

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

**of 9 April 2002**

**on the aid schemes C 74/2001 (ex NN76/2001) implemented by Belgium and which Belgium is planning to implement for the diamond industry**

*(notified under document number C(2002) 1345)*

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

**(Text with EEA relevance)**

(2002/778/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 interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

## I. PROCEDURE

- (1) In July 1999 the Commission received a complaint from the Belgian association of traders in rough diamonds (Vereniging van handelaars in ruwe diamant/Association des commerçants de diamant brut) concerning the diamond industry's internal compensation fund (hereinafter the 'compensation fund'). Following the complaint, it asked Belgium to provide further information by letter dated 15 November 1999 (D/64713). By letter dated 6 December 1999 (registered as received on the same day under A/39442), the Belgian authorities asked to be given until 31 January 2000 to provide the information; the Commission gave its agreement by letter dated 8 December 1999 (D/65127). By letter dated 27 January 2000 (registered as received on 28 January under No A/30751), Belgium requested an additional extension until 29 February 2000. It provided further information by letter dated 28 February 2000 (registered as received on 1 March under A/31802). A meeting between Belgium and the Commission took place on 3 February 2000; a second meeting was held on 25 April 2000. The complainant itself sent the Commission several letters containing further information.
- (2) On 13 March 2000 the Council of State annulled for procedural reasons the decree amending the provisions on which the compensation fund was based. Withdrawals and payments were suspended. Belgium found itself involved in various sets of legal proceedings to recover amounts paid in error.

<sup>(1)</sup> OJ C 363, 19.12.2001, p. 11.

- (3) At the meeting on 25 April 2000, the Belgian authorities undertook to recover the amounts paid to Lens Diamond Industries NV, the only recipient to have been paid more than EUR 100 000. By letter dated 8 August 2000 (D/54231), the Commission requested written confirmation of that undertaking and clarification of the recovery procedures. By letter dated 28 August 2000 (registered as received on 29 August under A/37035), Belgium asked to be given until 30 September 2000 to provide the information requested; the Commission gave its agreement by letter dated 31 August 2000 (D/54503). Belgium provided the information by letter dated 2 October 2000 (registered as received on 6 October under A/38191). The Commission requested further information by letter dated 11 October 2000 (D/55155) and sent a reminder to Belgium on 29 November 2000 (D/55935). Belgium replied by letter dated 11 December 2000 (registered as received on 13 December under A/40511). The Commission requested further information on the situation with regard to the recovery procedure by letters dated 18 January 2001 (D/50188), 26 March 2001 (D/51276), 17 May 2001 (D/52040) and 29 June 2001 (D/52666). The law firm representing Belgium replied by letters dated 9 April 2001 (registered as received on 10 April under A/32970) and 12 July 2001 (registered as received on the same day under A/35663). Belgium confirmed the information contained in the letter of 12 July by letter dated 24 July 2001 (registered as received on 26 July under No A/36056). Belgium and the law firm acting for it notified the Commission informally that they intended to bring in a new scheme to replace the one that had been annulled. Belgium confirmed this by letter dated 31 October 2001 (registered as received on 5 November under A/38610).
- (4) By letter dated 17 October 2001, the Commission informed Belgium of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned aid. Belgium replied by letter dated 30 November 2001 (registered as received on 4 December under SG A/13215). The decision was published in the *Official Journal of the European Communities* <sup>(?)</sup>. The Commission called on interested parties to submit their comments.
- (5) The only comments received in this connection were submitted by the original complainant (letter of 17 January 2002, registered as received under A/30398) and by the compensation fund itself (letter of 17 January 2002, registered as received under No A/30353). By letter dated 24 January 2002 (D/50280) the Commission forwarded these comments to Belgium so that it could give its observations on them. These observations were received from the law firm by letter dated 28 February 2002 (registered as received on 1 March under A/31591) and from the Belgian authorities by letter dated 6 March 2002 (registered as received on 11 March under A/31853). Lastly, by letter dated 20 March (registered as received on 22 March 2002 under A/32195), the law firm submitted a copy of the March edition of *National Geographic*, which contained a number of articles on the various aspects of diamonds.

