OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 26 June 2008 [1]

I — Introduction

1. In the present proceedings for a preliminary ruling the question put to the Court concerns the validity of a decision on a system of aid taken by the European Commission in 1997. In that decision the Commission decided not to raise any objections to the new version of a French system of aid to support sound radio broadcasting — Aid No N 679/97 ('the contested decision').

2. The objective of the system of aid is to provide financial support to small French radio stations with a local audience, which are known as *radios associatives*. [2] A 'support fund for sound radio broadcasting' [3] had been set up for this purpose as early as the 1980s; it was funded by a special tax on radio and television advertising transmitted to France — including both sound radio and television advertising. During the period of relevance here the tax was also levied on advertising that was transmitted to France from abroad.

3. The central issue in the present case is whether the Commission should have accepted this kind of funding for a national system of aid. It affords the Court an opportunity for the first time to elucidate its case-law and consequences with reference to the *Van Calster and Others* judgment [4] in the context of a system of aid that has been notified to the Commission.

1 — Original language: German.

2 — Compare the data provided by the Landesanstalt für Medien Nordrhein-Westfalen (North Rhine-Westphalia media authority) at http://www.lfm-nrw.de/hoerfunk/buergerfunk/ (last visited on 26 February 2008) regarding the phenomenon known in Germany as *Bürgermedien* (community media), particularly so-called citizens' radio.

3 — Fonds de soutien à l'expression radiophonique (FSER), originally set up by Decree No 82-973 of 17 November 1982 (JORF of 18 November 1982, p. 3460) to take effect on 1 January 1983. Further data on this fund is to be found, for example, at http://www.ddm.gouv.fr/rubrique.php3?id_rubrique=40 (last visited on 24 April 2008).

4 — Joined Cases C-261/01 and C-262/01 [2003] ECR I-12249.

II — Legal framework

A — *Community law*

4. The contested decision was taken in 1997. The provisions of the EC Treaty as worded in the Maastricht Treaty [5] therefore form the Community law framework in these proceedings.

5. Article 92 of the EC Treaty (now, after amendment, Article 87 EC) formerly read, in part, as follows:

‘1. Save as otherwise provided in this 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 shall, in so far as it affects trade between Member States, be incompatible with the common market.

…

3. The following may be considered to be compatible with the common market:

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

…’

5 — Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ 1992 C 191, p. 1). As the Amsterdam Treaty (OJ 1997 C 340, p. 1) did not enter into force until 1 May 1999, the amendments which it made to the EC Treaty and the associated renumbering of its articles are not relevant to the present case.

6. Article 93(3) of the EC Treaty (now Article 88(3) EC) provides:

'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 92, 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.'

B — *National law*

7. The French system of aid in question goes back to the year 1982 and came into effect for the first time on 1 January 1983. It was then extended and amended on several occasions. In its version relevant to the year 2001 it is based, first, on Law No 86-1067 of 30 September 1986 on freedom of communication [6] and, second, on Decree No 97-1263 of 29 December 1997 which implemented that law and introduced a special tax for the benefit of the support fund for sound radio broadcasting. [7]

8. Article 80 of Law No 86-1067 provides as follows:

'Sound radio broadcasting services whose commercial resources deriving from broadcasts of an advertising or sponsorship nature are less than 20% of their total turnover shall be granted aid in accordance with the procedure laid down by decree …

To fund that aid a tax shall be levied on revenue from advertisements broadcast on sound radio and television.

Revenue received by sound broadcasting services in connection with broadcasting to support collective or charitable action shall not be taken into account for the purposes of ascertaining the upper limit stipulated in paragraph 1 of this article.'

6 — Loi n° 86-1067 relative à la liberté de communication (JORF of 1 December 1986, p. 11755); this law applies in the version amended by Article 25 of Law No 89-25 of 17 January 1989 (JORF of 18 January 1989, p. 728) and Article 27 of Law No 90-1170 of 29 December 1990 (JORF of 30 December 1990, p. 16439).

7 — Décret n° 97-1263 portant création d'une taxe parafiscale au profit d'un Fonds de soutien à l'expression radiophonique (JORF of 30 December 1997, p. 19194).

9. Article 1 of Decree No 97-1263 reads as follows:

'With effect from 1 January 1998 a special tax on advertising broadcast on sound radio and television shall be introduced for a period of five years to fund a system of aid for the benefit of those licensed to provide sound broadcasting services whose commercial resources deriving from advertisements representing brand or sponsorship advertising are less than 20% of their total turnover.

The objective of this tax is to promote sound radio broadcasting.'

10. Article 2 of Decree No 97-1263 provides:

'The tax shall be calculated on the basis of the sums, exclusive of agency fees and value added tax, paid by advertisers for the broadcasting of their advertisements to French territory.

Those liable to pay the tax are the persons marketing the broadcasting of these advertisements.

The rate of tax shall be determined in a joint order made by the Ministers responsible for Budgetary Matters and for Communications and shall be graduated according to the quarterly revenue of the party liable to pay the tax, whereby the following upper limits shall apply:

…

II. Television advertising

Up to 3 million inclusive …	6 500
…	
from 780 to 840 million inclusive…	7 602 070
from 840 to 900 million inclusive…	8 181 250
over 900 million…	8 760 480.' [8]

8 — The figures are expressed in FRF. Under the forerunner system for the period 1993 to 1997 Article 2 of Decree No 92-1053 of 30 September 1992 (Décret n° 92-1053 portant renouvellement d'une taxe parafiscale au profit d'un Fonds de soutien à l'expression radiophonique, JORF No 228 of 1 October 1992) provided for the following upper limits for the tariff levels concerned (figures again given in FRF): Up to 3 million inclusive: 4 430; …; from 780 to 840 million inclusive: 5 175 000; from 840 to 900 million inclusive: 5 569 270; over 900 million: 5 963 570.

11. Under Article 3 of Decree No 97-1263 the net tax revenue is allocated to a *support fund for sound radio broadcasting*, which is kept as a separate account in the books of the National Audiovisual Institute. [9]

12. Under Article 4 of Decree No 97-1263 the tax is calculated, assessed and collected by the tax authority [10] for allocation to the support fund's account under the provisions applicable to value added tax and with the same guarantees and penalties.

13. Articles 7 to 20 of Decree No 97-1263 contain provisions on the aid that the INA pays from the net tax revenue allocated to the support fund. The parties eligible for aid are those licensed to provide sound radio broadcasting services pursuant to Article 1 of Decree No 97-1263.

14. Under Article 7 of Decree No 97-1263 aid is distributed from the available funds by a panel whose composition and rules of procedure are laid down in that Article 7 and in Articles 8 to 11 of Decree No 97-1263.

9 — Institut national de l'audiovisuel ('the INA').
10 — Direction générale des impôts.

15. Decree No 97-1263 makes provision for three types of aid:

— *start-up aid* under Articles 12 and 13 of the decree, which is granted to newly licensed radio stations and is limited to FRF 100 000;

— *equipment aid* under Article 14 of the decree, which can be granted on the basis of documentation submitted by individual radio stations but is only granted once during a five-year period and not less than five years after the grant of start-up aid; equipment aid must not exceed 50% of the amount invested and is also subject to a maximum limit of FRF 100 000;

— *annual operating aid* granted in accordance with the terms and conditions stated in Articles 16 and 17 of the decree.

16. The basic amount of annual operating aid is established from a table of rates drawn up by

the support fund panel. [11] The starting point taken here is a particular radio station's revenue from normal operations before deducting the advertising marketing costs.

17. The basic amount of operating aid can be increased by up to 60% depending on efforts made by the radio station to diversify its financial resources directly linked to its broadcasting activities, on measures that it takes to provide further professional training for its staff, on the action taken by it with regard to education and culture, on its participation in communal programming measures and on its endeavours in the fields of social communication in a neighbourhood context and integration.

18. It should finally be noted that the system of aid at issue was changed again in 2003. The position now is that only advertising broadcast from France is liable to the tax on radio and television advertising and advertisements transmitted to France from abroad no longer incur the tax. [12]

11 — As established during the oral procedure before the Court, the table is redrawn each year depending upon the funding available to the support fund for sound radio broadcasting. This is also apparent from the support fund's annual reports (available to be downloaded from the source stated in footnote 3).

12 — Article 302bis KD of the General Tax Code (Code général des impôts) as worded in the Law on financial legislation for 2003 (Article 47 of Law No 2002-1575 of 30 December 2002, JORF of 31 December 2002, p. 22025), as amended by Article 22 of Law No 2003-709 of 1 August 2003 on sponsoring schemes, associations and foundations (loi relative au mécénat, aux associations et aux fondations, JORF of 2 August 2003, p. 13277).

III — Background to the dispute

A — *The Commission's decisions on the French system of aid*

19. The French system of aid at issue had already been notified to the Commission in accordance with Article 93(3) of the EC Treaty on several occasions — for different consecutive periods of time — and in each proposed form had therefore been the subject of various decisions by the Commission. The contested decision of 1997 is one of these.

1. Background to the contested decision

20. In a letter of 1 March 1990 [13] the Commission had already informed the French authorities that it had no objection to the system of aid in the form notified to it at the beginning of 1990 (Aid No N 19/90). The

13 — Letter from the Vice-President of the Commission, Sir Leon Brittan, to the French Minister for Foreign Affairs; file reference: SG(90) D/02864.

letter does not contain a more detailed statement of reasons.

