II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 December 2002

concerning State aid scheme C 46/2001 — Central corporate treasuries (Centrales de trésorerie) implemented by France

(notified under document number C(2002) 4827)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/883/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 called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

I. PROCEDURE

(1) In 1997 the Ecofin Council adopted a resolution on a code of conduct for business taxation [2] with a view to putting an end to harmful tax practices. In line with the undertaking it gave in connection with that code, the Commission published in 1998 a notice on the application of the State aid rules to measures relating to direct business taxation [3] (hereinafter 'the notice'), restating its determination to apply the rules strictly and in accordance with the principle of equality of treatment. The present procedure has to be viewed in this context.

(2) By letter dated 4 August 1999 (D/63323), the Commission requested information on the French scheme for central corporate treasuries. The information was provided by letter of the French Permanent Representation to the European Union dated 12 October 1999 (A/37816).

(3) By letter SG(2001) D/289747 of 11 July 2001, the Commission informed France that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of the tax scheme for central corporate treasuries. By letter dated 31 October 2001 (A/38577), France commented on this decision.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. It invited interested parties to submit their comments on the aid. The Commission received no comments from interested parties.

II. DESCRIPTION OF THE MEASURE

(5) The status of central corporate treasury, which was approved on 3 November 1998, confers special tax treatment laid down in the Instruction of 16 April 1999 issued by the Directorate-General for Taxation (hereinafter 'the Instruction'). The Instruction, which took effect on 1 January 1999, lays down the arrangements for applying Articles 39(1)(3) and 131c of the General Tax Code (hereinafter 'the CGI'), which concern the tax treatment of interest paid by a company to its members on sums of money they place at its disposal.

[1] OJ C 302, 27.10.2001, p. 7.
[2] OJ C 2, 6.1.1998, p. 1.
[3] OJ C 384, 10.12.1998, p. 3.

[4] See footnote 1.

(6) Article 39(1)(3) of the CGI imposes a limit on the deductibility of interest paid to members on sums of money they leave or place at the disposal of the company, irrespective of its legal structure, in addition to their share in the capital. The deductibility is limited to interest calculated at a benchmark rate equal to the annual average of the average effective rates applied by credit institutions in respect of variable-rate business loans with an initial duration of more than two years. According to the Instruction, the French tax authorities may authorise derogations from this limit for operations carried out within the context of central corporate treasuries.

(7) Article 131c of the CGI provides for exemption from withholding tax for current-account operations carried out by members established outside France provided that these are third-party or associated companies. The Instruction stipulates that current-account operations carried out by members between a parent company and its subsidiaries or sub-subsidiaries under a contractual agreement between companies belonging to the same group on the setting up of a central corporate treasury that has been notified to the tax authorities are also eligible for this measure.

(8) In order to benefit, a central corporate treasury must be established in France in the form of a subsidiary and must be responsible within the group for centralising the management of treasury operations between the companies belonging to that group. Its role consists in receiving actual cash flows from companies in the group that are linked to it by the contractual agreement and to meet the cash requirements of those companies.

(9) Only companies directly or indirectly controlled by the same company and that company itself may be party to the contractual agreement. In addition, only groups of companies present in at least three countries are eligible for the scheme.

III. **REASONS FOR INITIATING THE PROCEDURE**

(10) In assessing the information provided by the French authorities, the Commission took the view that the derogation from the limit on the deductibility of interest, which is reserved solely for central corporate treasuries, seemed to be a selective advantage not justified by the nature and general scheme of the system.

(11) The Commission also took the view that the extension of the exemption from withholding tax for interest paid outside France by central corporate treasuries could not be regarded as a specific advantage since the exemption already applied to interest paid outside France by any company to third or associated companies.

IV. **COMMENTS FROM FRANCE**

(12) The French authorities note that, when opening the procedure, the Commission did not classify as State aid the exemption from withholding tax for interest paid outside France by central corporate treasuries. France thus regards as inconsistent the Commission's view of the derogation from the limit on the deductibility of interest for central corporate treasuries as an advantage since the purpose and scope of the two measures are identical.

(13) France considers that the derogation from the limit on the deductibility of interest for central corporate treasuries is not such as to give rise to an advantage, having been applied on very few occasions following its entry into force in January 1999 since the ceiling rate, defined as the average rate on variable-rate business loans granted to businesses by credit institutions, has been close to the market rate in most cases.

(14) France also points out that the Statistical Investigation Department of the Directorate-General for Taxation has tracked down only eight contractual agreements that have been lodged by companies meeting the conditions for applying these two measures. This would indicate that the scheme does not confer any practical advantages.