## II. DETAILED DESCRIPTION OF THE AID

- (6) The objective of the scheme is to promote Antwerp's diamond industry and to prevent it relocating to third countries outside the Community. This is to be achieved by making payments to employers in the industry which partly compensate for their social security contributions.
- (7) The original scheme was set up by the Law of 26 March 1999 on the 1998 employment action plan <sup>(?)</sup> and by the Royal Decree of 3 June 1999 <sup>(\*)</sup> amending the Royal Decree of 21 November 1960 <sup>(?)</sup> laying down the rules governing the internal compensation fund for the diamond industry.
- (8) The scheme provided for a levy on the value of each diamond transaction that was payable by natural or legal persons whose main or subsidiary activity was in the diamond trade or the diamond industry. All companies based in Belgium were required to pay the levy. A transaction is understood

<sup>(?)</sup> See footnote 1.

<sup>(\*)</sup> Belgian Official Gazette, 1.4.1999.

<sup>(\*)</sup> Belgian Official Gazette, 22.6.1999, p. 23426.

<sup>(?)</sup> Belgian Official Gazette, 8.12.1960.

as meaning any agreement for the purpose of creating added value in diamond sales transactions as a whole, either on the domestic market or on the export market <sup>(6)</sup>. With effect from 1 April 1999, the levy was set at 0,08 %. As from 1 April 2000, it was increased to 0,10 %. Total levies for 1999 were estimated at BEF 313 125 000 (7,76 million) <sup>(7)</sup>.

- (9) The amounts collected were used to pay compensation allowances to employers whose workers were involved in diamond processing (cleaving, cutting, rough-cutting, shaping and sawing). The allowances were fixed by a management committee and limited to the amount of employers' general social security contributions. In practice, they covered these contributions only in part. The right of employers to receive allowances took effect on 1 July 1999. According to Belgium, the allowances accounted at the time for 33 % of the total wage; they averaged 1,2 % (in a range of 0,5 % to 3 %) of total production costs. Belgium claims that the scheme was degressive: if it proved successful, the number of employees would increase, leading to a reduction in the amount of the allowance per employee. Belgium takes the view that all but one of the recipients meet the Community definition of a small or medium-sized enterprise.
- (10) The Council of State annulled the 1999 measure by decision of 13 March 2000. The total amount paid out as compensation allowances was BEF 172 254 892 (EUR 4,27 million). Only in one case, namely Lens Diamond Industries NV, did the amount paid exceed EUR 100 000, i.e. BEF [...] <sup>(\*)</sup> Since then, Belgium has undertaken to comply with the *de minimis* rule <sup>(8)</sup> (hereinafter referred to as the '*de minimis* Regulation') as regards implementation of the annulled scheme.
- (11) When Belgium informed the Commission of the scheme that was to replace the annulled scheme, not all aspects of the new scheme had been fully discussed, but overall it probably differed little from the original scheme. The levy was to be set at 0,10 %, while the tax base and allowances were to remain unchanged. The scheme was not to enter into force until the first or second quarter of 2002. In principle, it should remain in force for an unlimited period. Belgium has not undertaken to comply with the *de minimis* Regulation as regards implementation of the new scheme.

### Grounds for initiating the Article 88(2) procedure

- (12) In its preliminary evaluation the Commission stated its view that the schemes constituted State aid within the meaning of Article 87(1) of the EC Treaty and that the aid was operating aid, for which no exemption under Article 87(2) and (3) applied.

### III. COMMENTS FROM INTERESTED PARTIES

- (13) The complainant, the Belgian association of traders in rough diamonds, endorses the arguments put forward by the Commission in its decision to initiate the procedure since the scheme favours the Belgian diamond industry and, in addition, gives rise to discrimination between traders in rough diamonds because those not involved in processing activities derive no benefit from it. The scheme runs counter to the interests of the latter group of traders: a Belgian trader who purchases a rough diamond for the purpose of selling it in Germany would pay the levy, whereas a non-Belgian trader effecting the same transaction would not.
- (14) The compensation fund endorses the arguments put forward by Belgium.

