# COMMISSION DECISION

## of 17 February 2003

## on the aid scheme implemented by Belgium for coordination centres established in Belgium

*(notified under document number C(2003) 564)*

**(Only the French and Dutch texts are authentic)**

**(Text with EEA relevance)**

(2003/755/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on the interested parties to give their views pursuant to the abovementioned provisions [1], and having regard to their comments,

Whereas:

### I. PROCEDURE

(1) In 1997 the Council (Ecofin) approved a code of conduct for business taxation [2] to tackle harmful tax competition and set up an ad hoc group to examine the tax measures to which the code of conduct applies. Following the undertaking in the code of conduct, the Commission issued a Notice in 1998 on the application of the state aid rules to measures relating to direct business taxation [3], in which it affirmed its commitment to the strict application of the rules according to the principle of equality of treatment. Against this background, the Commission, acting in accordance with the state aid rules, began its examination of the measures identified by the code of conduct group as harmful. The Commission would stress here the parallels between the work of the code of conduct group and the Community's policy on state aid, both of which are aimed at eliminating those measures that distort or threaten to distort competition in the common market. The Commission also notes the progress that has already been made towards this goal of eliminating harmful tax competition, and in particular the steps taken by the Member States to abolish the measures identified by the code of conduct group as harmful, or at least to remove the harmful aspects of such measures.

(2) For further details of the procedural steps that preceded the Commission's decision of 27 February 2002 to initiate the formal investigation procedure, the Commission would refer to the letter it sent to Belgium on this occasion (letter initiating the procedure) [4].

(3) To recapitulate: Royal Decree No 187 of 30 December 1982 provides for a tax scheme for approved coordination centres that derogates from ordinary tax law. On 2 May 1984 the Commission decided that it did not object to Royal Decree No 187 in the form it would take after amendment by the bill submitted to it by the Belgian Government on 3 April 1984. The Belgian Government was notified of this decision. However, the amendments actually introduced by the Belgian Government did not correspond to the bill submitted to the Commission. The Commission consequently initiated a formal investigation procedure on 12 December 1985. Following amendments proposed by the Belgian Government and enacted on 4 August 1986, the Commission informed Belgium on 9 March 1987 that it had closed the procedure in the light of the amendments made by Belgium in order to make the aid scheme compatible with Article 92 of the EC Treaty (now Article 87).

[1] OJ C 147, 20.6.2002, p. 2.
[2] OJ C 2, 6.1.1998, p. 2.
[3] OJ C 384, 10.12.1998, p. 3.
[4] See footnote 1.

(4) On 1 December 1997 the Council adopted a Code of conduct for business taxation and asked the Commission to examine or re-examine the tax measures in force in the Member States. On 11 November 1998 the Commission issued a Notice on the application of the State aid rules to measures relating to direct business taxation (the Notice).

(5) Having sent a request for information to the Belgian authorities on 12 February 1999, the Commission announced on 17 July 2000 that the scheme probably now had to be considered as state aid. It then initiated the cooperation procedure applicable to existing aid schemes under Article 17(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([5]), by calling on the Belgian authorities to submit their comments. The Belgian authorities criticised the procedure and demanded that the cooperation stage be launched by the Members of the Commission, acting as a body, rather than by the Commission departments. The Commission contested this approach.

(6) On 11 July 2001 the Commission wrote to Belgium ([6]) proposing appropriate measures to make the scheme compatible with the rules on State aid. The Belgian authorities sent their comments in a letter of 19 September 2001, informing the Commission that these comments were not to be construed either as an acceptance or as a rejection of the proposed measures.

(7) In the absence of an explicit acceptance of the measures within the specified time limit, and in the light of the comments made by the Belgian authorities in their letter of 19 September, the Commission decided on 27 February 2002 to initiate the procedure referred to in Article 88(2) of the EC Treaty, in accordance with Article 19(2) of Regulation (EC) No 659/1999. The Commission informed Belgium of this decision by letter of 1 March 2002 ([7]).

(8) The original one-month deadline having been extended ([8]), the Belgian authorities notified the Commission of their position by letter of 12 April 2002, stating that these were not comments within the meaning of Article 88(2) of the EC Treaty but arguments within the meaning of Article 19(2) of Regulation (EC) No 659/1999 relating to the measures proposed by the Commission.

(9) By letter of 16 May 2002 Belgium communicated the text of a preliminary draft bill amending Royal Decree No 187. The amendments made to the Royal Decree by this text are the subject of a separate procedure ([9]).

(10) After meetings with the Belgian authorities on 26 June and 3 July 2002, the Commission asked Belgium for further information about both the scheme currently in force and the draft new scheme that had been notified ([10]). After an extension of the original deadline the Belgian authorities replied by letter of 30 August 2002.

(11) The Commission's decision to initiate the procedure was published in the Official Journal of the European Communities ([11]). The Commission asked the interested parties to make known their views on the measure in question. The Commission received comments on the subject from 90 interested parties, which it then forwarded to Belgium by letters of 24 September and 8 November 2002 ([12]). Belgium responded by letters of 16 October and 16 December 2002.

## II. **DESCRIPTION OF THE MEASURES INVESTIGATED**

(12) The tax scheme for coordination centres is based on Royal Decree No 187 of 30 December 1982. The Royal Decree was supplemented by the Law of 11 April 1983, the Royal Decree of 20 December 1984 and the Law of 28 December 1992, and has also been repeatedly amended ([13]). The scheme has applied in its present form since 1 January 1993. A general explanation by the tax administration is contained in Circular CI.RH.421/439.244 of 29 November 1993.

([5]) OJ L 83, 27.3.1999, p. 1.
([6]) Letter SG(2001) D/289723.
([7]) See footnote 1.
([8]) Request of 27 March 2002 (A/32428).
([9]) The scheme notified is registered under number N351/2002.
([10]) Letter COMP D/53779 of 18 July 2002.
([11]) See footnote 1.
([12]) Letters COMP D/55338 and D/56352.
([13]) Law of 27 December 1984, Law of 4 August 1986, Royal Decree of 3 November 1986, Law of 28 December 1990, Law of 23 October 1991 and Law of 4 April 1995.

(13) A coordination centre qualifies for the scheme if it has been individually approved by Royal Decree. In order to qualify for approval a coordination centre must, under Royal Decree No 187, be part of a group with a multinational character ([14]) and have capital and reserves of at least BEF 1 billion and an annual consolidated turnover of at least BEF 10 billion. Only certain types of preparatory, ancillary or centralisation work are allowed ([15]), and firms in the financial sector (credit, banking, insurance) do not qualify. Finally, coordination centres must employ at least the equivalent of 10 full-time staff in Belgium by the end of their first two years in business.

(14) The approval of the coordination centre is valid for 10 taxable periods from the taxable period in which the application for approval is made. Since the adoption of the Law of 23 October 1991 the approval may be renewed under the same conditions as those that applied to the original approval.

(15) Royal Decree No 187 derogates from the ordinary tax system by providing for the taxable income of approved coordination centres to be assessed at a flat rate that corresponds to a percentage of expenditure and operating costs (the 'cost plus' method). The calculation is based on all the centre's costs excluding staff costs, financial charges and corporation tax. The profit margin must in principle be calculated case by case, taking into account the work actually carried out by the centre. If the centre itself charges for some of its services at a rate that corresponds to the costs plus a percentage for profits, the same percentage can be used for the profit margin, provided this is not abnormal. In the absence of any objective criteria for determining the percentage of profits to be taken into account the rate is set at 8 %.

(16) The coordination centre's taxable profits may not, however, be less than the total of the expenditure or charges that are not deductible as business costs ('non-deductible expenditure') and the exceptional or gratuitous advantages extended to the centre by members of the group ('alternative tax base').

(17) The profits of coordination centres are taxed at the standard rate of corporation tax.

(18) Under the Law of 11 April 1983 coordination centres are exempt from property tax (*onroerende voorheffing/précompte immobilier*) on buildings they use for business purposes. The law also exempts them from registration duty (*registratierecht/droit d'enregistrement*) of 0,50 % on contributions and capital increases. Lastly, dividends, interest and royalties paid by coordination centres are exempt from withholding tax (*roerende voorheffing/précompte mobilier*) under the Law of 11 April 1983, except, in the case of interest, if the recipient is subject to tax on natural persons or tax on legal persons.

(19) As a result of the amendments introduced by the Royal Decree of 20 December 1984, Article 110(6) of the Royal Decree implementing the 1992 Income Tax Code states that income received by the coordination centres from their cash deposits is also exempt from withholding tax.