(15) According to the French authorities, the derogation from the limit on the deductibility of interest for central corporate treasuries of groups established in at least three countries is not a selective measure since it does not confer on them any comparative advantage relative to non-eligible groups. Taking the tax base at group level, the scheme simply shifts the point of taxation from the central corporate treasury to the member: interest deductible from the results of the central corporate treasury is taxed symmetrically in the hands of the member as financial revenue whereas, if the deductibility of interest is limited, the interest that is non-deductible and thus taxed in the hands of the subsidiary is deducted from the results of the parent company after being reclassified as distributed profit, which is exempt under the exemption scheme for holdings between parent companies and subsidiaries.

(16) According to the French authorities, the derogation from the limit on the deductibility of interest for central corporate treasuries is justified by the nature and general scheme of the system for deducting interest in respect of current-account operations carried out by members. The reason for limiting the deductibility of interest paid by a company to its members is to introduce a legal presumption that interest cannot normally be deducted over and above a certain level fixed in relation to the market rate, thereby avoiding any disputes as to the standard rate to be applied. Such a presumption is irrelevant where the relationship between members and the company is laid down in an agreement on the centralised management of treasury operations, since the commercial relationship between lender and borrower takes precedence over the member relationship between parent company and subsidiary. Interest is, therefore, deductible only if it is in line with the market rate between independent third parties. This same reasoning justifies the administrative approach followed in France since 1984 whereby no limit is imposed on interest paid by a subsidiary to a parent company classified as a credit institution.

V. ASSESSMENT OF THE MEASURE

Introduction

(17) After considering the observations made by France, the Commission holds to the position spelt out in its letter dated 11 July 2001 [5] initiating the procedure provided for in Article 88(2) of the Treaty. It takes the view that those observations have not removed the misgivings expressed by it and considers therefore that the tax scheme under investigation constitutes operating aid that is unlawful and incompatible with the common market pursuant to Article 87(1) of the EC Treaty. However, in its view, France and the beneficiary companies had good reason in the case in point to entertain a legitimate expectation that the aid would not be recovered.

(18) In particular, the Commission cannot accept the French authorities' observation that the exemption from withholding tax on interest paid outside France can be likened to the derogation from the limit on the deductibility of interest for current-account operations carried out by members. In the Commission's opinion, these two measures differ in scope and must be dealt with separately.

Exemption from withholding tax

(19) As regards the exemption from withholding tax for interest paid outside France, Article 131c of the CGI already provided for a generalised exemption from withholding tax [6]. The Instruction simply stated that interest paid outside France by central corporate treasuries, which are subject to the conditions spelt out in points 3 to 9 of the Instruction, qualifies for the existing exemption.

(20) In accordance with point 13 of the notice, tax measures of a purely technical nature, such as the exemption from withholding tax, are general measures and fall outside the scope of Article 87(1) of the EC Treaty provided that their benefits are accessible to all firms operating within the territory concerned.

(21) The Commission may, therefore, conclude that the general scope of the exemption from withholding tax for interest paid outside France, which was confirmed by the Instruction as regards application of this exemption to central corporate treasuries, does not allow this measure to be regarded as State aid within the meaning of Article 87(1).

Scheme for deducting interest paid to members

(22) As regards the derogation from the limit on the tax deductibility of interest paid on sums of money made available to a company by its members, the Commission regards this tax measure as constituting aid within the meaning of Article 87(1) of the EC Treaty since it satisfies all of the four criteria set out below.

Advantage

(23) First, the measure confers an advantage which relieves recipients of charges normally borne from their budgets. The derogation from the limit on the deductibility of interest for members' current-account operations carried out by central corporate treasuries enables them to reduce the tax base. As mentioned in point 9 of the notice, an advantage may be provided through a reduction in the tax burden, and notably a reduction in a company's tax base, following an additional deduction granted as a derogation from the standard deduction ceiling. Central corporate treasuries and the groups to which they belong receive an advantage whenever the treasuries can deduct from their tax base all of the interest paid to those members, whereas other companies in France would, in the same situation, have to comply with a ceiling.

[5] See footnote 1.

[6] Article 131c of the CGI states that 'the yield on borrowings contracted outside France by French legal persons with the authorisation of the Minister of the Economy, Finance and Privatisation (this authorisation is deemed to be generally granted by administrative instruction of the Directorate-General for Taxation in France) is exempt from the withholding tax provided for in paragraph III of Article 125A', while Article 125 A III, which concerns the withholding tax on the yield from fixed-income investments, stipulates that 'the withholding tax shall apply to the aforementioned revenue received by persons not having their tax domicile in France; the same provision shall apply to income paid outside France or received by legal persons not having their registered office in France'.

(24) As regards the observation by France, referred to in recital 13, that the measure would be applied on only a very few occasions since the rate applied is, in most cases, close to the market rate, the Commission notes that the existence of a few cases in which an advantage is conferred or even the mere possibility that the scheme confers advantages is sufficient for the scheme to be classified as an aid scheme, provided that the other conditions of Article 87(1) of the EC Treaty are met.