### IV. COMMENTS FROM BELGIUM

- (15) Firstly, Belgium is surprised that the decision to initiate the Article 88(2) procedure should concern not only the annulled scheme but also the proposed scheme, which it has not yet formally notified to the Commission.

<sup>(6)</sup> As a result, the levy is also payable on exports but not on imports.

<sup>(7)</sup> NB: In the Antwerp diamond trade, it is fairly standard practice for a consignment of diamonds to be sold to various brokers and dealers in succession, thus giving rise to several transactions, before a final purchaser is found. However, the levy is not charged on transactions which do not result in added value being created.

<sup>(\*)</sup> Business secret.

<sup>(8)</sup> Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2002, p. 30).

- (16) Secondly, Belgium states that the resources of the compensation fund are not State resources as required by the definition of State aid set out in Article 87(1) and as confirmed by the *PreussenElektra* case <sup>(9)</sup>. There is no transfer of State resources since the traders contributions replace the employers social security contributions. The budget impact for the State is neutral. This reasoning is unaffected by the fact that the contributions are levied under statutory provisions.
- (17) Thirdly, Belgium argues that the scheme merely involves a reinforcement of the solidarity mechanism that exists in every social security system. However, the employers' social security contributions are paid no longer by employers in the processing industry, but by the entire diamond industry, including diamond traders. Apart from that adjustment to the solidarity mechanism, no other change has been made to the scheme. This argument is borne out by the fact that a collaborating social security institution can assume responsibility for collecting compensation contributions. The scheme for the diamond industry can be compared to a social security system specific to a given industry, like the one for seamen.
- (18) Belgium adds that the scheme does not have any effect on trade between Member States. The position of Antwerp is very specific. The city is the most important centre for diamond trading in the Community <sup>(10)</sup>. According to estimates, it accounts for 80 % of the rough diamond trade in the Community. Scarcely 0,1 % of rough diamonds sold in Antwerp is sent to other Member States for processing. The annual value of the rough diamonds processed in Belgium is approximately USD 500 million.
- (19) There is no distortion of competition in respect of rough diamond traders. The compensation allowances are granted for processing activities only and do not have a detrimental effect on traders. In addition, the allowances reduce the cost of processed diamonds, something which also benefits traders. Belgium has produced an interim report which indicates a positive effect for Antwerp's diamond industry as a whole.
- (20) Belgium also refers to the case involving the *Künstlersozialversicherung* (social insurance for artists) <sup>(11)</sup> which appears to be similar to the scheme for the diamond industry. It was pointed out in this case that publishing houses and press agencies are required to pay a contribution to certain payments by artists and journalists. The Commission contested the scheme because it resulted in double taxation. At no time did it invoke the State aid rules, although Germany contributes to the system out of its own resources.
- (21) Belgium has provided an analysis carried out by an economic research bureau. The report begins by describing the competitors within and outside the Community. Diamond firms in the Netherlands are seen as being local in character since they focus mainly on visitors to Amsterdam and the local jewellery trade. According to the report, the sector is more industrialised in Germany and operates on a larger scale than in the Netherlands, with German firms specialising in processing diamonds for medical use and for use in repair activities. In any event, these firms do not compete with the Belgian diamond industry, which tends to specialise in the large-scale processing of relatively large, valuable diamonds. Its main competitors are located in India, Israel, the United States, Thailand, Sri Lanka, China, Russia and South Africa.
- (22) The report contains data on the trade in rough diamonds and processed diamonds. These figures do not indicate any effect on intra-Community trade. Exports of rough diamonds to the Netherlands, Germany, France and Italy increased during the period covered by the Belgian scheme. The percentage increase is even higher than that for exports to third countries. Belgian exports of processed diamonds to France declined after the scheme was introduced, while exports to the Netherlands, Germany and Italy rose. Indeed, they continued to rise after the scheme had been annulled, which suggests that it did not have much effect. The report also provides data on imports of processed diamonds into Belgium; however, these do not allow any clear conclusions to be drawn regarding the scheme's effects. In any event, the bulk (70 to 80 %) of processed diamond imports comprises diamonds which were exported and then reimported after being inspected.