21. Nor did the Commission raise any objection to the system of aid in the form notified to it in the summer of 1992 (Aid No N 359/92) and it informed the French authorities accordingly in a letter of 16 September 1992. [14] In its statement of reasons it said that the beneficiaries of the system of aid were small radio stations with local audiences so that 'intra-Community competition and trade ought not to be affected to an extent that is contrary to the common interest'. Accordingly, a derogation from the prohibition on aid could be justified on the ground that the system continued to pursue public interest objectives.

2. The contested decision

22. The contested system of aid was notified to the Commission in October 1997 in its form applicable to the years 1998 to 2002 (Aid No N 679/97); a draft of Decree No 97-1263, which would later be adopted, was enclosed. In response to that notification the Commission came, on 7 November 1997, to the contested decision that it would not raise any objection to the proposed amendments to the system of aid. [15]

23. The French authorities were informed of the contested decision in a letter of 10 November 1997. [16] In its statement of reasons the Commission referred in that letter, first, to the fact that the budgetary resources had not been increased and, second, to the fact that the beneficiaries of that aid were small radio stations with a local audience. On that basis it came to the assessment that 'intra-Community trade ought not to be affected to an extent that is contrary to the common interest'. [17] A derogation from the prohibition on aid could therefore be justified on the ground that the system continued to pursue public interest objectives.

24. After the contested decision had been received the French authorities adopted Decree No 97-1263.

14 — Letter from the Vice-President of the Commission, Sir Leon Brittan, to the French Minister for Foreign Affairs; file reference: SG(92) D/12470.

15 — In the original wording: '… la Commission a décidé de ne pas soulever d'objection aux modifications du régime, telles que notifiées.'

16 — Letter from Karel Van Miert, Member of the Commission, to the French Minister for Foreign Affairs; file reference SG(97) D/9265. A brief notice of the decision, which also gives 7 November 1997 as the date of its adoption, is to be found in OJ 1999 C 120, p. 2.

17 — '… les échanges intracommunautaires ne paraissent pas devoir être affectés dans une mesure contraire à l'intérêt commun …'

3. Developments after the contested decision

25. The contested system of aid was again notified to the Commission in November 2002 in the form that it was proposed to take from 1 January 2003 onwards. In response to that notification the Commission for the first time [18] raised the objection that the tax on radio and television advertising used to fund the system of aid was also being levied on advertisements transmitted to France from abroad.

26. In response to this the proposed territorial scope of application of the tax was restricted to advertisements transmitted from France [19] and notification of the system of aid was amended accordingly in June 2003.

27. It was only then that the Commission informed the French authorities in a letter of 28 July 2003 [20] of its decision not to raise any objections to the amendments to the system of aid notified to it (Aid No NN 42/03, formerly Aid No N 725/02). That decision by the Commission expressly relates to a tax that is not levied on radio and television advertising transmitted to France from abroad.

B — *The facts and the main proceedings*

28. Régie Networks is part of the NRJ Group and markets advertising time for its radio stations on their local frequencies. In the course of such activities Régie Networks paid special tax on radio and television advertising in France for 2001 in the sum of EUR 152 524.

29. Because Régie Networks considered the tax on radio and television advertising to be contrary to Community law it then demanded repayment of the sums paid from the Direction de contrôle fiscal [21] Rhône-Alpes-Bourgogne, and accordingly applied for relief

18 — Letter from the Commission's Directorate-General for Competition of 8 May 2003 to the French Permanent Representation to the European Union; file reference: COMP(2003) D/55066.

19 — See point 18 of this Opinion.

20 — Letter from Mario Monti, Member of the Commission, to the French Minister for Foreign Affairs; file reference: C(2003) 2828.

21 — Principal Revenue Office.

from the tax; it received no reply for six months.

30. Régie Networks then instigated proceedings in the Tribunal administratif de Lyon [22] on 3 August 2004 but those proceedings were dismissed in a judgment of 25 April 2006. Régie Networks lodged an appeal against the judgment at first instance with the Cour administrative d'appel de Lyon, [23] which is the referring court.

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

31. By a decision of 12 July 2007, which was registered at the Court on 17 July 2007, the Cour administrative d'appel de Lyon stayed the main proceedings and submitted the following question to the Court for a preliminary ruling:

'Is Commission Decision No N 679/97 of 10 November 1997 by which the Commission decided not to raise any objections to the alterations made to the system of aid to radio broadcasting introduced by Decree [No] 92/1053 valid

— in respect of the statement of reasons,

— in respect of the assessment made as to the compatibility with the EC Treaty of the funding scheme for aid to sound radio broadcasting which was established for the period 1998 to 2002 and

— in respect of the ground relating to the lack of any increase in the budgetary resources of the system of aid at issue?'

32. Régie Networks, the French Government and the Commission of the European Communities made written and oral submissions in the proceedings before the Court.

22 — Lyons Administrative Court.
23 — Lyons Higher Administrative Court.

V — Assessment

A — *Admissibility of the reference for a preliminary ruling*

1. Permissible subject-matter

33. It must first be considered whether the validity of the contested decision can still at this time be the subject of a reference for a preliminary ruling to the Court.

34. According to established case-law, a question on the validity of an act of the Community institutions may only be referred to the Court if that act has not already assumed a definitive nature. [24] In order to ensure legal certainty it is necessary to prevent the legal effects of actions by Community institutions from being 'called into question indefinitely'. [25] Where an individual can already obtain legal protection by means of an action for annulment in accordance with Article 173 of the EC Treaty (now Article 230 EC), he must pursue that direct route if he wishes to obtain a judicial examination of the legal act in question. [26] Otherwise, there is a risk that the time-limit set out in the fifth paragraph of Article 173 of the EC Treaty and the definitive nature of the legal act concerned arising on the expiry thereof might be circumvented. [27]

35. A person who allows the time-limit laid down for an action for annulment of a Community act under Article 173 of the EC Treaty to expire must accept the definitive nature of that act and cannot therefore plead its illegality before the national courts at a later date, even by means of an indirect challenge; [28] in such a case the national court

24 — Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833 ('*TWD*'), paragraphs 13 to 26; Case C-178/95 *Wiljo* [1997] ECR I-585, paragraphs 19 to 24; and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraphs 28 to 39.

25 — *TWD* (cited in footnote 24), paragraph 16; *Wiljo* (cited in footnote 24), paragraph 19; and *Nachi Europe* (cited in footnote 24), paragraph 29.

26 — See, in this vein, *TWD* (cited in footnote 24), particularly paragraph 17, and *Nachi Europe* (cited in footnote 24), paragraphs 37 to 39.

27 — *TWD* (cited in footnote 24), paragraphs 17 and 18; *Nachi Europe* (cited in footnote 24), paragraphs 29 and 30; Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 111; Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 31; and Case C-232/05 *Commission* v *France* [2006] ECR I-10071, paragraph 59.

28 — *TWD* (cited in footnote 24), paragraphs 13 and 17; *Nachi Europe* (cited in footnote 24), paragraphs 30 and 37; and Case C-11/00 *Commission* v *ECB* [2003] ECR I-7147, paragraph 75. However, this case-law only concerns instances in which proceedings before the national courts and a possible reference for a preliminary ruling were at all likely, from the point of view of their subject-matter, to call the validity of a Community act into question; see *Banks* (cited in footnote 27), paragraph 112, and *Wiljo* (cited in footnote 24), paragraphs 27 and 29.

is bound by the Community act that has become definitive and cannot subsequently question its validity by making a reference for a preliminary ruling to the Court. [29]

36. An indirect challenge before the national courts and the submission of a reference for a preliminary ruling to the Court should only be considered inadmissible, however, if the individual could *undoubtedly* have instituted an action for annulment in the Community Courts. [30]

37. In the present case it cannot be assumed that the right of Régie Networks to bring proceedings before the Community Courts would *undoubtedly* have been sufficient to enable the contested decision to also be *substantively* examined for legality.

38. As Régie Networks was not the person to whom the contested decision was addressed, it could only have challenged it in an annulment action if it were directly and individually concerned by it (fourth paragraph of Article 173 of the EC Treaty).

39. The very question of whether Régie Networks was *directly concerned* would appear problematic in this case.

40. In the contested decision the Commission authorised a system of aid. As far as the special tax funding that system of aid is concerned, the French authorities retain considerable discretion both as regards the levying of the tax and the amount of it. The same applies to payments made from the support fund to radio stations entitled to the aid: they are decided in each individual case by the competent advisory panel — to which discretion would appear to have been afforded in any event with regard to the grant of start-up aid and any topping-up of annual operating aid. [31]

41. The present case cannot therefore be compared to those in which a Member State is under an obligation to implement a Community measure, where that implementation

29 — *TWD* (cited in footnote 24), paragraph 25; *Wiljo* (cited in footnote 24), paragraph 24; and *Nachi Europe* (cited in footnote 24), paragraph 40. According to *Atzeni and Others* (cited in footnote 27), paragraphs 30 and 34, a reference for a preliminary ruling on the validity of the Community act at issue would be *inadmissible*.

30 — The principle that an individual must 'undoubtedly' have a right of action under the fourth paragraph of Article 173 of the EC Treaty follows from settled case-law in *TWD* (cited in footnote 24), paragraph 24; *Wiljo* (cited in footnote 24), paragraphs 21 and 23; *Nachi Europe* (cited in footnote 24), paragraphs 37 and 38; *Banks* (cited in footnote 27), paragraph 111; and Case C-441/05 *Roquette Frères* [2007] ECR I-1993, paragraphs 40, 41, 47 and 48. Similarly, in Case C-241/95 *Accrington Beef* [1996] ECR I-6699, paragraphs 15 and 16, Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraphs 28 and 29, and *Atzeni and Others* (cited in footnote 27), paragraph 34, the criterion is whether it is 'obvious', 'self-evident' or 'unquestionable' that the individual's action for an annulment would be admissible.