(20) The exemption from withholding tax was accompanied by a notional withholding tax on the payments made by the centres. The tax is notional in the sense that the recipients of the income paid by the centres receive the full amount, without deduction of a tax, but are entitled to offset the notional amount of tax against their final tax bill. According to the Belgian authorities the notional withholding tax is no longer applied to the interest paid by the centres, on the basis of agreements concluded since 24 July 1991, or to dividend payments with effect from the same date or to royalties paid or assigned since 1 January 1986.

(21) The Law of 28 December 1992 introduced an annual tax on coordination centres with effect from 1 January 1993, amounting to EUR 10 000 (BEF 400 000) per

([14]) Multinational character is determined on the basis of the following criteria: establishment (subsidiaries in at least four countries), turnover achieved abroad and capital invested abroad. The requirement that the multinational group must pursue activities in at least four countries was introduced by the Law of 4 August 1986.

([15]) Advertising, supplying and collecting information, insurance and reinsurance, scientific research, contacts with national and international authorities, centralisation of activities in the area of accounts, administration and data processing, centralisation of financial transactions and hedging of risks associated with exchange rate fluctuations, as well as all ancillary or preparatory work for the companies in the group.

full-time member of staff employed by a coordination centre, up to a maximum of EUR 100 000 (BEF 4 000 000) per centre.

(22) According to the Belgian authorities the scheme applies to around 250 approved centres and financial flows of billions of euros.

## III. REASONS FOR INSTITUTING THE FORMAL PROCEDURE

(23) The Commission took the view that the coordination centres probably enjoyed a specific advantage because the cost-plus method was applied only to them. Given that significant costs — financial charges and staff costs — were excluded from the calculation of the tax base, and the profit margin was generally set at 8 %, regardless of the nature of the work performed, it seemed unlikely that the taxable income calculated in this way would be comparable to what would have been obtained using the normal method that applies under ordinary tax law and is based on the difference between assets and liabilities. This method did not, therefore, appear to comply with the guidelines laid down by the Organisation for Economic Cooperation and Development (OECD) in its reports on the cost-plus method.

The Commission also held that the coordination centres and the groups to which they belonged probably received a specific advantage in that the exemptions from property tax, withholding tax and registration duty on capital injections went beyond the exemptions to which all firms were entitled on the basis of the ordinary tax system.

Finally, the Commission held that these specific advantages did not appear to be justified by the nature or structure of the Belgian tax system and could lead to competition being distorted and trade between the Member States being adversely affected. The measures in questions should therefore probably be regarded as aid within the meaning of Article 87(1) of the EC Treaty. Moreover, given that the exceptions provided for in Article 87(2) and (3) of the EC Treaty did not apply, the Commission concluded at this stage that such an aid measure was probably incompatible with the common market.

## IV. COMMENTS OF THE BELGIAN AUTHORITIES AND INTERESTED PARTIES

(24) Despite the objections by the Belgian authorities ([16]), the Commission does regard the remarks they made in their letter of 12 April 2002 as comments within the meaning of Article 88(2) of the EC Treaty.

(25) Three associations or federations submitted comments on behalf of the firms they represent. They were the *Verbond van Belgische Ondernemingen* (VBO) (Federation of Enterprises in Belgium), the American Chamber of Commerce (AmCham) and Forum 187, the federation of coordination centres, distribution centres, service centres and call centres located in Belgium. Forum 187's comments, like those of the Belgian Government, are intended to highlight irregularities in the procedure followed by the Commission and to refute the allegation that the scheme involves aid incompatible with the common market. Its arguments also seek to show that the withdrawal of the favourable decisions of 1984 and 1987 contravenes the fundamental principles of Community law, founded on legal certainty and legitimate expectation.

(26) Apart from these three associations, 87 centres or groups which have such centres sent comments to the Commission individually. The centres generally describe their own situation as regards date of approval, staff complement and investment and then endorse Forum 187's comments. The list of the 53 interested parties that did not ask to remain anonymous in order to conceal their identity from the Belgian state appears in the annexe to this decision.

### IV.1. Procedure

(27) The Belgian authorities stand by their refusal to accept the legal base invoked by the Commission for classifying the scheme as existing aid and their view that the chosen procedure was not then complied with. Forum 187, which represents the approved centres, denies the existence of any legal base and accordingly calls on the Commission to abandon its action. The following arguments are put forward in support of these views.

([16]) See recital (8).

(28) Firstly, the Commission cannot legitimately invoke Article 1(b)(v) of Regulation (EC) No 659/1999 as the legal base for its action because this requires the Commission to produce evidence that the scheme did not constitute aid when it entered into force but subsequently became aid because of the evolution of the common market. The Commission, however, has not proved that such an evolution took place. No other provision of Regulation (EC) No 659/1999 allows the procedure for existing aid schemes to be applied in the event of the Commission, having initially thought that a particular measure did not constitute aid, changing its mind and stating that the scheme does, after all, constitute aid within the meaning of Article 87 of the EC Treaty. The Commission cannot, therefore, apply the Procedure regarding existing aid schemes in Chapter V of the said Regulation.

(29) Secondly, only under strict conditions may the Commission withdraw or amend an unlawful favourable decision with retroactive effect. It must, for example, allow a reasonable length of time and must first produce evidence of the unlawfulness of the decision in question. Moreover, it must respect the legitimate expectation of the interested parties. Under the procedure followed by the Commission these conditions have not been met, with the result that there is no legal base for withdrawing the scheme.

(30) Thirdly, having itself chosen the procedure relating to existing aid schemes, the Commission is not complying with it. Because of the legal and economic importance of classifying a scheme as aid, such a value judgment is not the responsibility of the Commission departments but of the Members of the Commission acting as a body. The cooperation phase was therefore not properly launched by the letter of 17 July 2000 from the services of the Competition Directorate-General. Only the decision of the Members of the Commission of 11 July 2001 ([17]) can initiate this stage, with the result that in this case a step in the procedure relating to existing aid schemes was omitted. The Commission did not, therefore, initiate the procedure in a valid way. For this reason Belgium states that its letter of 12 April 2002 contains arguments relating to the appropriate measures proposed rather than comments on the initiation of the procedure.

([17]) Proposal for appropriate measures.

### IV.2. **Aid character of the scheme**

(31) Both the Belgian authorities and the interested parties that submitted comments argue that the scheme for the coordination centres satisfies none of the four criteria for classifying a measure as State aid.

#### IV.2.1. *Economic advantage*

(32) In the first place certain interested parties point out that the advantages arising from coordination centres are the result of economies of scale that can be attributed to the centralisation of certain horizontal activities within the group, and that their decision to set up a centre in Belgium was not influenced by tax measures that were perceived as more favourable. In this connection they refer to the existence of alternative locations with more attractive tax regimes.

(33) In addition, Forum 187, like the Belgian State, puts forward arguments relating to all of the individual measures which were the subject of the procedure initiated by the Commission on 27 February 2002.

##### IV.2.1.1. Exemption from property tax

(34) Firstly, the Commission has not shown that the tax entails financial charges that are normally borne by companies themselves. On the contrary, Belgian law provides for numerous exemptions from property tax, for example for companies based in employment areas or areas undergoing industrial restructuring and for innovative companies. Several regional decrees and ordinances grant exemption from such taxes to promote economic growth or restructuring. Given that the majority of companies based in Belgium consequently benefit from some form of exemption from property tax, this is not an advantage granted specifically to the coordination centres.

(35) Secondly, only those centres that own the buildings which they use can benefit from the tax advantage arising from the exemption from property tax. According to Forum 187, no more than 5 % of the centres are in this situation.

IV.2.1.2. Exemption from capital duty

(36) Firstly, Belgium likewise denies that capital duty entails financial charges that are normally borne by companies themselves. In support of this claim it points out that Belgian law provides for other exemptions from capital duty, such as those extended to companies based in employment areas and those connected with the award of certain subsidies to promote investment and employment in Belgium. The majority of capital injections in Belgium consequently benefit from some form of exemption, so this is not an advantage granted specifically to the coordination centres.

(37) Secondly, Article 7(1) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital ([18]), as last amended by the Act of Accession of Austria, Finland and Sweden, states that exemptions that predate 1 July 1984 will be maintained. The exemption provided for in Article 29 of the Law of 11 April 1983 dates from before this date. As regards the possible application of Article 9 of the Directive, it should be noted that because many other Member States do not levy capital duty this exemption does not distort competition conditions in the common market. As a result, neither Article 102 of the EC Treaty (now Article 97), that provides for consultation of the Commission, nor Article 9 of the Directive, that refers to the provision of the Treaty, is applicable in this case. The conditions laid down in the Directive for granting and maintaining this exemption were in any case fulfilled.