<sup>(9)</sup> Case C-379/98 *PreussenElektra AG v Schlesweg AG* [2001] ECR I-2099.

<sup>(10)</sup> The De Beers company has an effective monopoly. Some 40 'supervisors' sell rough diamonds in Antwerp. There are no such 'supervisors' in the other Member States.

<sup>(11)</sup> Case C-68/99 *Commission v Germany* [2001] ECR I-1865.

- (23) Thirdly, the report analyses the levy's effects on traders. It concludes that the levy does not give rise to discrimination in favour of traders also involved in other activities as opposed to 'pure' traders since no trader is deemed to use income from other activities to mitigate its effect. This reasoning also implies that the prices set by traders should not be affected by the allowances paid to them by virtue of their processing activities. In addition, the allowances represent only a small proportion of the total price (about 1,2 % of total costs) and contributions and they concern the same chain of diamond production, thereby reducing the net impact.
- (24) The report concludes with two general observations. Firstly, the scheme could be regarded as an adjustment designed to remedy a market failure. The diamond trade benefits from the 'externalities' resulting from the presence of the diamond industry. As a result of the scheme, these 'externalities' are internalised. Secondly, labour costs in Belgium are high and the system of taxation and social security contributions creates distortions. According to the report, the scheme is designed purely to iron out these distortions.

## V. ASSESSMENT OF THE AID

### V.1. State aid within the meaning of Article 87(1) of the EC Treaty

#### *State resources and the PreussenElektra judgment*

- (25) The amounts collected must be regarded as State resources. The scheme consists of a parafiscal levy. The size and use made of the proceeds are determined by Belgian law. The Court of Justice has established in several judgments that parafiscal levies may constitute State aid <sup>(12)</sup>. The Commission takes the view that the *PreussenElektra* judgment <sup>(13)</sup> does not apply in the situation under consideration. Under no circumstances do the diamond firms receive the allowances direct from the firms paying the contribution. A minimum price for the product in question is not enshrined in law, as was the case in *PreussenElektra*. In the case of the compensation fund, a 'classic' parafiscal levy is enshrined in law and managed by a fund established under the same law, which also collects the amounts of the levy and pays out the allowances. The Ministry of Labour approves the level of the allowances. A government commissioner appointed by the King on a proposal from the Minister for Labour takes part in the meetings of the supervisory bodies in an advisory capacity. However, he may appeal against any decision which he deems to be against the law or incompatible with the statutes, such appeals having suspensive effect. A decision becomes definitive provided that the Minister does not pronounce it null and void within 20 days. The system is governed by public law. Under the annulled measure the King appointed all members of the general management board and all the members of the management committee, whose task was to assist the management board. As regards the proposed scheme, Belgium has explained that the negotiations and discussions on the rules governing the compensation fund are still ongoing.

#### *Selective advantage and (potential) distortion*

- (26) Aid in excess of EUR 100 000 granted to an individual company over a three-year period distorts or threatens to distort competition by favouring certain undertakings. According to the settled case-law of the Court of Justice, a partial reduction of social charges devolving upon undertakings of a

<sup>(12)</sup> See in particular the judgment handed down on 22 March 1977 in Case 78/76 *Steinike & Weinlig v Germany* [1977] ECR 595. In paragraphs 21 and 22, the Court establishes the following: 'The prohibition contained in Article 92(1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid. In applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid. A measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned.'