31 — See points 15 to 17 of this Opinion.

is purely automatic because the national authorities are left no discretion in that regard;[32] nor is it comparable to cases in which there is a priori no doubt that the national authorities will implement a Community measure in a quite specific manner.[33]

42. As for the requirement that a person be *individually concerned*, Régie Networks may claim to be individually concerned only if the contested decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of those factors distinguishes it individually just as in the case of the person addressed (so-called '*Plaumann* case-law').[34] It cannot be assumed here beyond any doubt that Régie Networks was individually distinguished in this way.

43. Admittedly, the contested decision was taken following a purely summary preliminary examination of the French system of aid pursuant to Article 93(3) of the EC Treaty ('stage I' of the aid monitoring procedure), that is to say without implementing a formal review procedure ('stage II' of the aid monitoring procedure) under Article 93(2) of the EC Treaty. An undertaking such as Régie Networks could therefore possibly have challenged that decision simply with the aim of initiating the second stage of the aid monitoring procedure so as to specifically obtain the protection of any procedural guarantees afforded to it under Article 93(2) of the EC Treaty in a formal review procedure.[35]

44. In the present case, however, it is not claimed that the guarantees of a formal aid monitoring procedure were withheld from Régie Networks.[36] Indeed, the reference for a preliminary ruling submitted by the Cour administrative d'appel principally deals with the *substantive legality* of the contested decision, that is to say the question whether the Commission was right to consider the French system of aid compatible with the common market.

32 — Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and the cases cited there, and Case C-417/04 P *Regione Siciliana* v *Commission* [2006] ECR I-3881, paragraph 28.

33 — *Dreyfus* v *Commission* (cited in footnote 32), paragraph 44, and the cases cited there, and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 46.

34 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107 and established case-law; see also Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33, and Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 19.

35 — *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (cited in footnote 34), paragraph 35, and *Stadtwerke Schwäbisch Hall and Others* v *Commission* (cited in footnote 34), paragraphs 19 to 22.

36 — See in the same vein, in relation to an action for annulment, Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission*, paragraphs 48 to 56 and particularly paragraphs 48 and 56.

45. However if, as in this case, it is primarily the *substantive assessment* of a system of aid by the Commission that is being looked at, the status of an undertaking as a possible 'person concerned' within the meaning of Article 93(2) of the EC Treaty is not of itself sufficient to make it 'individually concerned' and afford it the right to bring an action before the Community judicature. In a case such as this the undertaking must demonstrate that it has a particular status within the meaning of the *Plaumann* case-law, which will be the case in particular where its market position is *substantially affected* by the aid — or system of aid — that the decision finds permissible. [37]

46. In view of the comparatively small size of the radio stations benefiting from the aid and of the limited scope of the aid granted to them from the French support fund for sound radio broadcasting it seems to me somewhat far-fetched to consider here that there was a risk of substantially affecting the market position of commercial nationwide broadcasting undertakings and the entities that marketed their advertising time. [38] In any event Régie Networks could not necessarily assume that its own market position or the market position of the NRJ Group would be substantially affected in such a way and that it was therefore *undoubtedly* entitled to bring a claim before the Community judicature.

47. The more likely conclusion is that the French system of aid that the contested decision found permissible did not so much affect Régie Networks with regard to its status as a possible competitor of the beneficiary of the aid, but primarily as a party liable to pay the tax. Hence, Régie Networks did not form part of a closed circle of persons affected and the contested decision affected it only as regards its status as a normal economic operator, that is to say as a result of objective criteria formulated in general and abstract terms. This would suggest that it is not a person individually concerned. [39]

37 — *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (cited in footnote 34), paragraph 37, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (cited in footnote 34), paragraphs 24, 28 and 29, Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 31, and Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 54; see also *Fachvereinigung Mineralfaserindustrie* v *Commission* (cited in footnote 36), paragraph 35.

38 — Adequate distinguishing circumstances cannot be seen to exist where the contested decision simply might have exercised an influence on the competitive relationships existing on the relevant market and where the undertaking concerned was in a competitive relationship with the addressee of that measure (see *Spain* v *Lenzing* (cited in footnote 37), paragraph 32).

39 — See Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraphs 67 and 68; see also, regarding the issue of concern as an economic operator as a result of objective criteria, *Plaumann* v *Commission* (cited in footnote 34), p. 238, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 14, Case 26/86 *Deutz and Geldermann* v *Council* [1987] ECR 941, paragraph 12, and Case C-451/98 *Antillean Rice Mills* v *Council* [2001] ECR I-8949, paragraph 51.

48. Due to significant uncertainty as to entitlement to bring an action (fourth paragraph of Article 173 of the EC Treaty), the admissibility of an action for annulment brought by Régie Networks against the contested decision of the Commission would therefore have been doubtful.

49. The fundamental right to effective judicial protection [40] requires that in subsequent proceedings on a reference for a preliminary ruling such uncertainty does not operate generally to the detriment of those concerned. Otherwise, in order to avoid jeopardising their possibility even to obtain a judicial review of the relevant Community legal act they would be under considerable pressure — even where admissibility is doubtful — always to pursue an action for annulment as a purely precautionary measure. From the point of view of procedural economy, this would hardly be desirable. [41]

50. In all, I conclude that the contested decision has not assumed a definitive nature with regard to Régie Networks so that there was no reason for the Cour administrative d'appel not to make the question of its validity the subject of the present reference for a preliminary ruling.

2. Whether the question referred is necessary to enable the national court to give judgment

51. The Commission casts doubt on the relevance of the question referred to a decision in the main proceedings. It argues that no significance is to be attached to the validity of the contested decision when assessing the legality of the special tax the repayment of which forms the subject-matter of the main proceedings, given that the tax does not form an integral part of the system of aid that the Commission found permissible. Furthermore, it continues, even if the contested decision should be declared invalid the French authorities are not under any automatic obligation to repay taxes already collected and the Commission would first have to make a new decision on the system of aid.

52. I am not convinced by this view put forward by the Commission.

40 — See, with regard to this fundamental right, Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (proclaimed in Nice on 7 December 2000) (OJ 2000 C 364, p. 1); see also Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 43.

41 — See also my Opinion in *Roquette Frères* (cited in footnote 30), point 33.

53. According to settled case-law, it is solely for the national court to determine the need for a preliminary ruling and where the questions submitted concern the interpretation of Community law the Court is in principle bound to give a ruling. [42] There is a general presumption that questions referred by national courts for a preliminary ruling are relevant and this presumption may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law which is sought bears no relation to the actual facts of the main action or to its purpose. [43]

54. In the present case, however, it cannot be said that it is *obvious* that the question referred for a preliminary ruling by the Cour administrative d'appel is *irrelevant* to a decision in the main action.

55. Contrary to the view taken by the Commission, it is certainly not absurd that a determination that the contested decision is invalid should at the same time entail the illegality of the special tax because the very purpose of that tax is to provide funding to the support fund for sound radio broadcasting to which the French system of aid relates. There is therefore prima facie a close relationship of mutual dependence (hypothecation) between the tax and the aid for radio stations funded from it; the possibility that this relationship is sufficiently close to permit the tax to be considered an integral part of the system of aid cannot be excluded a priori. A more in-depth examination of such hypothecation does not, however, fall within the scope of the admissibility of the reference for a preliminary ruling and must be reserved to the assessment of the substance of the question referred. [44]

56. Nor is the issue of the relevance of the question referred to a decision in the case frustrated by the fact that the Commission might then have to come to a new decision on the compatibility with the common market of the system of aid at issue.

57. A Community measure such as the contested decision here cannot avoid examination of validity in proceedings for a preliminary ruling simply because a new decision with the same content might possibly be taken in the event of it being declared invalid. References for preliminary rulings on the validity of a Community measure are one of

42 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43; and Case C-404/06 *Quelle* [2008] ECR I-2685, paragraph 19.

43 — Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 40, and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 29; with regard to the presumption that questions referred for a preliminary ruling are relevant, see also Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 31, Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, paragraph 25, and Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, paragraph 23.

44 — See points 101 to 115 of this Opinion.

the means of review of the legality of acts of the Community institutions. [45] The purpose of such a review is achieved, rather than frustrated, if after a finding of invalidity the competent Community institution reconsiders a measure adopted by it and then acts without any error of law — even if it should come to the same conclusion in substance as before.

58. Moreover, it is not established a priori in the present case that a new decision by the Commission would necessarily lead to the system of aid being found permissible. The question referred by the Cour administrative d'appel certainly does not just focus on formal defects that can easily be remedied but also considers the substantive legality of the French system of aid in the light of its funding. If this type of funding should conflict with Community law — with freedom to provide services, for instance — the illegality of the tax levied could hardly be avoided by a new Commission decision.