IV.2.1.3. Exemption from withholding tax

(38) Firstly, the application of withholding tax may not be regarded as a firm rule of the ordinary Belgian tax system: there are so many exceptions that the majority of financial flows are unaffected by this rule. In support of this assertion, the Belgian authorities list numerous exemptions from the withholding tax on dividends and interest, some of which they claim are closely related to the exemptions granted to coordination centres, in the sense that it is always income paid to non-residents that benefits from the exemption. According to Forum 187, any Belgian firm can avoid the deduction of withholding tax as a 'professional investor' ([19]). Coordination centres are professional investors and thus automatically exempt from withholding tax. In addition, the vast majority of interest payments to non-residents are usually exempt from withholding tax. The scheme is thus presented as a simplification on the grounds that the centres only carry out transactions within the group. The Belgian authorities had earlier cited the Commission's support for the abolition of all forms of deduction at source. They accuse the Commission of being inconsistent in objecting in this case to an exemption from deductions at source.

(39) Secondly, contrary to what the Commission asserts, the exemption from withholding tax does not allow those receiving income from movable property the opportunity to pay the tax later. To compensate for the fact that no tax is deducted at source they have to make higher payments in advance (in the form of advances against the tax to be levied later).

(40) Thirdly, it is wrong to assert that exemption from withholding tax automatically leads to a complete absence of taxation if the withholding tax constitutes the definitive tax. Belgium has avoided this by stipulating that the exemption only applies if the recipient of the interest payments is known and is not subject to tax on natural or legal persons, the only taxpayers for whom withholding tax is a definitive tax.

(41) Fourthly, in the case of the exemption from withholding tax on interest on deposits received by the coordination centres, the Commission has a mistaken perception of the Belgian system, which grants this exemption to all companies in their role as 'professional investors'. Coordination centres are not, therefore, given preferential treatment compared to other companies.

IV.2.1.4. Notional withholding tax

(42) The notional withholding tax was reduced to zero in 1991, with the result that the Commission's concern about this measure is misplaced.

([18]) OJ L 249, 3.10.1969, p. 25.

([19]) Article 105(3) of RD/ITC92 refers to 'professional investors' and three other categories of taxpayers that are eligible for exemption from withholding tax, i.e. 'financial institutions', 'semi-public organisations in the field of social security' and 'non-resident savers'.

IV.2.1.5. Flat-rate income assessment (cost-plus)

(43) Firstly, the cost-plus method is strongly advocated by OECD for determining the transfer prices for services within a group. The exclusion of certain costs and expenditure from the basis for assessment is compatible with OECD guidelines, which state that it is not always necessary to add a profit margin in order for the price to satisfy competition requirements ('at arm's length'). Moreover, when determining transfer prices, the Belgian administration must base itself on the OECD reports ([20]). In addition, according to the OECD principles, expenditure made in a particular country via an entity that is not a permanent establishment or subsidiary is normally deductible for the entities for which the expenditure was made. In that case there is no intermediation margin.

(44) Thirdly, the use of a single rate of 8 % is justified because this is the rate that was applied even before the introduction of the scheme for coordination centres for determining the taxable income of Belgian establishments of foreign companies. Another argument used is that the Belgian administration also applies flat-rate percentages for the profit margin of certain categories of the self-employed. The Commission's criticism of the use of a flat-rate percentage ignores the reality of the situation, which is that this has been administrative practice since 1964 and is an integral part of the Belgian tax system.

(45) Fourthly, the scheme is disadvantageous compared to the ordinary tax system if the centre's operating results show a loss. In that case the centres have to pay both tax on a notional flat-rate income obtained by applying the cost-plus method and the flat-rate tax of EUR 10 000 per employee ([21]), whereas they would not have been liable for any tax under the normal method. Moreover, any understatement of the tax to be paid by a centre in Belgium would automatically be offset at the level of the parent company of the multinational group when it paid tax on its worldwide income. Examples are cited of parent companies in the United States, Finland and Germany. Consequently, Forum 187 argues that no advantage is obtained at the level of the group.

(46) Fifthly, no advantage is gained from excluding staff costs, because this is offset by the flat-rate levy on the first 10 employees. This personnel tax is equivalent to 8 % of an amount comparable to the amount of the staff costs excluded from the calculation. The exclusion of financial costs is justified because if they were subject to tax the result would be a level of taxation that exceeded the income that the centre receives as its intermediation margin.

(47) Sixthly, the alternative basis of assessment described in recital 16 is not a theoretical basis but often serves as the actual tax base.

IV.2.2. *Use of state resources*

(48) No state resources are involved in implementing the scheme for coordination centres. Indeed, the introduction of the scheme has attracted centres to Belgium and thus contributed to Belgian State resources.

(49) Moreover, the majority of companies established in Belgium benefit from one or other exemption from withholding tax, property tax and capital duty. The Belgian state is not, therefore, renouncing any extra tax revenue.

IV.2.3. *Distortion of competition and adverse effect on trade between the Member States*

(50) Firstly, the arguments put forward in support of the Commission's decision to initiate the procedure are superficial and theoretical. No concrete evidence is provided that competition has been distorted and trade adversely affected. Citing a judgment of the Court of Justice of the European Communities ([22]), Belgium considers the failure to provide adequate reasons as sufficient grounds for annulment.

(51) Secondly, it is wrong to ignore the tax systems of the other Member States. The Commission's position that the scheme in question should be examined solely in the context of the ordinary tax legislation currently applicable in Belgium is unacceptable. For example, the exemptions from property tax, withholding tax and

([20]) See No 26/48 of the *Commentaar van het Wetboek van de Inkomstenbelastingen 1992* (commentary on the Income Tax Code) (Com.ITC).

([21]) See recital (21).

([22]) Joined cases C-15/98, Italian Republic v Commission and C-105/99 Sardegna Lines v Commission [2000] ECR I-8855.

capital duty cannot have an adverse effect on trade between the Member States because taxes of this sort are not found in some — if not all — other Member States. Nor is it apparent from the Commission's analysis of the cost-plus method used in Belgium in what way this method is more advantageous than the methods applied in other Member States to constructions comparable to coordination centres. The advantages extended to the coordination centres exist in many other countries too, and the Commission has thus been unable to demonstrate that competition and trade between the Member States have been adversely affected. The Commission should have produced hard evidence of such adverse effects.

(52) Thirdly, the Commission asserts on purely theoretical grounds that the presence of Belgian coordination centres within multinational groups adversely affects competition and trade. In so doing it ignores the economic reality that the general tendency to concentrate service provision within a group in coordination-centre-type entities is justified by the reduction in costs achieved through economies of scale. According to Forum 187, all multinationals have a unit responsible for centralising activities such as cash-flow management, financing, accounts and personnel management for the companies within the group. All of these multinationals are free to set up a centre in Belgium or elsewhere. There is therefore no question of competition being distorted.

(53) Fourthly, it is argued that even if the centres were in a privileged financial situation, competition on the financial market would not be affected because the financial institutions determine the conditions they offer on the basis of an independent analysis of the situation of a group, without taking into account the existence of a coordination centre and the advantages that might arise from any special tax schemes. Moreover, the banks base themselves on the reference rates (LIBOR, EURIBOR, etc.) on which the centres have absolutely no influence.

IV.2.4. *Selectivity/specificity of the measure*

(54) Firstly, the Commission has not demonstrated that any discretionary power can be exercised in granting the advantages of the scheme. On the contrary, the administration applies clear rules in a strictly uniform manner. For example, the fact that approved centres are not allowed to engage in insurance or reinsurance activities is solely due to insurance legislation, which does not permit insurance companies to undertake other activities, and not to any margin of discretion exercised by the tax administration.

(55) Secondly, the Belgian Government believes that the Commission wrongly lays the burden of proof at its door by requiring it to show that the measure is justified by the nature or structure of the Belgian tax system. The Commission is basing itself here on the Notice. But a notice cannot impose a new obligation on Member States. The onus is on the Commission to demonstrate that the scheme cannot be justified by the structure of the Belgian tax system.