<sup>(13)</sup> See footnote 9.

particular industrial sector constitutes aid within the meaning of Article 87(1) of the Treaty if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system <sup>(14)</sup>. The compensation allowances constitute such an exemption in favour of Belgian diamond firms and, as regards the initial scheme, in favour of Lens Diamond Industries NV in particular. Neither employers in the diamond industry in other Member States nor employers in other branches of Belgian industry are eligible for a comparable reduction in their social charges. Under the Belgian social security system, employers make a flat-rate contribution to social security for their employees. The measure creates a selective exception, outside the general system, for employers in the diamond industry. The result is a distortion of competition in favour of those employers. This conclusion is unaffected by the argument that the specific scheme reinforces solidarity within the diamond industry. Belgium itself regards the scheme as a specific adjustment for the diamond industry and refers to the specific circumstances of this industry which lay behind its decision to adopt the schemes in question. This confirms that the measure is not justified by the nature and general scheme of the Belgian social security system. The Court established in *Maribel bis/ter* that a scheme which pursues an employment policy by means affording a direct advantage only in relation to the competitive situation of the undertakings concerned, which belong to certain sectors of economic activity, is not justified by the nature or measure of the social security scheme in force in Belgium <sup>(15)</sup>.

- (27) With regard to the comment by Belgium that there are other sector-specific social security systems, and in particular the one for seamen, the Commission would point out that it has clarified the concept of State aid in this connection in the Community guidelines on State aid to maritime transport and, in the light of the highly specific characteristics of this sector, the conditions under which such aid may be compatible with the common market <sup>(16)</sup>.
- (28) Annulment of the scheme by the Council of State means that the compensation funds general management board is no longer empowered to carry out management functions. The Minister for Labour has taken over provisional management of the available financial resources and has appointed for that purpose persons who are supervised by a panel of administrators. Annulment also entailed the disappearance of the basis for payments to and from the fund. As a result, the fund is involved in various sets of legal proceedings for the recovery of amounts paid unlawfully. However, the panel of administrators has decided in principle to recover amounts paid and to repay amounts only after a first ruling in principle has been delivered in connection with these proceedings. The Commission concludes that recovery will not take place immediately and is uncertain in so far as it depends on subsequent rulings. The advantage still exists. The information provided by Belgium suggests that the proposed scheme would create equivalent advantages which, in reality, would be far greater because it would be applicable for an unlimited period.

*Adverse impact on trade between Member States*

- (29) According to Court of Justice case-law, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid <sup>(17)</sup>. In the case in point, the allowances strengthen the position of diamond firms on the processed diamond market. These firms export the bulk of their production, a substantial part of which goes to other Member States. As Belgium has stated, minor concentrations of this activity are to be found in other Member States, in particular the Netherlands (Amsterdam) and Germany (Idar-Oberstein).

<sup>(14)</sup> Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraph 36. This paragraph refers to the judgments in Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 33, and in Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

<sup>(15)</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 39.

<sup>(16)</sup> Community guidelines on State aid to maritime transport (OJ C 205, 5.7.1997).

<sup>(17)</sup> Case 730/79 *Philip Morris v Commission* [1980] 2671, paragraph 11, and Case T-214/95 *Vlaams Gewest v Commission* [1998] II-717, paragraph 50.