59. In the light of the foregoing considerations it is in any event not *obvious* that the question referred for a preliminary ruling *does not have relevance* to a decision in the main proceedings. The fact that the Commission might have to make another decision on whether the system of aid is compatible with the common market in the event of it being ruled that the contested decision is invalid does not affect the admissibility of the reference for a preliminary ruling; this fact can indeed be adequately taken into account in the context of the temporal limitation on the effects of the judgment handed down by the Court. [46]

3. Interim conclusion

60. The question referred for a preliminary ruling is therefore admissible in its entirety.

B — *Substantive analysis of the question referred*

61. The Cour administrative d'appel gives three grounds on the basis of which the contested decision might possibly be vitiated:

45 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 16; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 18; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 103.

46 — See points 128 to 155 of this Opinion.

an inadequate statement of reasons in the decision, a manifestly erroneous assessment of the facts, and another manifestly erroneous assessment in that, when reviewing the system of aid, the Commission failed to take the method of its funding into account.

1. Procedural illegality of the contested decision: failure to state reasons

62. It is apparent from the order for reference that the referring court is asking the Court to review the statement of reasons in the contested decision in two respects. [47] First, the Commission does not state the derogation on the basis of which it found that the French system of aid was permissible; second, it did not take any position on the means of funding that system of aid.

63. The requirement to state reasons under Article 190 of the EC Treaty (now Article 253 EC) is one of the essential procedural requirements failure to observe which can result in the measure concerned being declared invalid in the preliminary reference procedure. [48]

(a) Failure to refer to the method of funding of the system of aid

64. First, as far as the method of funding of the system of aid is concerned the Commission indisputably does not mention it at all in the statement of reasons for the contested decision. However, its silence does not necessarily mean that the contested decision is vitiated by a failure to state reasons.

65. It is clear from settled case-law that the statement of reasons required by Article 190 of the EC Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the

47 — The Cour administrative d'appel adopts in this respect the arguments put forward by Régie Networks in the main proceedings, to which reference is made in the order for reference.

48 — See, inter alia, Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, paragraphs 25 to 27; Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 9; and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 79 to 86.

circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. [49]

66. As already mentioned, one of the special features of the procedure for reviewing aid is that the preliminary stage under Article 93(3) of the EC Treaty has to be distinguished from the formal review procedure under Article 93(2) of the EC Treaty. Whilst the formal review procedure is designed to enable the Commission to be fully informed of all the aspects of a case, the preliminary stage is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question with the common market [50] — a decision that is taken in a short space of time. [51]

67. The contested decision was taken at the end of such a preliminary stage without the Commission instituting the second stage of the procedure. The requirements of a statement of reasons in such a decision must therefore also ultimately be lower than those of a statement of reasons in a decision by which a more extensive examination of a case is concluded in a formal review procedure. It need only state the reasons why the Commission considers that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market. [52]

68. In any event it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the EC Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [53]

49 — See only Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, paragraph 54; Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 80; and *Nuova Agricast* (cited in footnote 48), paragraph 79.

50 — Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; *Commission* v *Sytraval and Brink's France* (cited in footnote 49), paragraph 38; *Stadtwerke Schwäbisch Hall and Others* v *Commission* (cited in footnote 34), paragraph 20; and *Nuova Agricast* (cited in footnote 48), paragraph 57.

51 — *Matra* v *Commission* (cited in footnote 50), paragraph 48.

52 — *Matra* v *Commission* (cited in footnote 50), paragraph 48.

53 — *Commission* v *Sytraval and Brink's France* (cited in footnote 49), paragraph 63; *Italy* v *Commission* (cited in footnote 49), paragraph 55; *Sison* v *Council* (cited in footnote 49), paragraph 80; *Nuova Agricast* (cited in footnote 48), paragraph 79; and Case C-408/04 P *Commission* v *Salzgitter* [2008] ECR I-2767, paragraph 56.

69. As the contested decision in this case was the third in a line of decisions on the system of aid in question, [54] the Commission was entitled to assume knowledge of the general context in which its decision was made and to word it in a correspondingly concise manner. [55]

70. In its letter of 10 November 1997 the Commission informed the French authorities, in an extremely concise but nevertheless comprehensible form, of its reasons for again finding that the extended system of aid was permissible; it said that the budgetary resources had not been increased, the beneficiaries of this aid were small radio stations with local audiences, the system continued to pursue public interest objectives and intra-Community trade would not be affected to an extent contrary to the common interest.

71. As, according to its own affirmations, the Commission considered the method of funding the system of aid to be irrelevant as regards its assessment from the competition law aspect, it did not need to go into this in the statement of reasons for the contested decision. The statement of reasons of a Community measure only has to include essential considerations of fact and of law on which the decision is based. [56]

72. The question whether the reasons stated by the Commission are also proper in substance (whether the reasons given are correct) [57] and whether the Commission might have omitted to deal with a relevant aspect when arriving at its decision is not a question of compliance with essential procedural requirements but of the substantive legality of the contested decision. [58]

54 — See points 19 to 24 of this Opinion.

55 — In the same vein, see Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraphs 29 to 31.

56 — Case 6/54 *Netherlands* v *High Authority* [1954-56] ECR 103, 111; Case 24/62 *Germany* v *Commission* [1963] ECR 63, 69; Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 78; and Case T-206/99 *Métropole télévision* v *Commission* [2001] ECR II-1057, last sentence of paragraph 44.

57 — Case 2/56 *Geitling* v *High Authority* [1957 and 1958] ECR 3, 38; Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 65; and Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 55.

58 — See points 95 to 126 of this Opinion.

73. In these circumstances I do not consider the absence of statements on the nature of the funding of the system of aid to be a failure to state reasons which, as a significant procedural defect, could lead to the invalidity of the contested decision.

(b) Failure to state the legal basis

74. As Régie Networks rightly states, the contested decision does not contain any express allocation of the system of aid found permissible by the Commission to a derogation provided for in the EC Treaty. The only indirect reference to a possible legal basis for the contested decision is to be found in a phrase in the Commission's letter of 10 November 1997 in which it notifies the French authorities of its decision. There the Commission confines itself to stating that 'intra-Community trade ought not to be affected to an extent that is contrary to the common interest' without quoting any specific legal provision.

75. Admittedly, failure to refer to a precise provision of the Treaty need not always necessarily constitute an infringement of the obligation to state reasons under Article 190 of the EC Treaty. If the legal basis for a measure can be determined from other elements of that measure, there is no infringement of essential procedural requirements. However, express reference to a particular provision in the Treaty is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis of the measure concerned. [59]

76. In the present case the mere reference by the Commission to intra-Community trade and the extent to which it is expected to be affected does not clearly identify the legal basis for the contested decision. Admittedly, the Commission and the French Government consider that choice of wording to be an indication that the contested decision was based on Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC). However, they overlook the fact that reference is also made in Article 92(3)(d) of the EC Treaty (now Article 87(3)(d) EC) to trading conditions and competition in the Community and the extent to which they are affected, using quite similar wording. [60] An almost identically worded criterion is therefore to be found in two neighbouring provisions of the Treaty neither of which is a priori precluded from being the legal basis.

77. Contrary to the view taken by the Commission and the French Government, the contested system of aid need not necessarily just be considered in the context of facilitating the development of certain economic activities or certain economic

59 — *Commission* v *Council* (cited in footnote 48), paragraph 9, and Case T-308/05 *Italy* v *Commission* [2007] ECR II-5089, paragraph 124.

60 — The provision in Article 92(3)(d), which was incorporated into the EC Treaty by the Treaty of Maastricht, came into force on 1 November 1993.

areas (Article 92(3)(c) of the EC Treaty). A system of aid supporting small radio stations with a local audience which are also in the nature of *radios associatives* ('citizens' radio') could just as well be portrayed as a measure to aid culture (Article 92(3)(d) of the EC Treaty). This is particularly so here as the support fund for sound radio broadcasting also serves not least of all to support measures in the fields of social communication within the neighbourhood and integration. [61] A cultural dimension to the system of aid, such as promoting the development and expansion of a local youth culture in certain towns or urban districts with the help of radio broadcasts, cannot therefore a priori be precluded in any event. [62]

78. The review procedure to be carried out and the policy pursued by the Commission within the scope of its discretion when monitoring aid may differ according to which derogation in Article 92(3) of the EC Treaty applies. For instance, the Commission must not in the context of Article 92(3)(d) disregard the Community's general cultural policy obligations under Article 128(2) of the EC Treaty (now Article 151(2) EC), which might favour a more generous practice when determining whether State aid to promote culture should be permissible.

79. The Commission should therefore have precisely stated whether the contested decision was based on Article 92(3)(c) or (d) of the EC Treaty or on a combination of both derogations. Its letter of 10 November 1997 does not satisfy that requirement. Nor does the connection with the two previous decisions provide any indication in this respect because no clear mention of the legal basis is made there either.

80. As the contested decision leaves the parties concerned and the courts in the dark as to which legal basis was applied, it is in breach of the obligation to state reasons deriving from Article 190 of the EC Treaty.

61 — Article 17(2)(5) of Decree No 97-1263; see point 17 of this Opinion.

62 — The Community's own cultural policy also expressly encompasses artistic and literary creation in the audiovisual sector (see Article 128(2) of the EC Treaty, now Article 151(2) EC).

The contested decision must be declared invalid for this reason. [63]

2. Substantive illegality of the contested decision

81. The two remaining reasons for invalidity submitted by the referring court necessitate an examination of the substantive legality of the contested decision.

82. In this connection it should be remembered from the outset that according to settled case-law Article 92(3) of the EC Treaty affords the Commission a wide discretion when granting permission for aid. [64] The Community Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the Commission but must restrict itself to examining whether the Commission's assessment is vitiated by a manifest error or misuse of powers (examination of manifest error or misuse of powers). [65] Subject to that qualification, the two reasons for invalidity will now be examined.