Justification on the grounds of the nature or structure of the system

(56) Firstly, it is inherent in the nature of a tax system to set limits on and conditions for the advantages and disadvantages it offers. Contrary to the Commission's claim, the Belgian system is based on the principle that companies, as 'professional investors', are exempt, and not on the principle of systematic deduction of tax at source (see recital 38). Withholding tax is principally intended as a tax on natural and legal persons who are then released from an obligation: they are no longer required to declare the income from movable property that has been subject to withholding tax, because this constitutes the definitive tax on the income in question. The presentation of the regulations that apply here in the form of a principle followed by numerous exceptions reflects the desire of the legislator to include these regulations in a section of the 1992 Income Tax Code which is common to the four types of tax that are levied ([23]). According to Forum 187, it is inherent in the nature of a tax system to establish principles and to provide for exceptions to them. These exceptions will necessarily benefit some companies more than others. That does not mean that all of these exemptions have to be regarded as state aid within the meaning of Article 87(1) of the EC Treaty. It is therefore inappropriate to apply the provisions of that article to all of them.

([23]) Tax on the income of resident natural persons, resident legal persons, domestic companies and non-residents (subdivided according to whether the taxpayer is a natural person or a company).

(57) Secondly, the Belgian authorities use a numerical example to demonstrate that companies in general — and coordination centres in particular — should be exempt from withholding tax because they carry out a very large number of financial transactions every year. Without the exemption, the total amount of withholding tax deducted would exceed the amount of tax due over the whole year, with the result that the Belgian state would be compelled to repay large sums to all companies in the country. This applies *a fortiori* to the coordination centres because of their activities in connection with the centralisation of cash flow management (cash pooling).

(58) Thirdly, the exemption of the centres is justified because of the risk of double taxation associated with withholding tax. Although excess withholding tax collected on domestic transactions can be repaid, States rarely take account of withholding taxes levied abroad. Moreover, even though some States allow withholding tax levied abroad to be offset against the taxes they levy, no State goes so far as to repay withholding tax it has levied that is in excess of the final tax liability.

(59) Fourthly, the selectivity denounced by the Commission is justified because the measure is solely intended for companies that perform tasks normally carried out by a head office. In this connection it is pointed out that this selectivity is roughly the same as that in the tax regime prescribed by Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ([24]), as amended by the Act of Accession of Austria, Finland and Sweden, (or by the proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States) ([25]). Finally, the general nature of the exemption introduced in 1983 for income paid out by the centres was justified at the time because these centres were intended to promote new and unfamiliar forms of financial transaction. It was not clear at that point whether the various exemptions provided would actually apply to these new financial flows.

### IV.3. **Compatibility with the common market**

(60) The Belgian Government takes the view that if the scheme does qualify as aid it is compatible with the common market under Article 87(3)(c) of the EC Treaty, because it was introduced to promote investment and employment in Belgium. In support of this it cites the Report to the King that preceded Royal Decree No 187.

(61) The Commission questioned whether the exemption from capital duty was compatible with the Community provisions on the subject. Belgium asserts that all the conditions and formalities required by Directive 69/335/EEC were complied with and confirms that the application of this exemption is consequently compatible with Article 7 of the Directive, which states that exemptions predating 1 July 1984 must be maintained. The exemption provided for in Article 29 of the Law of 11 April 1983 dates from before that date.

### IV.4. **Legitimate expectation**

(62) Firstly, the advantage of the scheme was granted in good faith and entirely lawfully to the approved centres. The centres may therefore invoke the principle of legitimate expectation in order to benefit fully from the 10-year approval that currently applies. This legitimate expectation is based on the Commission decisions of 1984 and 1987 authorising the scheme and the answer to a Parliamentary question given by the Member of the Commission responsible for competition in 1990 ([26]), confirming that the Commission had no objections to the scheme in the light of the rules on State aid in force at the time.

(63) Secondly, the Commission's abrupt withdrawal of its favourable decisions of 1984 and 1987 violates certain fundamental principles of Community law, in particular the principles of legal certainty and legitimate expectation. Thus Forum 187, citing European case law, stresses that there is a presumption of legality as regards the Commission decisions, and the Commission must state and explain its reasons for deciding that earlier

([24]) OJ L 225, 20.8.1990, p. 6.
([25]) OJ C 123, 22.4.1998, p. 9.
([26]) Answer given on 12 July 1990 to Written Question No 1735/90 from Mr G. de Vries to the Commission (OJ C 63, 11.3.1991, p. 37).

decisions were unlawful (Papiers Peints ([27])). It must do so within a reasonable time (Alpha Steel ([28])). The addressee of a decision must be able to ascertain what obligations the decision imposes upon him (Gondrand ([29]) and Opel Austria ([30])). The Commission was criticised for differences in interpretation between a decision of 1999 and five previous decisions concerning the same company (Kvaerner Warnow ([31])). If the addressee of a decision fails to appeal within two months the decision can no longer be contested, and the same applies to the Commission because it declared that the scheme did not constitute State aid. Finally, the Commission, having approved a scheme, may not investigate each of the separate measures approved under this scheme (Italgrani ([32])).

(64) Thirdly, if the Commission were to ban the scheme, the centres — or the groups to which they belong — would suffer significant losses if they were not able to take advantage of the remaining period of their current approval. These losses would result in particular from the need to transfer the centres' activities from Belgium to a foreign country and to break the long-term contracts with the staff, financial institutions ([33]) or owners of the buildings they rent. As a result of the centre's obtaining approval, or having its approval renewed, important investments have been made by the group in order to organise the centre's activities and adapt the structure of the group ([34]), with a view to centralising the activities involved. The groups in question decided to set up their centres in Belgium or to invest there in the legitimate expectation that the scheme did not qualify as state aid within the meaning of Article 87 of the EC Treaty and that they would be able to take advantage of the scheme for the full term of their approval, and even beyond it, i.e. with a view to remaining operational in the long term.

([27]) Case 73/74 Papiers peints v Commission [1975] ECR 1491, paragraph 31.
([28]) Case 14/81 Alpha Steel v Commission [1982] ECR 749.
([29]) Case 169/80 Gondrand v Commission [1981] ECR 1931, paragraph 17.
([30]) Case T-115/94 Opel Austria v Council [1997] ECR II-39, paragraph 124.
([31]) Joined cases T-227/99 and T-134/00 Kvaerner Warnow Werft v Commission [2002] ECR II-1205.
([32]) Case C-47/91 Italy v Commission [1994] ECR I-4635, paragraph 24.
([33]) Banks, leasing companies, etc.
([34]) Costs of computer network, software, financial circuits, etc.

(65) For these reasons Forum 187 believes that the Commission cannot go back on its earlier decisions of 1984 and 1987 and should stop the procedure initiated on 27 February 2002. The associations and centres that expressed their views separately demand acknowledgement of the faith that they legitimately placed in the legality of the approval granted by the Belgian Government and in the maintenance of the effects of the scheme until the end of the current approval period. The last approvals to be renewed will expire on 31 December 2010.

(66) Certain centres are also demanding the renewal of their approval for a further 10-year term once the present term has expired.

## V. REMARK BY THE BELGIAN AUTHORITIES ON THE COMMENTS OF THE INTERESTED PARTIES

(67) Belgium notes that the many comments submitted are indicative of a positive attitude to the scheme. The scale of the investments made by the interested parties shows the extent of their trust in the legal status of coordination centres and the Belgian and EU decisions relating to them. The Belgian authorities also note that none of the parties from the business world involved have expressed any negative views on the scheme, which, in their view, confirms that it does not involve any distortion of competition.

## VI. EVALUATION OF MEASURES

### VI.1. Procedure

(68) Belgium and Forum 187 have criticisms of the fact that the measure was classed as existing aid, of the legal basis which the Commission chose for taking action, and of the procedure it has followed.

(69) According to the Commission, the immediate legal basis is Regulation (EC) No 659/1999. Its underlying legal basis is provided by Articles 87 and 88 of the EC Treaty, which underpin all State aid-related Commission measures. Article 87 lays down the criteria for aid and its compatibility with the common market. They are objective criteria and the Commission has no room for manoeuvre as regards their evaluation. If it can show that an aid measure meets all the criteria laid down in Article 87, it can prove that it is aid, even if a previous

decision states the contrary. Regulation (EC) No 659/1999 confirms this approach in that it defines 'aid' as 'any measure fulfilling all the criteria laid down in Article 87(1) of the Treaty'. As the matter at stake is aid within the meaning of Article 87(1) of the EC Treaty, Article 88 applies and it must be established whether or not the measure concerned can be classed as existing aid. Regulation (EC) No 659/1999 uses the term 'new aid' in such cases.

