

COMMISSION

COMMISSION DECISION

of 8 September 2004

concerning the aid scheme which Belgium is proposing to implement for coordination centres

(notified under document number C(2004) 3348)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2005/378/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 ⁽¹⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 1 December 1997 the Council adopted a code of conduct for business taxation ⁽²⁾ and requested the Commission to examine or re-examine the tax systems in force in the Member States. On 11 November 1998 the Commission adopted a notice on the application of the State aid rules to measures relating to direct business taxation ⁽³⁾.
- (2) Belgian Royal Decree No 187 of 30 December 1982 provides for a tax scheme derogating from ordinary law for approved coordination centres (coordination centres or centres). The group set up by the Council in accordance with point H of the code of conduct for business taxation (Council group on the code of

conduct) considered that the scheme constituted a harmful tax competition measure. Similarly, the Commission opened a formal investigation procedure into the scheme on 27 February 2002. The procedure was closed on 17 February 2003 by Commission Decision 2003/755/EC, a final negative decision ⁽⁴⁾.

- (3) Pursuant to Article 88(3) of the Treaty, Belgium notified by letter dated 16 May 2002, the part of a preliminary draft law amending Royal Decree No 187 so as to comply with the criteria laid down by the Council group on the code of conduct. This is therefore a new scheme for coordination centres, which is intended to replace that in force since 1983. The Law amending the system for companies with regard to income taxes and instituting a system of advance decisions on tax matters ⁽⁵⁾ was promulgated on 24 December 2002. According to Article 32 of the Law, the date for the entry into force of Article 29, which contains the amendments to Royal Decree No 187, will be fixed by royal decree at a later stage.

- (4) On 23 April 2003, after several exchanges of correspondence and meetings aimed at obtaining further information ⁽⁶⁾, the Commission ruled on the notified scheme. The Decision authorised certain aspects of the scheme and initiated the procedure laid down in Article 88(2) of the Treaty with regard to three other aspects of the scheme. The authorisation related to: 1. the principle of prior approval for the centres for a 10-year period; 2. the principle that advance decisions valid for five years should be granted to the centres; and 3. the principle that the 'cost plus' flat-rate method should be used for calculating the tax base, provided that the use of this method guarantees comparable taxation to that obtained, for an independent company, by applying the rules of ordinary law ⁽⁷⁾. The procedure was initiated with regard to: 1. the

⁽¹⁾ OJ C 209, 4.9.2003, p. 2.

⁽²⁾ OJ C 2, 6.1.1998, p. 1.

⁽³⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁴⁾ OJ L 282, 30.10.2003, p. 25.

⁽⁵⁾ Moniteur Belge, 31.12.2002 (Ed 2), p. 58 817.

⁽⁶⁾ For details, see the initiating Decision (footnote 1 of this Decision).

⁽⁷⁾ For the detailed considerations underlying this approval, see the initiating Decision (footnote 1 of this Decision).

specific exemption from withholding tax; 2. the specific exemption from capital duty, and 3. the non-taxation of the abnormal and gratuitous advantages accorded to the centres.

- (5) The Commission Decision to initiate the procedure (the initiating Decision) was published in the *Official Journal of the European Union* ⁽⁸⁾. The Commission invited interested parties to submit their comments on the measure in question.
- (6) By letter dated 15 July 2003, forwarded by the Permanent Representation of Belgium to the European Union on 27 July, the Belgian authorities communicated their comments within the time limit, which had been extended in response to their request.
- (7) By letter dated 17 October 2003, the Commission transmitted to Belgium the comments received from third parties. Belgium gave its comments on these by letter dated 14 November 2003.
- (8) By letter dated 24 November 2003, the Commission transmitted to the Belgian authorities its preliminary comments. After four technical meetings ⁽⁹⁾ between Commission officials and representatives of the Belgian tax administration, new proposals were formulated by the Belgian authorities. An additional meeting was held on 6 May 2004 between the Belgian Prime Minister, the Minister for Finance and the Commissioner responsible for competition.
- (9) By letter dated 7 June 2004, Belgium confirmed the terms of the commitments made on 6 May.

II. DETAILED DESCRIPTION OF THE SCHEME

1. Introduction

- (10) As is clear from the procedural summary in section I, the scheme which is the subject of the procedure was notified to the Commission on 16 May 2002. On 23 April 2003, the Commission approved the scheme in part and initiated the procedure with regard to three

exceptional measures (withholding tax, capital duty, exceptional and gratuitous advantages).