- (30) The Commission cannot follow the argument that diamond firms in the Netherlands and Germany do not compete with Belgian firms. Competition does exist: local customers (local jewellers, the jewellery sector's wholesale trade, etc.) can be expected to compare the price/quality ratio of 'local' diamonds with that of diamonds exported from Belgium. It can even be assumed that tourists stimulate competition in so far as diamond centres are known throughout the world. A few Amsterdam-based firms, for example, sell a significant proportion of their production to Americans on the basis of their reputation. Customers have already taken account of competition from Antwerp when they decide on their trip.
- (31) What is more, Belgian diamond firms are generally active in the same market segment as their European competitors. Antwerp has already lost a substantial market share to firms based in low-wage countries. Belgian firms will be increasingly obliged to strengthen their position in the high-quality segment of the market. This is precisely the segment in which several Dutch firms (and probably German firms too) are active. The comment by the economic research bureau commissioned by Belgium to the effect that a distinction should be drawn between Belgian firms specialising in 'large-scale' activities and firms from other Member States which have 'smaller-scale' activities is irrelevant <sup>(18)</sup>. They are operating on the same product market <sup>(19)</sup>.
- (32) Although the initial consequence of the allowances is to reduce labour costs, it cannot be ruled out that they will also strengthen the position of recipients on input markets, particularly the rough diamond market. De Beers has a particularly strong position on that market. In the whole of Europe it allows just forty or so 'supervisors' based in Antwerp to sell rough diamonds. It is common practice for rough diamonds to be the subject of several successive transactions before being processed. The same firms from Belgium, the Netherlands, Germany, etc. therefore operate on this market.
- (33) The Commission endorses the conclusions of the research bureau's report (p. 2) to the effect that the trade figures must be interpreted with great care and cannot be regarded as providing decisive proof. The periods taken into consideration, the time that may be needed to establish the measure's effects and a whole series of other factors which may impact on the data provided are all open to discussion. The importance of the industry outside Belgium and within the common market should not be minimised either. For instance, it can be calculated from the data provided by Belgium that the number of diamond workers in the European Community and outside Belgium represents some 7 to 10 % of the total <sup>(20)</sup>.
- (34) Consequently, the annulled scheme and the proposed scheme reinforce the competitive position of Belgian diamond firms in relation to their competitors in other Member States. In so far as Belgium does not comply with the conditions of the *de minimis* Regulation, as in the case of Lens Diamond Industries NV at least, the Commission takes the view that the annulled scheme and the proposed scheme affect trade between Member States.
- (35) Given that all the factors determining aid are present, the Commission takes the view that the annulled scheme and the proposed scheme constitute State aid within the meaning of Article 87(1) in so far as Belgium does not comply with the conditions of the *de minimis* Regulation.
- (36) Accordingly, Belgium has infringed Article 88(3) of the Treaty by granting aid without prior notification and approval.

<sup>(18)</sup> Most Belgian firms are very small as well, and there are also 'medium-sized' firms in Amsterdam.

<sup>(19)</sup> The Belgian authorities have not demonstrated that the medical use of diamonds is totally distinct from other segments of the diamond industry nor shown that no Belgian company operates in that segment. Even if all these conditions were met, it would still be an exception, even in Germany: Idar-Oberstein is known mainly for its precious stones industry, not for surgical instruments.

<sup>(20)</sup> This figure does not take account of the different employment ratios or of the fact that a substantial part of diamond processing is done by the black economy.

*Comparison with the Künstlersozialversicherung*

- (37) The infringement file processed by the Court in Case C-68/99 is of limited scope, as indicated in recital 14, and does not affect the Commission's analysis of the schemes in the light of the State aid rules. In any event, the lack of such an analysis by the Commission does not affect its analysis of the compensation fund for the diamond industry.