(70) Article 88(1) of the EC Treaty provides for a more favourable procedure for existing aid schemes, allowing additional opportunities for interested parties to express their views. It is only if these proposals are rejected that the formal inquiry procedure, which is directly applicable to new or unlawful aid, can be applied to existing aid. Article 1(b) of Regulation (EC) No 659/1999 covers a variety of situations relating to 'existing aid'. 'Approved aid' is classed as existing aid, irrespective of whether it was expressly approved as aid compatible with the common market or as a non-aid measure, or was tacitly approved because the Commission had no objections. As indicated in point 32 of the letter initiating the procedure, this provision does cover cases in which the Commission, after initially taking the view that a given measure did not constitute aid, has changed its mind and now takes the view that the measure is aid within the meaning of Article 87 of the Treaty. This category includes aid that is classed as existing aid, because it can be shown that it was not aid at the time of entry into force, but was classed as aid at a later stage as a result of developments in the common market, although the Member State concerned had not modified it in any way. The Commission has consequently drawn the following conclusions.

(71) Firstly, if Article 1(b) of Regulation (EC) No 659/1999 were not applicable in this case, as Belgium and Forum 187 have tried to show, this would not imply that the Commission has no legal basis for pursuing its inquiry. On the contrary, since the Commission notes that the scheme covering the centres has all the characteristics of an aid scheme (see VI.2, Aid character), it should take measures to abolish or alter aid that is incompatible with the common market, in accordance with Article 88 (1) or (2) of the EC Treaty. If the aid concerned could not be shown to be existing aid, the Commission should have concluded that it was 'new aid', that the more favourable procedure for 'existing aid' was not applicable and that the formal investigation procedure must be launched immediately. However, such an approach would have been unjustified, in view of the situation resulting from the 1984 decision. The Commission therefore confirms its judgment that the scheme for coordination centres constitutes existing aid because it was approved in 1984.

(72) Secondly, the Commission again confirms its right to withdraw or amend an unlawful favourable decision (see recital 29). As indicated in point 33 of the letter initiating the procedure, the Commission can decide to withdraw a decision provided that certain conditions laid down in case law ([35]) are met. The Commission takes the view that if its decision were to be regarded as a withdrawal of or an amendment to the earlier decisions of 1984 and 1987, these conditions would be met. In more general terms, the procedure followed guarantees legal certainty and respect for the legitimate expectations of the beneficiaries, provided that the procedure is clearly established and does not jeopardise the actual application of Community law. As the procedure used for existing aid rules out the possibility of recovering aid granted in the past, this decision cannot be made retroactive. Since the procedure has implications for the future only, and since the legitimate expectations of the persons affected are respected, the Commission cannot, therefore, accept the argument that the deadline within which it would be reasonable to withdraw or amend the unlawful decision has passed.

(73) Thirdly, as regards compliance with the procedure for existing aid, the Commission can only reiterate point 34 of the letter initiating the procedure: 'The Commission notes that the letter ([36]) of 17 July 2000 did not constitute a formal and final position, but rather the initial step in a lengthy procedure. It did serve its purpose, as it enabled the Belgian authorities to present their observations before the Commission proposed appropriate measures. Finally, the request for information and the invitation to submit comments, as mentioned in Article 17 of the Regulation laying down

([35]) Notably Cases C-248/89 and C-365/89 Cargill v Commission [1991] ECR I-2987 and I-2045, and Case C-90/95 P de Compte v Parliament [1997] ECR I-1999.

([36]) Letter D/53864 from the Commission, launching the phase of cooperation with Belgium.

the procedures, are of the same type as other previous steps for which the Regulation provides in another context (such as requests for information and injunctions pursuant to Articles 5 and 10, requests for observations in accordance with Article 11), which, in accordance with established practices to which the Member States have no objections, are carried out by Commission departments. This is why the letter in question did not have to be approved by the Members of the Commission acting as a body'.

### VI.2. **Aid character**

(74) Following the formal investigation procedure and taking account of the arguments adduced in connection with the decision to launch the procedure, the Commission takes the view that the doubts voiced at the beginning of the procedure cannot be set aside, for the following reasons.

#### VI.2.1. *Economic advantage*

(75) The Commission confirms that the various exemptions from property tax, withholding tax and capital duty, the imposition of a notional withholding tax and the flat-rate used to establish the centres' taxable income, as set out in this Decision, result in economic advantages within the meaning of Article 87(1) of the EC Treaty to the centres and the groups to which they belong.

##### VI.2.1.1. Exemption from property tax

(76) Firstly, the rule applicable to income from immovable property is that property tax is levied on owners or persons enjoying the usufruct of a property, irrespective of whether they are natural persons, companies or other legal persons, or Belgian or foreign residents. The property tax is thus a tax on all companies owning immovable property in Belgium ([37]). The exceptions referred to — companies based in employment areas, innovative companies, and firms in restructuring areas — do not by any means represent all or even most of the companies based in Belgium, and it is therefore an exaggeration to claim that the majority of Belgian firms benefit from some type of exemption from the property tax. Moreover, the simple fact that there are other — numerous — derogations does not in itself constitute sufficient justification for exemption. Any advantage must be measured against the applicable rules on state aid, depending on the conditions and circumstances under which it was granted. The exemptions referred to may be classed as not constituting aid, or as aid compatible with the common market, or they may be classed as aid implemented unlawfully in Belgium which is not compatible with the common market. The Commission wishes to place particular emphasis on the substance of its Decision SG(83) D/12, addressed to Belgium on 3 January 1983 in connection with the scheme for companies based in employment areas. The Decision states that the Commission has established that the exemption from corporation tax, property tax and registration duty falls under the general prohibition on aid enshrined in Article 92(1) of the EC Treaty before the aid in question is declared to be compatible with the common market. Reference is also made to this principle in another decision addressed to Belgium ([38]), SG(2000) D/108799.

(77) Secondly, the limited number of persons/organisations which benefit from this exemption from property tax does not show that these centres do not derive any benefit from the measure.

##### VI.2.1.2. Exemption from capital duty

(78) The rule in Belgium ([39]) is that contributions to capital are subject to tax. Capital duty is therefore normally payable by all capital companies within the meaning of Article 3 of Directive 69/335/EEC which make contributions in Belgium in accordance with Article 4 of the Directive. As with property tax, the exceptions referred to do not represent the majority of the firms that are subject to taxation in principle, and it is thus an exaggeration to claim that most Belgian companies benefit from some type of exemption from capital duty. Finally, the argument cited at the end of recital 76 is applicable in this context too, *mutatis mutandis*, as justification for rejecting comparison with other exemptions, particularly those granted to companies based in employment areas.

([37]) This means built or unbuilt immovable property, including material and equipment which are immovable owing to their intrinsic nature or the use to which they are put.

([38]) N226/2000 — Regional aid scheme under the law of 30 December 1970.

([39]) See Articles 115 ff. of the Code on Registration, Mortgages and Court Fees.

(79) Finally, the reference to the opinions expressed by the Council or Commission in favour of the abolition of capital duty appears at the very least paradoxical, given that payment of capital duty is the rule in Belgium. Granting an exemption to the centres is at best a step in that direction, but if it involves discrimination the centres will enjoy advantages not available to other companies based on Belgian territory. Moreover, Directive 69/335/EEC does not provide for the abolition of capital duty, but regulates its harmonisation and allows for keeping national exceptions within a very stringent framework, indicated in Article 9. The exemption in question does not comply with that framework.

VI.2.1.3. Exemption from withholding tax

(80) As with property tax and capital duty, the Commission confirms that exemption from withholding tax constitutes an economic advantage enjoyed by the centres and the groups to which they belong. It confirms, notably, that the withholding tax deducted under the conditions provided for under Belgian ordinary law is a tax to which most firms are subject. Where the general exemption for income paid by the centre extends beyond the exemptions provided for by ordinary law, it constitutes an economic advantage to the centres and the groups to which they belong. The advantage derived from this exemption lies in the deferred payment of final taxes, the mitigation of final tax or even the non-taxation of the income from movable property in question. The arguments cited by Belgium and Forum 187 cannot be accepted, for the following reasons.

(81) Firstly, as argued above, the existence of exemptions to which certain firms can have recourse cannot be justified by the fact that other exemptions exist. In this context it matters little that there are more companies with an exemption than firms obliged to pay or deduct withholding tax. Given that there are differences in the application of withholding tax and that these exemptions confer on the beneficiaries an advantage not enjoyed by non-beneficiaries, these differences are potentially caught by Article 87 of the EC Treaty, and it is necessary to determine whether the advantage conferred does in fact constitute aid; if it does, its compatibility with the common market should be assessed.

(82) Moreover, it is far from true to say that the greater part of the income paid by companies based in Belgium is subject to an exemption under ordinary law. Belgian law confers few general exemptions from withholding tax that are linked with the status of the party paying the income. Where it does confer such exemptions, the situation of the liable parties concerned [40] is not comparable with that of the centres. Moreover, such exemptions must be established by law, not by Royal Decree. After all, Section 266 of the Belgian 1992 Income Tax Code restricts the Crown's right to refrain from levying withholding tax to the income of parties whose identity can be established. This restriction emphasises the special nature of general exemptions under Belgian law.