(25) The Commission notes France's argument, referred to in recital 15, that the derogation from the limit on interest deductibility would simply shift the point of taxation from the central corporate treasury to the member and would not confer any comparative advantage at the level of the group concerned relative to non-eligible groups. However, the comparison made by the French authorities of the level of effective taxation of a group, depending on whether the sums paid by a central corporate treasury to its parent company are in the form of deductible interest or distributed profits (dividends), does not allow the existence of an advantage to be ruled out in all cases since it is based on different situations that vary according to external parameters. For instance, the amount of dividends distributed depends on the subsidiary generating distributable profits and on its management choices, and their tax treatment depends on the amount of capital held by the parent company and on the tax rules — notably at international level — that could be applicable. In this respect, the situation described by France arises only very infrequently and presupposes among other things that the parent company and the subsidiary are subject to the same level of effective taxation. This line of reasoning is also based on the assumption that the subsidiary's profits are distributed in full to the parent company. Lastly, France's line of reasoning presupposes that the parent company qualifies for an arrangement exempting holdings between parent company and subsidiary, something which is not always the case.

(26) What is more, the Commission points out that the assessment as to whether a particular measure constitutes an advantage must relate to the national arrangements applicable in the Member State concerned and not to a system ensuring hypothetical equality of treatment between countries, as implicitly invoked by France.

(27) Accordingly, the Commission concludes that the derogation from the limit on the deductibility of interest paid to members could confer an advantage on central corporate treasuries and on the groups to which they belong.

State resources

(28) Second, the advantage is granted through State resources. In the case at issue, the reduction in the tax base of central corporate treasuries established in France results in a loss of tax revenue constituting State resources.

Effect on competition and trade between Member States

(29) Third, the measure in question affects competition and trade between Member States. This criterion is met since the central corporate treasuries must operate in a multinational framework that encompasses, *inter alia*, intra-Community trade. In view of the advantage conferred on central corporate treasuries, the position of all the companies and all the groups to which they belong is strengthened relative to that of other companies or competing groups in different sectors, at least some of which are characterised by the existence of Community trade.

(30) As underscored in point 11 of the notice, the relatively small amount of aid [7] mentioned by France does not alter this conclusion.

Selectivity

(31) Lastly, the Commission considers that the provisions of the Instruction are selective in that they favour certain undertakings since, in the case in point, they concern only central corporate treasuries of groups established in at least three countries. Consequently, they do not apply in particular to companies belonging to groups established only in France or only in two countries.

Justification by the nature or general scheme of the system

(32) France argues that the arrangements whereby no limit is placed on the deductibility of interest for central corporate treasuries are justified by the reasoning behind the limit itself. On account of the special relationship between a member and its company, the limit would introduce a legal presumption that interest cannot normally be deducted over and above a certain level fixed in relation to the market rate, thereby avoiding disputes as to the standard rate to be applied. Such a presumption would be irrelevant in the case of an agreement on the centralised management of treasury operations since the commercial relationship between lender and borrower would take precedence over the member relationship between the parent company and the subsidiary. For this reason, interest could be deducted only if it conformed to the market rate between independent third parties.

[7] See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42.

(33) The Commission is not amenable to this argument since France does not give the reasons why the commercial relationship would take precedence over the parent company/subsidiary relationship only in the case of central corporate treasuries, as compared with the functions involved in the centralised management of treasury operations and performed by subsidiaries not covered by an agreement within the meaning of the Instruction. Nor does France explain why the centralised management activities carried out by a French company for a group established only in France or in two countries would differ from those carried out by central corporate treasuries eligible for the scheme. Consequently, the Commission takes the view that the irrelevance of the general rule imposing a limit on interest deductibility in the case of central corporate treasuries eligible for the scheme is not borne out by characteristics peculiar to central corporate treasuries alone, as opposed to the other companies carrying out the same type of activity. The fact that interest paid by a subsidiary to its parent company which is classified as a credit institution qualifies for a similar exemption is unlikely to affect this assessment since this derogation does not in itself provide justification for the specific nature of the scheme, which applies only to certain central corporate treasuries. The derogation from the general rule imposing a limit on interest deductibility that is applicable only to central corporate treasuries of groups established in at least three countries cannot, therefore, be justified by the nature or general scheme of the system.

(34) The Commission concludes therefore that the scheme is a State aid scheme within the meaning of Article 87(1) of the EC Treaty.

Compatibility

(35) As emphasised in the decision initiating the formal investigation procedure, the scheme in question does not seem prima facie to qualify for any of the derogations in Article 87(2) and (3) of the EC Treaty and the French authorities have not challenged the Commission's assessment in the matter, which can be summed up as follows.

(36) The derogations in Article 87(2) for aid having a social character that is granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted in certain areas of the Federal Republic of Germany are not applicable in the case in point.