(a) Manifest error of assessment with regard to the extent of the budgetary resources available for the system of aid

83. The referring court first asks the Court to examine the validity of the contested decision with regard to the Commission's underlying assumption that the budgetary resources allocated to the system of aid would not be increased during the period 1998 to 2002.

84. The Commission has wrongly attempted to dismiss this question as insignificant to the permission granted for the system of aid and

63 — *Commission* v *Council* (cited in footnote 48), paragraph 22 in conjunction with paragraph 9.

64 — Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraph 11, and Case 78/76 *Steinike & Weinlig* [1997] ECR 595, paragraph 8; see also Case C-456/00 *France* v *Commission* [2002] ECR I-11949, paragraph 41, and *Atzeni and Others* (cited in footnote 27), paragraph 84.

65 — Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34; Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 26; *France* v *Commission* (cited in footnote 64), paragraph 41; *Atzeni and Others* (cited in footnote 27), paragraph 84; and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83.

its legality. Indeed, the Commission itself paid a great deal of attention to the extent of the budgetary resources since it found it necessary to make express mention of that question when notifying the contested decision in its extremely concisely worded letter of 10 November 1997.

85. Contrary to what the Commission appears to be asserting, this question does not lie outside the scope of judicial review. Although the Court affords it a wide discretion when examining the compatibility of aid with the common market, a decision by the Commission — as already mentioned [66] — is open to examination by the Community Courts for misuse of powers and manifest errors of assessment. Examination of whether there is a manifest error of assessment extends, in particular, to whether the facts on which it is based are complete and correct. Not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. [67]

86. The assertion by the Commission that the budgetary resources allocated to the system of aid would not increase in the period from 1998 to 2002 can therefore also be reviewed to ascertain whether the facts on which it was based were complete and correct and whether they could substantiate the conclusions drawn from them by the Commission.

87. It should be noted here that the precise extent of the funding that would be available to the support fund for sound radio broadcasting in the years 1998 to 2002 could not have been established in 1997 when the Commission took its decision since it depended upon the future annual revenue from the special tax on radio and television advertising. The Commission therefore necessarily had to proceed on the basis of estimates at the time that the contested decision was adopted.

88. The question whether the Commission committed a manifest error of assessment with regard to those estimates has to be assessed in the light of the facts available to it at the time, that is to say in 1997. [68] The figures on how the budgetary resources later actually developed, which were produced to the Court by the Commission and the French Government during the proceedings, would not have

66 — See point 82 of this Opinion.

67 — Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39; Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 76; *Spain* v *Lenzing* (cited in footnote 37), paragraph 57; and *Italy* v *Commission* (cited in footnote 65), paragraph 83.

68 — Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33; and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31. According to *Nuova Agricast* (cited in footnote 48), paragraph 54, this case-law also expressly applies to Commission decisions in a preliminary examination procedure in which — as here — it decides not to raise objections to an aid or system of aid.

been available at all in 1997 and must therefore be disregarded for the purposes of examining at the present time whether the Commission then committed a manifest error of assessment. [69]

89. The facts available in 1997 nevertheless included the fact that Decree No 97-1263 [70] did at least make it possible for the rate of tax on advertising broadcast on television to clearly be increased for the years 1998 to 2002. The permissible upper limits for ascertaining the various levels of tax were raised in Decree No 97-1263 by a good 46% in comparison with the former system under Decree No 92-1053. [71] Régie Networks has properly referred to this in the proceedings before the Court.

90. Admittedly, the mere raising of the permissible upper limits did not necessarily have to lead to a similarly clear increase in the rates of tax actually applicable; under Article 2(3) of Decree No 97-1263 a ministerial order was also required in order for them to be determined; that order did not necessarily have to provide for rates that went up as far as the upper limits stated.

91. Moreover, the extent of the budgetary resources that were to be available to the support fund for sound radio broadcasting in the years 1998 to 2002 depended not just on the rate of tax but also on the size of the basis of assessment, that is to say on the actual advertising revenue received by those liable to pay the tax. This could vary from quarter to quarter and from year to year.

92. All the same, at the time that the contested decision was adopted, in view of the clear increase of a good 46% in the permissible upper limits for the rate of tax applicable to television advertising, the possibility of the support fund for sound radio broadcasting being allocated significantly greater budgetary resources from then on could not be excluded. Quite the reverse: that increase in the permissible upper limits for the tax on television advertising leads to an expectation of an increase in the budgetary resources available, particularly as the lion's share of the revenue from the tax comes from television advertising.

93. However, it is not apparent from the statement of reasons in the contested decision or from any other facts available to the Court that the Commission did look at the increase in permissible upper limits for the rate of tax stated, let alone why it might have considered

69 — The figures produced by the Commission and the French Government nevertheless show that the budgetary resources annually allocated to the support fund certainly did not remain the same and, on the contrary, showed an — albeit moderate — *increase*.

70 — A draft of Decree No 97-1263 was submitted to the Commission in the course of the aid monitoring procedure.

71 — See point 10 of this Opinion and footnote 8 with regard to the upper limits for the tax.

that fact insignificant. In these circumstances it is to be assumed that the Commission did not in any event base its decision on all of the relevant facts known to it at the time of its decision.

94. It therefore follows that the contested decision is vitiated by a manifest error of assessment and hence is unlawful. For that reason it must be declared invalid.

(b) Manifest error of assessment due to failure to take account of the nature of the funding for the system of aid

95. The Court is finally being asked to determine whether the contested decision is invalid because the Commission did not take into account the nature of its funding — which might possibly be contrary to Community law — when it examined the system of aid. The referring court alludes to the fact that the special tax on radio and television advertising in its form applicable in the years 1998 to 2002 was also levied on advertising broadcast to France from abroad, whereas aid from the support fund for sound radio broadcasting only benefited radio broadcasting services established in France.

— Preliminary comments

96. As already mentioned, [72] Article 92(3) of the EC Treaty affords the Commission a wide discretion when granting permission for aid, which is why the substantive review of its decisions before the Court is confined to manifest errors of assessment and misuse of powers.

97. The bounds of the Commission's discretion, which are open to review by the Community judicature, mean nevertheless that in its decisions on aid monitoring procedure the Commission must not conflict with specific provisions of the EC Treaty and general principles of Community law — the principle of equal treatment, for instance. [73] State aid, certain conditions of which contravene provisions of the EC Treaty or general principles of Community law, cannot therefore be declared by the Commission to be compatible with the common market. [74]

72 — See point 82 of this Opinion.

73 — Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11; Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41; *France* v *Commission* (cited in footnote 64), paragraph 30; and — particularly on the principle of equal treatment — *Nuova Agricast* (cited in footnote 48), paragraphs 50 and 51.

74 — Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 78; Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraph 104, and case-law cited there; *Van Calster and Others* (cited in footnote 4), paragraph 48; and *Nuova Agricast* (cited in footnote 48), paragraph 50 in conjunction with paragraph 51.

98. It should also be noted that a State aid or system of aid must not affect trading conditions and competition to an extent that is contrary to the common interest. [75] It can also be concluded from this that the Commission may not permit State aid or systems of aid where the way in which they in fact operate is in breach of provisions of the EC Treaty or general principles of Community law; this is because a breach of Community law cannot be 'in the common interest'.

99. The conclusion that a system of aid is contrary to Community law and therefore also 'contrary to the common interest' can be drawn inter alia from the method by which it is financed. [76] According to settled case-law, therefore, the Commission is not allowed to isolate the aid as such from the method by which it is financed and to disregard this method if, in conjunction with the aid in its narrow sense, it renders the whole incompatible with the common market. [77]

75 — Expressly provided in Article 92(3)(c) and (d) of the EC Treaty, although there are minor differences in the wording of the two provisions. The Court has now made it clear that the common interest also has to be taken into account in the context of the other derogations provided for in Article 92(3) of the EC Treaty, even though not expressly mentioned there; see *Spain* v *Commission* (cited in footnote 65), paragraph 17; Case C-113/00 *Spain* v *Commission* (cited in footnote 74), paragraphs 66 and 67; and Case C-114/00 *Spain* v *Commission* (cited in footnote 74), paragraphs 80 and 81.

76 — Case 47/69 *France* v *Commission* [1970] ECR 487, paragraphs 8 and 23; *Van Calster and Others* (cited in footnote 4), paragraph 48; and Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 45.

77 — *France* v *Commission* (cited in footnote 76), paragraphs 4, 8 and 17; *Van Calster and Others* (cited in footnote 4), paragraph 46; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 44; Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 29; and *AEM and AEM Torino* (cited in footnote 76), paragraph 45.

100. It is therefore necessary to examine below whether, in 1997 when it ruled that the French system of aid was permissible, the Commission was under an obligation to include an examination of the method of its financing through the special tax on radio and television advertising. If this should be the case, that financing would have been an aspect vital to the decision finding the aid permissible and for the Commission to neglect to do so would represent a manifest error of assessment.

— The Commission's obligation to take account of the method of financing

101. According to established case-law, funding through taxation must always be taken into account by the Commission when assessing a system of aid if that tax, or part of it, forms an integral part of the system of aid. This is the case where the tax is *hypothecated* to the aid measure in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. [78]

78 — Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 26; Case C-175/02 *Pape* [2005] ECR I-127, paragraph 15; Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France and Others* [2005] ECR I-9481, paragraph 40; *AEM and AEM Torino* (cited in footnote 76), paragraph 46; Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 46; and Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraph 44.