(83) Most of the exemptions set out in the Royal Decree implementing the 1992 Income Tax Code are granted subject to stringent conditions. This applies particularly to the exemptions conferred on professional investors, who/which are by no means covered by a general exemption comparable with the one granted to the centres and the companies of the groups to which they belong. For instance, the types of income listed below are covered by an exemption in the case of the centres, but not for firms subject to ordinary law:

— income paid to a foreign company based outside the European Union in a country with which Belgium has not concluded an agreement on the avoidance of double taxation,

— income paid to a company based in Belgium or elsewhere in the European Union and which does meet the criteria laid down in Directive 90/435/EEC,

— income paid to a company based in one of the many countries with which Belgium has concluded an agreement providing for taxation at source, even if such taxation is limited.

(84) The exemptions applying to non-residents are subject to stringent conditions and are confined to the income of savers not resident in Belgium. This comparison is not, therefore, relevant in the context of an analysis of state aid relating to tax concessions granted to firms rather than savers.

[40] The Belgian state, social insurance institutions, financial institutions (banks, insurance companies, etc), investment funds and companies, the stock exchange.

(85) Secondly, the argument relating to advance payments of tax is not relevant in all cases, notably those described above, in which the party receiving the income is an entity not based in Belgium, which pays no tax in Belgium and is not, therefore, subject to any penalties because no advance payments have been made. In cases where the party receiving the income does pay tax in Belgium, it does enjoy an economic advantage, as withholding tax is not levied, because advance payments are made voluntarily and at particular times, in accordance with a calendar chosen by the company, depending on its estimated taxable revenue. Where necessary, loss-making companies or companies with a low taxable income are obliged to wait until the advance payments made have been refunded.

(86) Thirdly, under ordinary law the withholding tax is the final Belgian tax on both the income paid to savers (natural persons) or associations subject to taxation on income accruing to legal persons and on income paid to foreign companies which are unable to have this income offset or refunded in the country of destination. In this case, the general exemption granted for income paid by the centres is beneficial to the companies of the group based abroad, as the withholding tax is normally a final tax for them.

(87) Fourthly, it is not true to claim that income from the deposits of all companies in their capacity as 'professional investor' is exempt from withholding tax. If this had been the case, there would have been no need to apply Article 110 of the Royal Decree implementing the 1992 Income Tax Code so as to ensure that the centres, which are also 'professional investors', can benefit by the exemption applied to this income.

VI.2.1.4. Notional withholding tax

(88) The Commission thus confirms that assigning a notional withholding tax does constitute an advantage. The fact that the percentage was reduced to zero in 1991 does not necessarily mean that interest received from long-term loans concluded prior to 1991 cannot still benefit from a notional withholding tax. Moreover, the fact that this measure exists as a scheme represents a potential risk to competition and trade between the Member States. Although the percentage has been reduced to zero, the measure has not been abolished as a matter of principle and the percentage could be adjusted by ordinary Royal Decree.

VI.2.1.5. Flat-rate income assessment (cost plus)

(89) Firstly, although it is not always necessary, according to the OECD guidelines, to allow for a profit margin in order for a price to comply with competition conditions, such exceptions apply to occasional costs borne by an associated company, to which they are passed on. They do not under any circumstances apply to costs borne by the coordination centres on a regular basis in connection with the activities for which they were established. For instance, the centres' staff costs and the financial costs incurred in connection with cash management or financing activities are essential costs which make a major contribution to enabling the centres to earn revenue. There is thus no justification for excluding them from the cost-plus-basis, in the light of the OECD criteria for establishing transfer prices.

(90) Secondly, Forum 187 seems to be drawing a comparison with certain entities which are not permanent establishments. The Commission cannot accept this comparison. Firstly, such an entity must meet extremely restrictive conditions which the centres accredited under Royal Decree No 187 do not satisfy. The centres are by definition companies under Belgian law or permanent establishments belonging to a company under non-Belgian law. These entities act on behalf of other entities and they are transparent for Belgium as far as tax is concerned; there is no taxable income associated with these entities, all income is directly taxable under the auspices of the supervisory entities. The purpose of the cost-plus method in Belgium is essentially to reconstruct a tax base for the centres, which work for their own benefit. Finally, the example given implies that the amount of costs is equal to the benefits accruing, so that the income from such transactions is zero. In view of the aim of transparency with regard to taxes, this situation implies that the sum deducted as costs by the party to which the costs are

passed on is equal to the benefits incorporated into the tax base by the party responsible for passing on the costs. However, applying the cost-plus method implies that there is no longer any automatic link between income reported in Belgium and income taxed in Belgium. The sums deducted by the parties to which the costs are passed on are therefore not necessarily the sums which will be used in calculating the tax base.

(91) Thirdly, it cannot be concluded from the fact that a percentage of 8 % has been applied since 1964 to establish the taxable income of Belgian branches of non-Belgian companies that this practice is compatible with the Treaty. Rather, the Commission criticises the fact that a single uniform percentage is applied to all activities, as this makes it impossible for each centre to obtain a tax base in line with the principle of free competition. Nor does this long-standing practice imply, either for these branches or, still less, for the centres, that this percentage is an appropriate reference point. And even if this percentage were, on average, acceptable where Belgian branches of foreign companies are concerned, this argument would on the contrary show that it is too low for centres where it is automatically applied to a greatly reduced cost base. Finally, given that this is an administrative practice without any legal basis, it is unacceptable for this percentage, taken out of its original context, to be a constituent part of ordinary law or of the Belgian tax system.

(92) Fourthly, the fact that the scheme appears to be disadvantageous for the centre in the event of accounting losses and neutral from the point of view of the group if the parent company is taxed on its worldwide income undoubtedly means that it is not advantageous for certain companies. However, it can certainly not be concluded from this that it is not advantageous for other companies in a different situation. Moreover, the centres' activities are confined to preparatory or ancillary activities which imply a limited risk of accounting loss. That is one of the reasons why the application of the cost-plus method is justified. As regards the taxation of the parent company's worldwide income, it should be noted that the countries where this situation applies are in a minority and that there are sometimes exceptions. Even if the parent company is based in one of these countries, there is no guarantee that a tax concession granted to the centre would be offset at the level of the parent company.

(93) Fifthly, the flat-rate tax on staff (BEF 400 000 or EUR 10 000 per employee) is no justification for excluding staff costs from the cost-plus base. This tax was introduced after the cost-plus system and was thus not intended to compensate for the exclusion of staff costs from the cost-plus base. Moreover, it is restricted to the first 10 members of staff. To receive approval, however, a centre must employ 10 people or undertake to do so within two years of being set up. The maximum amount of tax is therefore often set at BEF 4 million (EUR 100 000). Given that there is a ceiling on this tax and that it relates only to the number of employees, it does not guarantee taxation comparable with that which would obtain if staff costs were included in the cost-plus base. As regards the exclusion of expenses, the arguments cited by Forum 187 — if they are correct — point instead to the fact that the cost-plus method is not an appropriate way to reconstruct income from particular financial activities. Under no circumstances can it be concluded from these arguments that these costs must be excluded from the cost-plus base systematically and without using an alternative method to quantify income from financial activities.

(94) Sixthly, the Commission takes the view that the purpose of the alternative base is to limit the impact of any abuses and that it is not a base comparable with that obtainable through the traditional method based on the accounting result. This is because the alternative base includes only the special advantages granted to the centres and advantages without any *quid pro quo*, as well as ineligible expenditure. These sums are also subject to taxation in other companies and are added to the accounting profits, which the cost-plus method seeks to reconstruct for the centres.

(95) The purpose of applying the OECD rules is to establish transfer prices that are close to the prices obtaining under conditions of free competition, in accordance with rules accepted by transnational corporations and the tax authorities of the Member States concerned. These rules make it possible to establish the division of revenue for accounting purposes among the various branches of the corporation based in each Member State. Using this method should also make it possible for each Member State to tax the corporations in question in accordance with a tax base comparable to that which would be obtained by

calculating the difference between the assets and liabilities of a company operating in an environment subject to free competition. Where — as is the case in Belgium — this comparable base is subject to the normal rate of corporation tax, the ultimate objective of establishing a comparable amount of tax has been achieved, and the application of the cost-plus method confers no advantages. The Commission's view is that the cost-plus method used by Belgium as part of the scheme covering the centres does not guarantee that income from free competition is taken into account; still less does it guarantee taxation comparable with that applied to other companies subject to the ordinary tax system. The cumulative effect of excluding significant costs from the cost-plus base and the application of a single rate, generally set at 8 %, without differentiating the types of activities carried out by the centre, is to reduce taxes, thereby conferring an economic advantage, as referred to in Article 87 of the EC Treaty.

