement that they do not restrict the scope and effectiveness of Community law (*Ladbroke Racing* v *Commission*, paragraph 184 above, paragraph 187 and the case-law cited).

298 It is therefore sufficient if it is possible to calculate the amount of the aid to be recovered, without overmuch difficulty, on the basis of the information given in the decision (*France* v *Commission*, paragraph 281 above, paragraph 33).

299 Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid, particularly where that calculation requires tax and social security systems, the detailed rules of which are laid down in the applicable national legislative provisions, to be taken into account (*Spain* v *Commission*, paragraph 281 above, paragraph 26, and *Ladbroke Racing* v *Commission*, paragraph 184 above, paragraph 188).

300 However, the freedom granted to the Commission to refrain from stating the precise amount of aid to be recovered cannot allow the Commission to avoid complying with the principle of legal certainty, which requires that every act of the administration which produces legal effects should be clear and precise so that the person concerned is able to know without ambiguity what his rights and obligations are and to take steps accordingly (*Langnese-Iglo* v *Commission,* paragraph 281 above, paragraph 78).

301 In the present case, it should be pointed out that, in paragraph 59 of the contested decision, the Commission stated that the aid at issue amounted to between EUR 798 million and EUR 1 140 million. It follows that the amount of EUR 798 million must be considered to be the minimum aid amount to be recovered in accordance with Article 2 of the contested decision. The enacting terms of a decision relating to State aid are indissociably linked to the statement of reasons for that decision and, in consequence, when that decision has to be interpreted, account must be taken of the reasons which led to its adoption. Since the amounts delimiting the range within which the amount of the aid at issue lies are not indicative, the contested decision contains the appropriate information to enable the French Republic to determine itself, without too much difficulty, the final aid amount to be recovered (see, to that effect, *Commission* v *France,* paragraph 87 above, paragraphs 31 to 40 and the case-law cited).

302 First, in recital 42 of the contested decision, the aid at issue was precisely identified as being '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'.

303 Secondly, in recitals 54 to 60 of the contested decision, the Commission set out the estimates which had been sent to it by the French Republic during the administrative procedure and took that data as a basis for determining the amount of aid at issue. In so doing, the Commission rightly pointed out that methods of obtaining an approximate amount of the aid, such as those used in this case, might be accepted if the Member State and the undertaking were unable to calculate exactly the amount of the advantage from which FT had benefited.

304 Accordingly, since it was possible, without overmuch difficulty, to calculate the amount of the aid to be recovered on the basis of the information given in the contested decision, it was permissible for the Commission to state, in recitals 59 and 60 of the decision, that the exact amount of the aid would be determined by the French authorities during the implementation stage of the decision.

305 It follows that FT is not justified in maintaining that, owing to the impossibility of calculating the amount of aid at issue, the obligation to recover it is contrary to the principle of legal certainty. Consequently, the second part of FT's fourth plea must be rejected.

8. *The application of the limitation rules*

Arguments of the parties

306 By their third plea, the French Republic and FT state that, under Article 15 of Regulation No 659/1999, the powers of the Commission to recover aid are subject to a limitation period of 10 years and that the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme.

307 Both the French Republic and FT contest the Commission's analysis that the aid at issue was granted under an aid scheme and that the point from which time for the purposes of the limitation period started to run is the date on which the first aid instalment was actually paid to FT, that is to say, 1 January 1994.

308 The French Republic and FT maintain, on the contrary, that, in accordance with the principle of legal certainty, the point from which time for the purposes of the limitation period started to run is the date on which a legally binding act introduced the measure at issue, that is to say, 2 July 1990, the date on which Law No 90-568 — Article 21 of which established clearly and precisely the special tax rules applicable to FT from 1994 — was promulgated and entered into force. They put forward six arguments in support of this submission.

309 First, the Commission considers that Member States act in breach of their obligation under Article 88(3) EC to notify new aid where, irrespective of any payment, they adopt a legally binding act in respect of aid.

310 Second, also regarding the notification of new aid, the case-law confirms the Commission's practice (Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 74).

311 Third, the fact that the alleged aid was granted each year has no bearing on the calculation of the limitation period, since Regulation No 659/1999 lays down no rule comparable to the rule which applies to continuing infringements in relation to competition.

312 Fourth, the tax provisions laid down in Law No 90-568 do not constitute an aid scheme for the purposes of the State aid rules, since (i) the enacting terms concern only one undertaking, (ii) the tax regime was implemented by a single national measure which was not itself amended before being repealed; (iii) it needs no subsequent implementing measure; and (iv) it was not designed to confer an advantage on the undertaking.

313 Fifth, Article 15 of Regulation No 659/1999 fixes the point from which time for the purposes of the limitation period starts to run as the date on which the aid was 'awarded', not the date on which it was 'paid', whichever the language version (for example, 'concedido' in Spanish, 'accordée' in French, 'gewährt' in German, 'vienne concesso' in Italian). Also, the terms of Article 15 of Regulation No 659/1999 are different from those of Article 14 of that regulation, which make interest payable from the date on which the aid 'was at the disposal of the beneficiary'. In other words, the taking into consideration of the date on which the aid is awarded is in principle consistent with the Commission's decision-making practice (Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1)), confirmed by the case-law of the Court of First Instance (*Scott* v *Commission*, paragraph 254 above).

314 Sixth, the Commission's argument that the aid must be regarded as having been awarded on the date from which it may be calculated is a source of legal uncertainty, since no definite date may be identified on the basis of that theory.

315 The French authorities and FT maintain that the Commission's first request for information is dated 28 June 2001, that is to say, more than 10 years after 2 July 1990. Since recovery of the aid at issue is time-barred, the contested decision should therefore be annulled.