102. Contrary to this case-law, the Commission took the view in the oral procedure before the Court that it only ever has to take account of the financing of a system of aid through a tax where the party liable to pay the tax and the recipient of the aid are in competition with each other.

103. I am not convinced by the Commission's argument. A finding as to whether or not such a competitive relationship exists often requires an evaluation of complex economic links the outcome of which is not a priori certain. The uncertain outcome of such an evaluation should not determine either the Commission's jurisdiction and terms of reference as aid monitoring authority or the scope of the notification and standstill obligation on the Member States under Article 93(3) of the EC Treaty. [79]

104. The question whether the party liable to pay the tax and the aid beneficiary are competitors is not a *precondition* for taking the funding into account when monitoring a system of aid. [80] The existence or non-existence of such a competitive relationship could at most be of significance to the *outcome* of that monitoring procedure, that is to say to the question of the compatibility of the system of aid with the common market. [81]

105. I shall therefore be guided below simply by the aforementioned criterion deriving from former case-law, according to which the tax must be hypothecated to the aid measure funded by it.

106. In the present case all of the information available to us points towards the existence of such hypothecation.

107. It is clear just from the wording of the relevant French legislation that there is a link between the levying of the special tax on radio and television advertising and the financing of the aid measure to support sound radio

79 — The Court has also ruled accordingly in *Streekgewest* (cited in footnote 78), paragraph 21, stating that the last sentence of Article 93(3) of the Treaty must be interpreted as meaning that it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure.

80 — *Van Calster and Others* (cited in footnote 4), particularly paragraphs 46 to 52, does not make mention of any such competitive relationship requirement.

81 — See, in particular, points 122 to 125 of this Opinion.

broadcasting. The tax is expressly levied 'to finance' a fund of aid for sound radio broadcasting (Article 80(2) of Law No 86-1067 in conjunction with Article 1(1) of Decree No 97-1263).

108. The manner in which the system of aid operates also supports the conclusion that the tax is hypothecated to the aid measure.

109. In the first place, the special tax on radio and television advertising represents the only source of finance for the support fund for sound radio broadcasting worth mentioning. [82] All aid that is granted out of the support fund is therefore necessarily financed from that tax.

110. In the second place, the tax has no other purpose but to fund the aid provided by the support fund for sound radio broadcasting to which all of its net revenue accrued (Article 3 of Decree No 97-1263). The present case therefore differs fundamentally from the cases of *Pape* and *Casino France and Others*, in which the Court was faced with special taxes which had several different purposes and were therefore not solely intended to fund the systems of aid at issue. [83]

111. In the third place, the aid granted from the support fund for sound radio broadcasting was also entirely dependent, in terms of quantum, on the revenue received from the tax. [84]

112. On the one hand, all three types of aid are only granted from available funds (Article 7 of Decree No 97-1263). Hence, the lower the tax revenue the lower the budgetary resources available to the support fund for the grant of any aid; in the case of start-up aid and equipment aid, for example, this can lead to the amount distributed to each aid beneficiary being less than the permissible maximum sum. It is apparent from the oral procedure that even where rate tables are drawn up for the operating aid each year reference is made to the expected tax revenue.

113. On the other hand — unlike the case of start-up aid and equipment aid — there are no limits on the amount available for operating aid, which is of particular importance in practice. The basic amount of that aid can be boosted by up to 60%, the amount of that

82 — In this context I am ignoring so-called 'other income' (*recettes diverses*) which occasionally also accrued to the support fund. This primarily took the form of subsequent payments of tax debts from earlier assessment periods and repayments of aid already granted. It is apparent from the oral procedure before the Court that the amount of this other income is not significant. I would also add that subsequent payments and repayments such as this are ultimately sums of money that originate from the special tax on radio and television advertising.

83 — *Pape* (cited in footnote 78), paragraph 16, and *Casino France and Others* (cited in footnote 78), paragraphs 55 and 56.

84 — The present case is also distinguishable in this respect from *Pape* and *Casino France and Others* (both cited in footnote 78).

boost by its very nature proving more generous according to whether more budgetary resources are available to the support fund — that is to say, the higher the tax revenue proves to be during a particular period.

114. In the fourth place, hypothecation is not precluded by the fact that the aid is distributed by a panel and that this panel may enjoy a certain degree of discretion in each individual case. Even discretion such as this does not alter the fact that the entire net revenue from the special tax accrues to the support fund for sound radio broadcasting. The exercise of discretion here can never result in part of the revenue from the special tax being used for purposes other than the three types of aid to support sound radio broadcasting. In this respect the present case differs quite fundamentally from *Pape* and *Casino France and Others*, in which the competent national authorities were free to use their discretion to determine whether and to what extent revenue from a special tax was to be allocated to the financing of a system of aid or used for quite different purposes. [85]

115. All in all, therefore, there are in this case sufficient indications of hypothecation, showing that the special tax on radio and television advertising forms an integral part of the French system of aid to support sound radio broadcasting.

— Manifest errors of assessment by the Commission

116. In view of the hypothecation of the special tax on radio and television advertising to the aid funded from it the Commission, in 1997, should have also taken the method of its financing into account when considering permission for the system of aid for the period 1998 to 2002. It should have examined whether this method of financing leads to the system of aid being incompatible with the common market.

117. Such an examination should have been carried out, in particular, in the light of the provisions on freedom to provide services, which is one of the fundamental principles of the Community [86] (Articles 59 and 60 of the EC Treaty, now, after amendment,

85 — *Pape* (cited in footnote 78), paragraph 16, and *Casino France and Others* (cited in footnote 78), paragraphs 55 and 56.

86 — Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 17; Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 64; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101.

Articles 49 EC and 50 EC).[87] Broadcasting undertakings which transmit broadcasts — including advertising — beyond intra-Community borders exercise that freedom to provide services.[88]

118. When carrying out this examination the Commission should especially have considered the fact that in the form that the special tax operated in the period from 1998 to 2002 it was not restricted to radio and television advertising *transmitted from France* but was levied on all radio and television advertising *destined for French territory*, that is to say including radio and television advertising transmitted to France from abroad (Article 2(1) of Decree No 97-1263). Foreign undertakings were therefore called upon to fund the system of aid.

119. When considered in isolation the operation of a special tax in this manner would not appear to infringe the principle of freedom to provide services. The manner in which it is levied is not discriminatory per se because it is levied without distinction on radio and television advertising transmitted both by national undertakings in France and by foreign undertakings to France; furthermore, the amount of the tax should not weigh so strongly in the balance as to have the effect of restricting freedom to provide services.[89]

120. However, it must be borne in mind that — as already mentioned — the special tax is hypothecated to the aid funded from its revenue. If one now considers these two integral parts of the system of aid in tandem, the following picture emerges: whilst both national and foreign broadcasting undertakings (or the agencies marketing their advertising time) have to pay the tax equally, only broadcasting undertakings situated in France are also able to receive aid from the support fund because a national broadcasting licence is required for this purpose.

121. A system of this kind by which a special tax is also levied on the services of foreign undertakings even though only national undertakings benefit from it can present problems in the context of the rules on

87 — The specific prohibition on tax discrimination laid down in Article 95 of the EC Treaty (now Article 90 EC) does not relate to services but is an extension of the provisions on the free movement of goods and the customs union (see Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraphs 4 and 5). Nor does the general principle of the prohibition of discrimination in Article 6(1) of the EC Treaty (now Article 12(1) EC) apply where there are more specific provisions of relevance, such as those relating to freedom to provide services (see, for example, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraphs 16 and 17, and Case C-289/02 *AMOK* [2003] ECR I-15059, paragraphs 25 and 26).

88 — For established case-law on television broadcasting, see, for example, Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 8; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 13; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 28; and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 28. For radio broadcasting, see, for example, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 14 to 16, and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraphs 22 and 23.

89 — See, in the same vein, Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraphs 37 and 38.

freedom to provide services. It can have a protectionist effect because any rise in the turnover of foreign broadcasting undertakings from advertising transmitted in France simultaneously increases the budgetary resources of the support fund for sound radio broadcasting and therefore enables greater aid to be provided for the benefit of national broadcasting undertakings. [90] In simple terms it could be said that the greater the success of foreign undertakings with their services on the national market, the greater the support given to a few national undertakings operating in the same market. [91]

122. The assertion of both discrimination and a protectionist effect does admittedly presuppose that the services concerned are comparable. In other words the broadcasting undertakings whose advertising broadcast in France is subject to the tax and the broadcasting undertakings that are entitled to aid from the support fund for sound radio broadcasting must be in a competitive relationship with each other. [92] If a broadcasting undertaking has assigned the marketing of its advertising time to another undertaking within the same group of undertakings, as happened in this case within the NRJ Group, it might be necessary to consider that group of undertakings in its entirety and then investigate the competition between it and other broadcasting undertakings or groups of undertakings with regard to audience ratings and advertising revenue.

123. The French Government denied the existence of such a competitive relationship in the proceedings before the Court. According to what it told the Court, the lion's share of revenue from the special tax comes from advertising broadcast on television, whereas the aid granted from the support fund does not benefit television stations but small radio stations with a local audience and a primarily social objective, namely *radios associatives* ('citizens' radio'). The French Government does admittedly also concede that part, at least, of the special tax comes from advertising on the radio; in its opinion, however, the tax is primarily paid by commercial radio stations, which are too different to the *radios associatives* entitled to benefit from the aid to be in a truly competitive relationship with them.