VI.2.2. *Use of State resources*

(96) The Commission stands by its view that the economic advantages referred to in recital 75 are paid for using State resources. Applying the special scheme for coordination centres based in Belgium implies a reduction in tax by comparison with the ordinary law. This means that the Belgian State is forfeiting a proportion of its tax revenue.

(97) The increase in tax revenue referred to is based on a comparison between the total tax revenue from all Belgian companies between the introduction of the scheme and the present date. The issue of whether a measure constitutes aid must be assessed on an individual basis with reference to the beneficiary company at a particular time, in order to establish whether individual companies receive more from the State or contribute less to the financing of public goods and services. If this were not the case, all forms of aid would be justified if such aid ensured that a company was persuaded to set up in a Member State, that its future taxable income increased or that it was discouraged from leaving the country in question.

(98) Moreover, the fact that Belgium forfeits other tax revenue through other exemptions is irrelevant to an assessment of whether the exemption in question constitutes aid. As already mentioned in this Decision, the other exemptions referred to may be classed as incompatible or compatible State aid, or, indeed, as not being State aid at all; this depends on their individual characteristics. The use of State resources is not ruled out for any of these three sorts of measure.

VI.2.3. *Distortion of competition and adverse effects on trade between the Member States*

(99) The Commission also stands by its view that the advantages referred to in this Decision distort competition between companies based in Belgium, or that there is a risk of such distortion, and that such distortion affects intra-Community trade. According to the case law of the European Court of Justice ([41]) and as noted in point 11 of the Notice, 'the mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected'.

(100) Firstly, the Commission believes that it provided sufficient — albeit concise — justification for this aspect of its decision to initiate the procedure in points 56 and 57 of the letter initiating the procedure, even as regards the judgment ([42]) referred to in the footnote. According to paragraphs 65 and 66 of that judgment, the statement of reasons required by Article 190 of the EC Treaty (now Article 253) must be appropriate to the measure 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 requirement to state reasons must be evaluated according to the circumstances of each case. According to the Court, it is not necessary for the reasoning to go into all the relevant facts and points of law. As regards decisions on State aid, in particular, the Court has ruled that although in certain cases the very circumstances in which aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision. The arguments set forth, however, indicate that the centres, thanks to the

([41]) Case 730/79 Philip Morris v Commission [1980] ECR I-2671.
([42]) See footnote 22.

advantages they enjoy, are strengthening their competitive position in the sector of services provided to members of the group — in which sector they compete directly with organisations including financial institutions, trusts and consultancies specialising in tax, recruitment, IT, and so on — in addition to strengthening the competitive position of firms belonging to the group which are active in numerous economic sectors. These are all sectors characterised by intensive international and intra-Community trade, where large multinational corporations compete directly with other multinational or local firms of different sizes.

(101) Secondly, the existence of comparable or competing provisions in other Member States is no justification for allocating State aid. Like the centres scheme, every measure needs to be analysed in the context of the tax system of the Member concerned. These measures can be classed as general measures, compatible aid or incompatible aid, depending on their inherent characteristics. However, none of these descriptions automatically rules out the existence of distortions of competition or an adverse impact on trade. The Commission takes the view that Belgium's demand that it empirically demonstrate distortion of competition and the adverse impact on trade goes too far, and in this connection it refers to the judgments in cases C-15/98 and C-105/99.

(102) Thirdly, the Commission is well aware of the phenomenon of concentrating activities within multinational groups in entities such as coordination centres. It has no criticisms of this provided that the only reason for such concentration is the economies of scale to which it is supposed to lead. However, it cannot accept the setting up of such entities in conjunction with specific tax schemes that are considerably more favourable than ordinary law. The Commission also rejects the argument that all multinational corporations have such entities or can set them up in Belgium or other countries. That argument is based on the assumption that the only competitors of large multinational groups in intra-Community trade are other large multinational groups. This assumption is unwarranted, as local firms or smaller multinational groups are also engaged in intra-Community trade, but are not eligible for the tax advantages granted to coordination centres.

(103) Fourthly, the group benefits directly and indirectly from the financial advantages conferred by the tax scheme applicable to the coordination centres. These advantages strengthen the group's financial position, which can affect the rating given to it by banks, thereby strengthening its financial position still further by giving it access to more favourable conditions.

VI.2.4. *Selectivity/specificity of the measure*

(104) The Commission confirms that the advantages are specific, as they favour particular companies in the way referred to in Article 87 of the EC Treaty. The scheme is directly applicable to the coordination centres and, directly or indirectly, to the other companies within the multinational group to which these centres must necessarily belong. The selective nature of application results not from regional or sectoral criteria, but from the compulsory criteria which the centres and the groups to which they belong must satisfy in order to be approved and thereby to be able to take advantage of the scheme (see recital 13). These criteria include those relating to the size and multinational character of the group and the nature and type of activities carried out within it. The arguments set forth by the interested parties have done nothing to change the Commission's views on the selective nature of application and the absence of any justification inherent in the nature or structure of the tax system.

(105) Firstly, as regards discretionary powers, the Commission accepts the argument about carrying out insurance and reinsurance activities. Nor does it contest the fact that the administration has few — if any — powers of discretion to grant or withhold approval of a centre, and that it is thus not a specific feature of the scheme. However, it does repeat its conviction that discretionary powers were used when deciding that the standard percentage set out in the administrative circular should be set at 8 %. Systematic application of a single low percentage may, given the limited base to which it applies, reduce the tax base, thereby giving rise to an economic advantage as referred to in Article 87(1) of the EC Treaty.

(106) Secondly, the Notice does not establish any further obligations on the Member States. In the course of the various stages of the procedure, the Commission has explained its reasons for judging the measures in question to be selective and for denying a justification based on the nature and structure of the scheme. In order to allay the doubts expressed by the Commission, the Member State may, for

example, demonstrate that the measure is not selective. Another possibility would be to prove that the specificity of the measure is justified by the nature or structure of the tax system, which results in the scheme being regarded as a general measure. In the absence of convincing arguments, the Commission therefore concludes that its view that the measure is selective was well-founded.

Justification on the grounds of the nature or structure of the system

(107) The arguments on withholding tax set out in recitals 56 to 59 are unconvincing, for the following reasons.

(108) Firstly, withholding tax was introduced as a form of taxation, and it is not true to claim that its main purpose is to tax natural and legal persons who/which are not obliged to declare the income that is subject to withholding tax. As regards the other tax exemptions referred to, their existence does not mean that all exemptions are justified by the nature or structure of the Belgian tax system, nor, specifically, that the selective criteria established by law for the centres are justifiable. All these exemptions can be classed as not constituting aid, or as constituting compatible or incompatible aid, depending on their inherent characteristics. For instance, following the announcement of the employment zones scheme in 1982, the Commission explicitly classed as aid the exemptions from withholding tax and capital duty conferred on companies based in the employment zones, before declaring them to be compatible with the common market.

(109) The exemptions provided for by the ordinary law with respect to income paid to non-residents, to which the interested parties also refer, are generally conditional and limited to 'non-resident savers', that is, natural persons who are not using movable property which produces income to practise a professional activity.

(110) Secondly, the example given by the Belgian authorities to show that the deduction of withholding tax is incompatible with cash pooling is irrelevant in this context. The erroneous assumption is made here that the company which receives the income also pays tax in Belgium, but in such a case the ordinary law is sufficient to exempt the transaction from withholding tax. Moreover, it is not the purpose of the associated procedure to make withholding tax obligatory on all transactions carried out by a centre, as it does not relate in any way to the many exemptions provided for in the ordinary law and which the centres can continue to use. The chance that the coordination centres might deduct withholding tax from all income paid out is thus restricted to cases in which all income was paid to taxpayers who are unable to avail themselves of the general exemptions provided for by Belgian and EU law and the international agreements signed by Belgium. And in this case the centre would simply be exposed to the same risks as other companies engaged in the same activities in a group that does not satisfy the conditions laid down in Royal Decree No 187.

(111) Thirdly, the risk of double international taxation is the same for the other firms engaged in the same activities as coordination centres, but which are not covered by the exemption scheme. Moreover, given the extensive network of international agreements concluded by Belgium, such risks are confined to transactions with countries with which Belgium has not concluded any such agreement.