**V.2. Compatibility of the aid with the common market**

- (38) The aid granted under the previous scheme, and to be provided under the proposed scheme, reduces the beneficiaries' current expenditure without a linkage to any eligible investment costs or job creation. Accordingly, the Commission regards it as operating aid.
- (39) The Commission is obliged to ascertain whether the aid is compatible with the EC Treaty. It has therefore examined whether the exemptions laid down in Article 87(2) and (3) of the Treaty apply. The exemptions in Article 87(2) do not apply since the measures in question (a) do not constitute aid having a social character granted to individual consumers, (b) are not designed to make good damage caused by natural disasters or exceptional occurrences and (c) are not required in order to compensate for the economic disadvantages caused by the division of Germany. Nor do the exemptions set out in Article 87(3)(a),(b) and (d) since the measures in question do not constitute aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, aid to promote the execution of an important project of common European interest or aid to promote culture and heritage conservation.
- (40) Indeed, the Belgian authorities made no attempt to justify the aid on the aforementioned grounds.
- (41) The second part of the exemption in Article 87(3)(c) of the Treaty, which refers to aid to facilitate the development of certain economic areas, does not apply either because the aid is not intended for initial investments or for job creation in a region where enterprises are eligible for aid of that type. Nor is the aid granted to enterprises located in outlying regions. The first part of this exemption, which refers to aid to facilitate the development of certain economic activities, is not applicable either: firstly, the aid is not intended for R & D, environmental objectives or investments by SMEs; secondly, while the aid is designed as sectoral employment aid, the conditions whereby the Commission can conclude that such aid is compatible with the common market have not been met. In the guidelines on aid to employment <sup>(21)</sup> and its notice on monitoring State aid and reduction of labour costs <sup>(22)</sup>, the Commission states that aid targeted on one or a few sensitive sectors experiencing overcapacity or in crisis is mostly such that, as a rule, it cannot be regarded as being compatible with the common market. Point 23 of the aforementioned notice states that a reduction in social charges cannot be genuinely effective unless it relates to sectors which are less exposed to international competition, in particular certain services. The diamond industry is in no way protected from international competition. Belgium argues that the payments in question redress market failures relating to 'externalities' linked to the diamond trade and resulting from the high level of social charges. However, in the Commission's view, these arguments do not provide a basis for concluding that the aid is compatible. The existence of market failures, which could be observed in a number of industries, did not convince the Commission, when drafting the guidelines and the notice on employment aid, that such measures could be regarded as compatible with the common market in view of the distortions of competition to which they give rise.

<sup>(21)</sup> OJ C 334, 12.12.1995, p. 4. The extension of the period of validity was published in OJ C 371, 23.12.2000, p. 12.

<sup>(22)</sup> OJ C 1, 3.1.1997, p. 10.



- (42) Since none of the exemptions laid down in Article 87 applies, the annulled scheme and the proposed scheme are, in so far as Belgium does not comply with the conditions of the *de minimis* Regulation, incompatible with the common market.
- (43) Recovery of incompatible and unlawful aid is an obligation imposed on the Commission by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(23)</sup>. This measure is necessary to restore the previous situation and to cancel any financial advantages enjoyed by the recipient since the aid was paid. This aid must be repaid without delay and in accordance with the procedures of Belgian law, provided that they allow the immediate and effective execution of the Decision. The aid to be recovered includes interest as from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. Interest is calculated on the basis of the commercial rate used to calculate the grant equivalent of regional aid.

#### VI. CONCLUSION

- (44) The allowances granted to Belgian diamond firms by the compensation fund set up under the annulled scheme, in particular the aid granted to Lens Diamond Industries NV, and the allowances to be paid by the compensation fund as provided for by Belgium constitute State aid within the meaning of Article 87(1) of the EC Treaty in so far as Belgium does not comply with the conditions of the *de minimis* Regulation.
- (45) The Commission finds that Belgium has unlawfully implemented the 1999 aid scheme in breach of Article 88(3) of the Treaty. The fact that the scheme has been annulled by the Council of State does not affect this conclusion.
- (46) The allowances for diamond firms paid under the annulled scheme and to be paid under the proposed scheme must, in so far as Belgium does not comply with the conditions of the *de minimis* Regulation, be regarded as operating aid. Since none of the exemptions provided for in Article 87(2) and (3) of the Treaty is applicable, the aid is incompatible with the common market.
- (47) The unlawful aid must be recovered from the beneficiaries,

HAS ADOPTED THIS DECISION:

#### Article 1

The aid scheme which Belgium has implemented for diamond firms, in so far as it does not comply with the conditions set out in the Commission Regulation on *de minimis* aid, and the aid scheme which Belgium intends to implement for diamond firms are incompatible with the common market.

#### Article 2

Belgium shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

#### Article 3

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

<sup>(23)</sup> OJ L 83, 27.3.1999, p. 1.

*Article 4*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 9 April 2002.

*For the Commission*  
Mario MONTI  
*Member of the Commission*

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