90 — See, in the same vein, in the context of a special French tax on textile products, *France* v *Commission* (cited in footnote 76), paragraphs 20 and 21.

91 — The case could also be considered from the point of view of freedom of establishment, that is to say in relation to the possibility of foreign undertakings suffering discrimination compared to domestic undertakings as regards entitlement to aid. The Court has already had occasion to consider a similar problem in Case C-464/05 *Geurts and Vogten* [2007] ECR I-9325, paragraphs 18 to 22; see also, with regard to freedom to provide services, Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraphs 15 and 16.

92 — See, in the same vein, *France* v *Commission* (cited in footnote 76), paragraph 20, where reference is made to 'revenue from the charge levied on competing foreign products'.

124. Unlike the French Government, Régie Networks argued in the proceedings before the Court that there was a competitive relationship in existence between those liable to pay the tax and the recipients of the aid. Even if a radio station entitled to aid only broadcast a little advertising, or none at all, it took up part of the audience with its programming, which could lead to a reduction in the audience ratings of commercial radio stations and therefore ultimately to a reduction in their earnings potential on the local market for radio and television advertising.

125. It is ultimately not for the Court to make final conclusions in the course of the present proceedings with regard to the outstanding issues in the context of freedom to provide services and competition between the various broadcasting undertakings. Indeed, the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. [93]

126. For the purposes of the present proceedings it is sufficient to determine that, when finding the French system of aid for the period 1998 to 2002 permissible, the Commission did not consider the method of its funding and therefore did not examine, in particular, the effects that might result from that method of funding in the context of compatibility with the common market. As, by acting in this way, the Commission disregarded an essential aspect of assessment of the system of aid, the contested decision is vitiated by a manifest error of assessment. For this reason alone it has to be declared invalid.

3. Interim conclusion

127. As demonstrated, the contested decision is therefore unlawful in several respects, with each individual point justifying a declaration that it is invalid.

C — Temporal limitation on the effects of a declaration of invalidity

128. If — as proposed by me — the Court should declare the contested decision invalid, the French Government and the Commission are applying for a temporal limitation to be imposed on the effects of the judgment. They are relying on the principles of legal certainty and protection of legitimate expectations and

93 — *Van Calster and Others* (cited in footnote 4), paragraph 45; see also Case C-354/90 *Fédération nationale du commerce extérieur* [1991] ECR I-5505 ('*FNCE*'), paragraph 14, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 42, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 52, and, in the same vein, as early as *Iannelli & Volpi* (cited in footnote 64), paragraph 11, and *Steinike & Weinlig* (cited in footnote 64), paragraph 9.

refer, in particular, to the fact that this is a system of aid that had been notified to the Commission and permitted by it and had been applied in a large number of cases over many years.

1. Preliminary remarks

129. No express provision is made in the EC Treaty for the consequences that flow from a preliminary ruling declaring a Community measure to be invalid. However, as the reference for a preliminary ruling on the validity of a Community act and the action for annulment are the two complementary mechanisms provided by the Treaty for reviewing the legality of the acts of Community institutions, [94] it is in accordance with established case-law for the consequences of a declaration of invalidity to be determined by analogy with the provisions of Articles 231 EC and 233 EC applicable to judgments on annulment actions. [95]

130. In principle, therefore, a judgment of the Court in proceedings for a preliminary ruling declaring a Community act invalid has retroactive effect, like a judgment annulling an act. [96] A finding of invalidity is also sufficient reason for any national court to regard the act concerned as void for the purposes of measures to be pronounced by it. [97]

131. Based on the legal principle expressed in Article 231(2) EC, [98] however, the Court has the power to order the specific effects of a contested act to be maintained if it considers it necessary, discretion being afforded to it in this respect. [99] The Court has in the past made use of that possibility, in particular, where, having regard to all the interests at stake in the cases concerned, owing to overriding considerations of legal certainty the charging or payment of sums of money in respect of the period prior to the date of its judgment cannot be called into question. [100] These principles can also be usefully applied in the present case.

94 — Case C-212/94 *FMC and Others* [1996] ECR I-389, paragraph 56, and *Unión de Pequeños Agricultores* v *Council* (cited in footnote 40), paragraph 40.

95 — Case 4/79 *Providence agricole de la Champagne* [1980] ECR 2823, paragraphs 44 and 45; Case 109/79 *Maïseries de Beauce* [1980] ECR 2883, paragraphs 44 and 45; Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraphs 51 and 52; Case 300/86 *van Landschoot* [1988] ECR 3443, paragraph 24; and Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 35.

96 — Case C-228/92 *Roquette Frères* [1994] ECR I-1445, paragraph 17, and *FMC and Others* (cited in footnote 94), paragraph 55; see most recently on the retroactive effects of judgments annulling an act Case C-199/06 *Centre d'exportation du livre français* [2008] ECR I-469 ('*CELF*'), paragraphs 61 and 63.

97 — Case 66/80 *International Chemical Corporation* [1981] ECR 1191, paragraph 13, and order in Case C-421/06 *Fratelli Martini and Cargill*.

98 — Although the wording of Article 231(2) EC strictly only refers to regulations, it has also been applied by the Court to other acts; see, with regard to the analogous application of this provision to decisions, Case C-22/96 *Parliament* v *Council* [1998] ECR I-3231, paragraph 42, and Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 41.

99 — Case 112/83 *Société des produits de maïs* [1985] ECR 719, paragraph 18, and Case 41/84 *Pinna* [1986] ECR 1, paragraph 26.

100 — *Pinna* (cited in footnote 99), paragraphs 26 to 28; *Silos* (cited in footnote 95), paragraph 36; and Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraph 24.

2. No unlimited maintenance of the effects of the contested decision

132. However, it must be borne in mind that the Commission — albeit subject to review by the Community Courts — has exclusive competence to rule on the compatibility with the common market of a State aid or system of aid. [101] If the Court should rule in the present case that the contested decision is invalid, the Commission will then on an analogous application of Article 233(1) EC have to make a new decision on whether the French system of aid is compatible with the common market. [102] The judgment of the Court must certainly not anticipate the Commission's new decision in the matter, otherwise it would undermine the Commission's role as aid monitoring authority and frustrate the discretion [103] afforded to it under Article 92(3) of the EC Treaty (now Article 87(3) EC) when ruling on permission for aid. [104]

133. In these circumstances the Court cannot maintain the effects of the contested decision for an unlimited period of time but only for an interim period until such time as the Commission makes a new decision on the compatibility of the French system of aid with the common market and that decision assumes a definitive nature — that is to say, until such time as it can no longer be challenged by an action for annulment under Article 230 EC.

3. Temporary maintenance of the effects of the contested decision

134. However, there are indeed overriding considerations of legal certainty, namely the protection of legitimate expectations, which would support an order that the effects of the contested decision should be maintained during the aforementioned interim period until such time as a definitive new decision is made by the Commission.

135. The present case concerns a system of aid that was duly notified and found permissible by the Commission. In reliance upon that permission the French authorities assumed that the special tax on radio and television advertising collected by them in the years 1998 to 2002 and the aid granted from the support fund for sound radio broadcasting during that same period were lawful; the recipients of that aid also proceeded on the basis of the legality of the benefits received.

101 — See point 125 of this Opinion and the case-law cited in footnote 93.

102 — A re-examination of the French system of aid by the Commission is required in the present case simply because it is not absolutely possible to determine from the information submitted to the Court what effects the method of funding the system of aid have on its compatibility with the common market; it still has to be clarified, in particular, whether and to what extent in this case those liable to pay the tax and those receiving the aid are in a competitive relationship (see points 122 to 124 of this Opinion).

103 — See point 82 of this Opinion.

104 — The fact that, when determining the temporal effects of its judgment, the Court also takes into account the Commission's prerogative over the assessment of complex economic connotations is apparent, for example, from the cases cited in footnote 95, namely *Providence agricole de la Champagne*, paragraph 43 and final sentence of paragraph 45, *Maiseries de Beauce*, paragraph 43 and final sentence of paragraph 45, and *Roquette Frères*, final sentence of paragraph 52.

136. Admittedly, such expectations do not always necessarily merit protection. The Court has ruled, for instance, that a decision by the Commission not to raise any objections to a State system of aid cannot be regarded as capable of having caused the recipient of the aid to entertain any legitimate expectation where the decision has been challenged in due time before the Community Courts. [105]

137. In the present case, however, no action to annul the contested decision has been brought before the Community Courts under Article 173 of the EC Treaty. The contested decision has therefore assumed a definitive nature as regards those parties who could have challenged it and the expectations arising from its definitive nature therefore merit protection.

138. The persons concerned could not foresee that the contested decision would be declared invalid by the Court many years later in a reference for a preliminary ruling, particularly as such procedure can be instituted by many national courts and is also not subject to time-limits the expiry of which the aid recipients could or should have awaited.

105 — Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 53, recently confirmed in *CELF* (cited in footnote 96), paragraphs 66 and 67.