(112) Fourthly, no indication is given as to why activities performed at the head office should necessarily benefit from an exemption scheme. Above all, no arguments were presented to justify the selective criteria used to restrict access to the scheme on the basis of the nature or structure of the scheme. Firms belonging to smaller groups or whose activities are confined to two countries can also perform activities in their head office, but this does not qualify them for inclusion in the scheme. The selective nature of the scheme under Directive 90/435/EEC is not more or less the same as that of Royal Decree No 187, as the conditions relate to the percentage share held by a firm (the parent company) in another firm (the subsidiary) and the duration of this share. At all events, in adopting this directive the Council ensured that the Member States' tax regulations were harmonised; consequently, provided that they are in line with the obligatory provisions of the directive in future, they will no longer be attributable to a particular Member State and cannot therefore be classed as state aid. Finally, no further explanation was given of the need, which arose in 1983, to exempt all the centres' transactions in view of the innovative nature of the financial instruments which they were to develop. At any rate, it seems that this need can no longer be invoked to advocate a special scheme for coordination centres. Given

the current prevalence of this type of financial instrument, this argument would, however, seem to confirm the evolution of the markets on which the centres operate.

### VI.3. **Compatibility with the common market**

(113) In order to be compatible with the common market an aid scheme must strictly conform to one of the situations described in Article 87(2) and (3) of the EC Treaty. After examining the arguments presented by the interested parties, the Commission confirms that the scheme for coordination centres satisfies none of the exceptions contained in these provisions. The scheme is not aimed at individual consumers, is not intended to make good the damage caused by exceptional occurrences, or to remedy a serious disturbance in the Belgian economy, or to promote the execution of an important project of common European interest, or to promote culture and heritage conservation.

(114) As regards the investment by the centres, no evidence was provided to show that this corresponds to initial investment qualifying for aid, as described in points 4.4 and 4.5 of the Guidelines on national regional aid ([43]). For large firms, the category to which most of the coordination centres belong, investment aid is only allowed in the regions covered by the exceptions provided for in Article 87(3)(a) and (c). Finally, as regards job creation, the Guidelines on aid to employment ([44]) state that the level of aid may not exceed that which is necessary to stimulate job creation. In the case under consideration the Commission concludes that the tax advantages arising from the scheme for coordination centres depends on the volume of activity generated by the centre rather than the number of jobs created.

(115) The tax advantages extended to the centre are not, therefore, connected with investment, job creation or specific projects. They therefore represent permanent reductions in charges which constitute operating aid. Operating aid is in principle prohibited. However, point 4.15 of the Guidelines on national regional aid states that such aid may exceptionally be allowed in regions covered by the derogation provided for in Article 87(3)(a). Because Belgium is not covered by this derogation the aid measures in question can affect trading conditions to an extent contrary to the common interest and are accordingly not covered by the exemption provided for in Article 87(3)(c). The comparison with the employment areas approved by the Commission in 1982 is not relevant here as an argument for the compatibility of the measure with the common market. Although it is not necessary to examine the evolution of the Commission's policy in this matter, suffice it to say that that decision related only to the employment zones of Wallonia and Flanders that were experiencing high unemployment at that time. The Commission categorically ruled out the creation of an employment area in the Brussels Region. Yet most of the coordination centres appear to be based in the Brussels Region.

(116) As regards exemption from capital duty, the Commission believes that, because the aid is incompatible with the common market, it is not necessary in the context of the present Decision to consider whether it is compatible with the terms of Directive 69/335/EEC. The Commission reserves the right to deal with this question in another suitable context.

### VI.4. **Legitimate expectation**

(117) The Commission recognises that there is a legitimate expectation on the part of beneficiaries of the scheme. It is therefore right that the Commission should allow the centres that hold an approval on 31 December 2000 to continue to enjoy the benefits of the scheme until the end of their period of approval, if this was ongoing at the time of the present Decision, up to 31 December 2010 at the latest. This view is based on the following grounds.

(118) By issuing the approval the tax administration assumed that the approved centre would comply with the conditions for benefiting from the exemption scheme of Royal Decree No 187 for 10 years, without having to prove every year that the conditions were being met. If the administration found that the conditions were no longer being met the centre would be excluded from the scheme in future. In accordance with the Belgian Constitution, these agreements related only to the facts and not to the scheme being implemented. They cannot, therefore, give any legal guarantee that the scheme, as it stood on the date approval was granted, would be

([43]) OJ C 74, 10.3.1998, p. 9.
([44]) OJ C 334, 12.12.1995, p. 4.

maintained for the next 10 years. There is thus no contractual undertaking by the administration to the approved centre as regards the advantages conferred. This interpretation would seem to be supported by the reply from the Belgian State, which refers to its civil liability in connection with the losses a company might suffer, rather than its contractual liability to the company. The Belgian and European case law referred to by the Belgian State and the third parties regards respect for the principles of legal certainty and legitimate expectation in the same light. Careful reading of these judgments merely shows that the Commission may withdraw a decision with retroactive force only under very strict conditions, for example by allowing a reasonable time. However, if it applies the procedure for existing aid the Commission's action may not have retroactive force at all, given that it cannot recover aid. These judgments also state that the Commission may not, even in the future, withdraw its decision if this would cause unjustified hardship to the companies involved. Here, too, the procedure for existing aid guarantees the legal certainty of the companies by allowing the Commission the option, where necessary, of providing for a transitional period for phasing out the scheme.

(119) In this context, the Commission believes that it should indeed take into account the comments by the Belgian State and the interested parties regarding the major investment made by the companies concerned and the groups to which they belong. This investment relates, for example, to the creation and development of the infrastructure for the centre and the changes made to the organisation of the structures, networks, procedures and distribution of activities within the group. Long-term commitments were also made to staff, property companies and financial institutions. Although approval gives no guarantee as to the continued existence of the advantageous nature of the scheme, the Commission admits that centres were established, investment made and commitments entered into in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the tax regime. The Commission has accordingly decided to allow a transitional period so that the cost-plus scheme for the present beneficiaries can be gradually phased out.

(120) Because the approvals do not represent a right to the continuation of the scheme or its advantageous character, even during the approval period, the Commission believes that they cannot, under any circumstances, confer a right to have the scheme renewed when the present approval expires. In view of the explicit restriction of the approval to ten years it is impossible that a legitimate expectation should have been created as to automatic renewal, which would have amounted to approval that could theoretically last for ever.

## VII. **CONCLUSIONS**

(121) The Commission concludes that the tax scheme covering coordination centres in Belgium is incompatible with the common market and that measures must be taken to remedy the incompatibility of its various components by abolishing or amending them. As of the date of notification of this Decision, new beneficiaries can no longer be covered by this scheme or sections thereof, nor can it be maintained by renewing existing approvals. The Commission notes that centres approved in 2001 have not benefited from the scheme since 31 December 2002.

(122) As regards the centres currently covered by the scheme, the Commission acknowledges that the 1984 Decision approving Royal Decree No 187 and the reply to a Parliamentary question given by the Member of the Commission responsible for competition ([45]) gave rise to a legitimate expectation that the scheme did not violate the rules on state aid enshrined in the Treaty.

(123) In view of the substantial investments made on this basis, as well as the need to respect legitimate expectations and the legal certainty of the beneficiaries, it is justifiable to allow a reasonable period for eliminating the scheme's impact on the existing approved centres. The Commission takes the view that this reasonable period comes to an end on 31 December 2010. The centres whose approval expires before this date can no longer make use of their approval after the deadline. After the date on which approval lapses and at any rate after 31 December 2010, it will be unlawful to grant or maintain the tax concessions in question,

([45]) See footnote 26.

HAS ADOPTED THIS DECISION:

*Article 1*

The tax scheme which currently operates in Belgium for the benefit of coordination centres approved under Royal Decree No 187 constitutes aid incompatible with the common market.

*Article 2*

Belgium is required to withdraw the aid referred to in Article 1 or to amend it in such a way as to make it compatible with the common market.

As of the date of notification of this Decision, the benefits of this scheme or sections thereof may no longer be granted to new beneficiaries or maintained by renewing existing agreements.

With regard to centres approved before 31 December 2000, the scheme may be maintained until the expiry date of the individual approval applying on the date of notification of this Decision and until 31 December 2010 at the latest. In accordance with the second paragraph, if approval is renewed prior to that date the benefits of the scheme dealt with in this Decision may no longer be granted, even temporarily.

*Article 3*

Belgium shall inform the Commission within two months of the date of publication of this Decision of the measures taken to comply with it.

*Article 4*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 17 February 2003.

*For the Commission*

Mario MONTI

*Member of the Commission*