(37) The derogation in Article 87(3)(a) for aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment could not be invoked since the scheme being investigated has unlimited territorial scope.

(38) Similarly, the scheme for central corporate treasuries does not fall within the category of projects of common European interest, which is eligible for the derogation in Article 87(3)(b), and does not qualify, in so far as it is not aimed at promoting culture and heritage conservation, for the derogation in Article 87(3)(d).

(39) The tax advantages granted under the scheme for central corporate treasuries are unlikely to qualify for the derogation in Article 87(3)(c), which authorises aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Such aid is operating aid which relieves the beneficiary companies or groups to which they belong of charges that should normally be borne by them.

(40) Accordingly, the aid scheme is incompatible with the common market.

Recovery

(41) The measures in question cannot be regarded as existing aid within the meaning of Article 88(1) of the EC Treaty and Article 1(b) 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 [8]. They were in fact implemented after the entry into force of the Treaty, were never notified to the Commission in accordance with Article 88(3), are not covered by the period of limitation and constituted aid as soon as they were implemented. They thus constitute new aid. Where State aid granted unlawfully proves to be incompatible with the common market, it naturally follows from such a finding that the aid should be recovered from the beneficiaries in accordance with Article 14 of Regulation (EC) No 659/1999. Recovery of the aid is designed to restore as far as possible the conditions of competitiveness that existed before the aid was granted. Neither the absence of any precedent for applying State aid rules in similar cases nor the alleged lack of clarity in the Community policy on State aid would justify a derogation from this basic principle.

[8] OJ L 83, 27.3.1999, p. 1.

(42) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 stipulates that 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice of the European Communities and Commission practice have established that an order to recover aid would infringe a general principle of Community law where, following action by the Commission, the beneficiary of a measure has a legitimate expectation that the aid was granted in accordance with Community legislation.

(43) In *Van den Bergh en Jurgens* [9], the Court stated as follows:

'The Court has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

France has not presented the Commission with any argument based on the existence of legitimate expectation on the part of the beneficiaries under the scheme. However, it transpires from the Court's case-law [10] that the Commission is required to take into consideration on its own initiative the exceptional circumstances that provide justification, pursuant to Article 14(1) of Regulation (EC) No 659/1999, for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law, such as respect for the legitimate expectation of beneficiaries.

(44) In the present case, the Commission notes that the French scheme for central corporate treasuries has certain similarities with the system introduced in Belgium by Royal Decree No 187 of 30 December 1982 concerning the taxation of coordination centres. The two schemes concern intra-group activities and lay down specific rules for determining the tax base. In its decision of 2 May 1984, the Commission took the view that the scheme did not give rise to aid within the meaning of Article 92(1) of the EC Treaty. Even though the decision has not been published, the fact that the Commission did not raise any objection to the Belgian scheme for coordination centres was made public at the time in the 14th Report on Competition Policy and in an answer to a Parliamentary question [11].

(45) Under the circumstances, the Commission notes that its decision on the Belgian scheme for coordination centres was adopted before the French scheme was adopted. Furthermore, the French scheme was adopted before publication of the notice. Accordingly, the Commission concludes that the beneficiaries under the scheme and the French administration had a legitimate expectation that the aid would not be recovered and is not requiring recovery.

VI. CONCLUSIONS

(46) The Commission finds that the French scheme for central corporate treasuries constitutes State aid within the meaning of Article 87(1) of the EC Treaty and that France has unlawfully implemented the aid in breach of Article 88(3).

(47) Nevertheless, the position that the Commission has taken in the past with regard to certain tax measures for multinationals created on the part of the French authorities and of the beneficiaries under the scheme the legitimate expectation that the scheme for central corporate treasuries was compatible with the State aid rules. The Commission finds that recovery of the aid would run counter to the general principle of respect for legitimate expectation and, accordingly, has decided not to require recovery of the aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented by France in the form of the derogation from the limit on interest deductibility for central corporate treasuries, that derogation being governed by the Instruction of 16 April 1999, which was issued by the Directorate-General for Taxation in connection with the scheme for central corporate treasuries and took effect on 1 January 1999, is incompatible with the common market.

Article 2

France is required to remove the selective aid elements referred to in Article 1 of the scheme governed by the Instruction of 16 April 1999.

Article 3

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

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(9) Case 265/85 [1987] ECR 1155, paragraph 44.
(10) Case 223/85 *RSV* v *Commission* [1987] ECR 4617.
(11) See the decision on the Belgian scheme for coordination centres (SG(84) D/6421, 16.5.1984) and the answer to Written Question No 1735/90 (OJ C 63, 11.3.1991, p. 37).

Article 4

This decision is addressed to the French Republic.

Done at Brussels, 11 December 2002.

For the Commission

Mario MONTI

Member of the Commission