139. It should also be borne in mind that, as a result of the system of aid being ruled permissible, taxes were levied and aid was granted in a large number of cases for several years. As also credibly argued by the French Government, the aid from the support fund for sound radio broadcasting constitutes an essential element of the income of numerous small radio stations with a local audience. If the aid were to be reclaimed, the existence of those radio stations and therefore ultimately pluralism in the French media landscape at a local level could be jeopardised. [106]

140. In the light of the foregoing I do not consider it reasonable rashly to subject recipients of the aid to claims for repayment or interest. This could come about, however, if the Court were to find the contested decision invalid in the present case without simultaneously ordering that its effects should continue *pro tempore*. In such a case it would be for all of the national authorities to draw the necessary consequences from the invalidity of the contested decision. [107] This particularly applies in the light of the recent

106 — With regard to the importance of maintaining press diversity in general, see, for example, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 18; with regard to the importance of maintaining pluralism in radio and television broadcasting, see, for example, Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23, and *United Pan-Europe Communications Belgium and Others* (cited in footnote 88), paragraph 41.

107 — Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 51; Case 359/87 *Pinna* [1989] ECR 585, paragraph 13; Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 67; and order in *Fratelli Martini and Cargill* (cited in footnote 97), paragraph 53.

decision of the Court in *CELF*, according to which the grant of aid must be retroactively regarded as unlawful as soon as the decision to permit it is defeated in an annulment action. [108]

141. I do, admittedly, doubt whether the solution to be found in the *CELF* judgment could be completely applied to a case such as this one. It should particularly be borne in mind that the aid in *CELF* had not been notified to the Commission whereas the system of aid in the present case was the subject of notification under Article 93(3) of the EC Treaty and was not implemented until after it had been found permissible.

142. Nevertheless, as things stand at present, the possibility of national authorities also being guided by the *CELF* case-law in a case such as the present one cannot be precluded. National courts in particular could be prompted under their own national law and even before a new decision is made by the Commission to order the repayment of aid already granted plus interest or to award damages in response to actions brought by competitors; [109] equally, national courts could immediately order the repayment of tax paid on radio and television advertising and thereby jeopardise the financial equilibrium of the support fund for sound radio broadcasting. All this can only be prevented with complete certainty by ordering that the effects of the contested decision should continue to have effect *pro tempore*.

143. I therefore propose that the Court should maintain the effects of the contested decision until such time as the Commission has made a new decision on the compatibility of the French system of aid with the common market and that decision has assumed a definitive nature, that is to say until such time as it can no longer be challenged in an action for annulment under Article 230 EC.

4. The consequences of maintaining the contested decision *pro tempore*

144. If the effects of the contested decision should be maintained in the manner proposed by me, the following consequences would apply with regard to the aid recipients and those liable to pay the tax.

108 — Cited in footnote 96 (see paragraph 63 of that judgment in particular).

109 — *CELF* (cited in footnote 96), particularly paragraphs 52 and 53.

(a) The legal position during the interim period

145. During the interim period until a new definitive decision is made by the Commission on the compatibility of the French system of aid with the common market the recipients of aid will not have to pay back the aid received by them in the years 1998 to 2002, nor can the French tax authorities be obliged to make a final repayment to taxpayers such as Régie Networks of the special tax levied in the years 1998 to 2002. [110] This is because the permission for the system of aid given by the Commission in the contested decision continues to have effect *pro tempore*.

146. However, maintenance of the effects of the contested decision *pro tempore* must not jeopardise legal protection being effectively afforded to those taxpayers who — like Régie Networks here — have already lodged appeals in accordance with relevant national legislation with the objective of obtaining repayment of tax paid by them. [111]

147. It is for the national court to ensure such effective legal protection under the possibilities available to national law. [112] The national court could therefore, for instance, order *provisional reimbursement* of the tax paid until a new decision is made by the Commission or make reimbursement subject to the *condition precedent* that the Commission declares the French system of aid incompatible with the common market in a decision of a definitive nature. It is also conceivable that the national court could *adjourn the main proceedings* until the Commission has made a new decision on the question of the compatibility of the system of aid with the common market and that decision has assumed a definitive nature.

(b) The legal position in the event of a new favourable decision

148. If the Commission should again come to the conclusion, in a decision of a definitive nature, that the French system of aid is

110 — See, in the same vein, the judgments cited in footnote 95 in *Providence agricole de la Champagne*, final sentence of paragraph 45 and paragraph 46, *Maïseries de Beauce*, final sentence of paragraph 45 and paragraph 46, and *Roquette Frères*, final sentence of paragraph 52 and paragraph 53.

111 — See, in the same vein, *Roquette Frères* (cited in footnote 96), paragraph 27, and *FMC and Others* (cited in footnote 94), paragraph 58; see also *Pinna* (cited in footnote 99), paragraph 30, and *Lomas and Others* (cited in footnote 100), paragraph 24.

112 — See, with regard to the duty of the national court to interpret and apply its domestic rules of procedure in a manner that ensures judicial protection, the judgments cited in footnote 40 in *Unibet*, paragraph 44, and *Impact*, paragraph 54. See, with regard to the individual's entitlement to an effective legal remedy to obtain repayment of taxes levied in breach of Community law, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 204, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 128, first indent.

compatible with the common market, then repayment of the aid granted in the years 1998 to 2002 and reimbursement of the taxes levied during that period would be finally precluded.

149. For the sake of completeness I would also add that, in such a case, no interest on the benefit received could be demanded from the aid recipients, nor would third parties have to be indemnified because of that benefit.

150. The Court did admittedly say in *CELF* [113] that the Commission's final decision does not have the effect of regularising, retrospectively, implementing measures taken in disregard of the prohibition on implementation. However, this was said in the context of cases in which — as happened in *CELF* — State aid is not duly notified to the Commission and is, in any event, implemented before being ruled permissible. This statement was influenced by a concern not to abet non-observance of the duty to notify or of the standstill obligation under Article 93(3) of the EC Treaty and to ensure the effectiveness in practice of these two cornerstones of the system of prior control of plans to grant aid. [114]

151. Consequently, the *CELF* case-law cannot apply to cases such as the present one, where a system of aid has been duly notified to the Commission and also not implemented until after it has been ruled permissible. In cases such as this the concern is not to prevent any breaches of the duty to notify and the standstill obligation, let alone to penalise any infringements that actually occur. The intention is rather to ensure that due account is taken of the principles of legal certainty and protection of legitimate expectations. In order to achieve this objective the new declaration of compatibility of the system of aid with the common market must have *ex post* facto effect to the date on which the system of aid began to be implemented.

(c) The legal position in the event of an unfavourable decision

152. If, however, following a new review of the system of aid, the Commission should come to the conclusion that it is not compatible with the common market, then both the aid granted in the period from 1998 to 2002 and the tax levied during that period would be definitively considered unlawful.

113 — Cited in footnote 96, first sentence of paragraph 40; see also *FNCE* (cited in footnote 93), paragraph 16; *Van Calster and Others* (cited in footnote 4), paragraph 63; and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 41.

114 — *CELF* (cited in footnote 96), second sentence of paragraph 40 in conjunction with paragraphs 36 and 37; see also *FNCE* (cited in footnote 93), paragraph 16, *Van Calster and Others* (cited in footnote 4), paragraph 63, and *Transalpine Ölleitung in Österreich* (cited in footnote 113), paragraphs 41 and 42.

153. In such a negative decision the Commission would have to weigh up, having regard to the principle of protection of legitimate expectations, whether it is justifiable to require the French Republic to claim back the aid already paid; [115] such an order by the Commission would in turn be open to review by the Community judicature.

154. As an integral part of the French system of aid, the special tax would also be covered by the negative decision by the Commission and would therefore also be incompatible with the common market. Consequently, the tax paid for the period 1998 to 2002 would have been wrongly levied and would have to be repaid. According to settled case-law, individuals are entitled to obtain repayment of national charges levied in breach of Community provisions. [116] Of course, the rules governing repayment must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not render repayment virtually impossible or excessively difficult (principle of effectiveness). [117]

155. Admittedly, in the event of a negative decision by the Commission a situation, could then arise in which the parties liable to pay the tax would have to be refunded the special tax on radio and television advertising paid by them, although the aid recipients would possibly be entitled to retain the aid received during the period 1998 to 2002, based on the principle of protection of legitimate expectations. This would result, to a certain degree, in the special tax on radio and television advertising ceasing to be hypothecated to the aid funded from its revenue. This is unavoidable, however, if, on the one hand, the aid recipients are to be afforded the protection of legitimate expectations to which they are entitled and, on the other, if the effective legal protection of those liable to pay the tax is not to be jeopardised. The risk of incompatibility with the common market is borne by the Member State, which has designed its system of aid in such a way that the tax is hypothecated to the aid funded by it; this risk ought not to be switched to those liable to pay the tax or to the aid recipients.

115 — See also, with regard to consideration of the principle of protection of legitimate expectations when reviewing systems of aid, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraphs 147 to 167.

116 — Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20; Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 54; *Test Claimants in the FII Group Litigation* (cited in footnote 112), paragraph 202, and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 112), paragraph 110.

117 — Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 25; *San Giorgio* (cited in footnote 116), paragraph 12; *Test Claimants in the FII Group Litigation* (cited in footnote 112), paragraph 203; and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 112), paragraph 111.

VI — Conclusion

156. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Cour administrative d'appel de Lyon for a preliminary ruling as follows:

(1) The decision notified to the French Republic on 10 November 1997 by the Commission of the European Communities not to raise any objections to the French Republic's system of aid to support sound radio broadcasting notified to it (Aid No N 679/97) is invalid.

(2) The effects of the decision referred to in paragraph 1 above continue to apply until such time as the Commission of the European Communities has made a new decision on the compatibility of the notified system of aid with the common market and the latter decision can no longer be challenged by an action for annulment under Article 230 EC.