316 In its reply, the French Republic questions the relevance of the case-law relied on by the Commission in the defence and also the relevance of whether the aid at issue was existing aid irrespective of the application of Article 15 of Regulation No 659/1999. The French authorities add that the Commission's theory that it is necessary to distinguish, in the case of an aid scheme, between the date on which the legal act concerning the aid is adopted, on the one hand, and the date on which each aid instalment may be calculated, on the other, is not substantiated and is unsupported by Article 15 of Regulation No 659/1999.

317 The Commission contests those claims.

Findings of the Court

318 Under Article 15(1) of Regulation No 659/1999, the powers of the Commission to recover aid are subject to a limitation period of 10 years.

319 Article 15(2) of Regulation No 659/1999 provides:

'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.'

320 It is apparent from Article 15(2) of Regulation No 659/1999 that the point at which time starts to run for the purposes of the limitation period is the date on which the aid whose recovery is ordered by the Commission may be regarded as having been granted, that is to say, where the grant of the aid depends on the adoption of legally binding acts, the date on which those acts are adopted (*Fleuren Compost* v *Commission*, paragraph 310 above, paragraph 74; see also, to that effect, *Scott* v *Commission*, paragraph 254 above, paragraphs 3 and 57).

321 In the present case, the French Republic and FT maintain that the legally binding act which awarded the aid at issue is Law No 90-568, which was dated 2 July 1990. The limitation period therefore ended on 1 July 2000 and no measure adopted by the Commission interrupted that period, because the first request for information sent to the French Republic was dated 28 June 2001.

322 However, in recital 42 of the contested decision, the Commission defined the advantage constituting State aid as representing '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'. Accordingly, the Commission did not consider that the aid at issue consisted in the special tax provisions applicable to FT, but in the tax differential representing the difference between the amount of the business tax contributions which the undertaking would have had to pay if it had been subject to the tax under the general law and the amount which it was actually charged under the special tax provisions to which it was subject (see paragraph 201 above).

323 Since business tax is charged annually (see paragraph 202 above), the existence of an advantage for FT depended each year on whether the special tax regime had the effect of making FT have to pay a business tax contribution which was lower than that which it would have had to pay 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 FT had premises.

324 For that reason, the aid at issue cannot be regarded as having been awarded, for the purposes of Article 15(2) of Regulation No 659/1999, before the year 1994, because that was the year of adoption of the binding legal acts which made it possible, for the first time, to establish the existence of a tax differential. In that regard, the applicants' argument cannot be accepted, since it would mean, in cases where a legal act establishes a special regime applicable in the future, that time for the purposes of the limitation period starts to run on a date on which it is impossible to determine with

certainty whether that special regime introduces an advantage which might constitute State aid.

325 Accordingly, 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. As a consequence, the limitation period started to run afresh on that date and had not expired by 2 August 2004, the date on which the contested decision was adopted.

326 It follows that the third plea put forward by the French Republic and by FT must be rejected.

327 It is apparent from all the foregoing that none of the applicants' pleas can be upheld and that, in consequence, their claims that the contested decision should be annulled must be rejected.

Costs

328 Under Article 87(2) of the Rules of Procedure, 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 French Republic and FT have been unsuccessful, they must be ordered to pay the costs, in accordance with the Commission's pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the actions;

2. Orders the French Republic and FT SA to pay the costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 30 November 2009.

[Signatures]

Table of contents

Legal context ..... II - 4324

1. State aid rules ..... II - 4324

2. Rules relating to the adoption of Commission decisions ..... II - 4329

Facts ..... II - 4331

1. Founding of France Télécom ..... II - 4331

2. Liability of FT to business tax ..... II - 4332

General business tax regime ..... II - 4332

Rules applicable to FT ..... II - 4334

Principle of liability to tax under the ordinary law ..... II - 4334

Fixed levy ..... II - 4334

Special tax regime ..... II - 4335

3. Administrative procedure ..... II - 4336

4. The contested decision ..... II - 4339

Procedure and forms of order sought by the parties ..... II - 4348

Law ..... II - 4351

1. Summary of the pleas for annulment ..... II - 4351

2. Compliance with the rules relating to the adoption of Commission decisions ..... II - 4352

Arguments of the parties ..... II - 4352

Findings of the Court ..... II - 4355

3. Respect for the French Republic's rights of defence ..... II - 4360

Arguments of the parties ..... II - 4360

Findings of the Court ..... II - 4361

4. Respect for FT's procedural rights ..... II - 4364

Arguments of the parties ..... II - 4364

Findings of the Court ..... II - 4365

5. Existence of State aid ..... II - 4367

Arguments of the parties ..... II - 4367

Existence of justifications relating to the overall structure of the tax system ... II - 4367

The nature of the fixed levy ..... II - 4368

The indivisible nature of the tax regime applicable to FT during the period from 1991 to 2002 ..... II - 4371

The need to apply a set-off ..... II - 4372

Findings of the Court ..... II - 4376

Existence of an advantage ..... II - 4376

— Whether the special tax regime can be examined separately from the fixed levy ..... II - 4378

— The possibility of a set-off ..... II - 4380

— Existence of a tax differential ..... II - 4383

Justification in terms of the cohesion of the tax system ..... II - 4385

6. The principle of the protection of legitimate expectations ..... II - 4389

Arguments of the parties ..... II - 4389

Findings of the Court ..... II - 4393

7. The possibility of ordering recovery of an indefinite amount and observance of the principle of legal certainty ..... II - 4399

Arguments of the parties ..... II - 4399

Findings of the Court ..... II - 4403

8. The application of the limitation rules ..... II - 4405

Arguments of the parties ..... II - 4405

Findings of the Court ..... II - 4408

Costs ..... II - 4410