- (11) Following the discussions between the Commission and Belgium, the latter undertook to abolish the withholding tax and capital duty exemptions specific to coordination centres as provided for by the Law of 24 December 2002. Belgium considers, moreover, that the alternative measures it is proposing to take with regard to withholding tax and capital duty are general measures, whose scope is consequently wider than just coordination centres, and do not need therefore to be notified to the Commission under Article 88(3) of the Treaty. As regards the exceptional and gratuitous advantages accorded to centres, Belgium undertakes to amend the Law of 24 December 2002 so that such advantages receive the same tax treatment as the similar advantages received by other firms established in Belgium.
- (12) For the purposes of this Decision, the Commission will confine itself to summarising the initial measures contained in the Law of 24 December 2002 and would refer the reader to the initiating Decision for a more detailed description. As to the alternative measures proposed by Belgium, only those are described which adapt the coordination centres scheme as regards the consideration given to exceptional and gratuitous advantages. Since the proposed measures concerning withholding tax and capital duty are more general in scope, they do not constitute an amendment of the scheme. As they have not been notified, these measures are neither described in detail nor evaluated in this Decision.

2. The coordination centres scheme following the Law of 24 December 2002

- (13) The legal basis for the notified scheme is Royal Decree No 187 of 30 December 1982, as last amended by Article 29 of the Law of 24 December 2002 ⁽¹⁰⁾. Only centres individually approved in advance by royal decree are eligible for the scheme. To be approved, a centre must be part of a multinational group that meets certain size criteria. It may conduct certain activities only and must carry them on for the benefit only of group members. Approval, or renewal, is granted to a centre on request and for a period of 10 years. Approval is automatically repealed once the centre no longer satisfies the conditions.

⁽⁸⁾ See footnote 1.

⁽⁹⁾ On 14 January and 2, 6 and 23 February 2004.

⁽¹⁰⁾ Reminder: this Article's entry into force will be determined later by royal decree.

- (14) By derogation from the ordinary tax system⁽¹¹⁾, Royal Decree No 187 as amended provides that the taxable income of approved centres shall be determined at a flat rate and shall correspond to a percentage of the operating expenditure, in accordance with the 'cost plus' method. The exceptional or gratuitous advantages⁽¹²⁾ conferred on the centre by the members of the group are not added to the tax base obtained by the cost plus method. An alternative base including the exceptional and gratuitous advantages is calculated nevertheless, in order to limit exceptional transfers of income to the Belgian coordination centre. Centres' profits are taxed at the full rate of corporation tax. The cost plus method is applied in practice to each centre individually, in accordance with the arrangements laid down by an individual advance decision taken by the Federal Public Service Finance. By 'advance decision' is meant the legal act by which the Federal Public Service Finance determines, in accordance with current provisions, how the law will be applied to a situation or particular operation, described by the taxpayer, which has not yet produced any fiscal effects. It is valid for five years and published anonymously. It binds the tax administration for the future, and cannot entail a tax exemption or reduction. The rules on advance decisions are set out in Articles 20 to 28 of the Law of 24 December 2002.
- (15) Apart from the flat-rate calculation described above, the following exemptions were also provided for in the notified provisions: 1. withholding tax is not due on dividends, income from claims or loans or the yield from the sale of intangible movable assets owed by the centre; 2. contributions to and increases of the centre's capital are exempt from proportional registration tax (capital duty).

III. REASONS LEADING PARTLY TO APPROVAL AND PARTLY TO INITIATION OF THE FORMAL PROCEEDING

1. Approval

- (16) In the initiating Decision the Commission approved the principles in accordance with which advance decisions on the cost plus arrangements will have to be taken. It considered that the framework rules provided for by the Law of 24 December 2002 were not in themselves likely to give rise to State aid.

2. Initiation of the procedure

- (17) The Commission initiated the procedure with regard to three other aspects of the coordination centres scheme. Firstly, it considered that a special advantage seemed to

be conferred on coordination centres and the groups they belong to by exemptions from withholding tax which go beyond the exemptions available to any undertaking under the ordinary tax rules. Secondly, it considered that the exemption, specific to coordination centres, from the proportional tax on contributions seemed to give them an economic advantage compared with undertakings which, in the same circumstances, are subject to it. Thirdly, it considered that the failure to take into account the exceptional and gratuitous advantages accorded to centres in the calculation of their tax base, in addition to the result of applying the cost plus method, seemed to confer a special advantage on them compared with companies whose tax base is calculated in accordance with the traditional analytical method (revenue less expenses).

- (18) The Commission considered, lastly, that these specific advantages did not appear to be justified by the nature or economy of the Belgian tax system and that they distorted competition and affected intra-Community trade. Consequently, the said measures appeared to constitute aid within the meaning of Article 87(1) of the Treaty. In addition, since the exceptions referred to in Article 87(2) and (3) did not apply, the Commission concluded that such aid seemed at this stage to be incompatible with the common market.

IV. COMMENTS AND ALTERNATIVE PROPOSALS FROM THE BELGIAN AUTHORITIES

- (19) Following the initiating Decision, Belgium explained how it interpreted the Commission's approval concerning the cost plus method and undertook to adapt the rules on withholding tax, capital duty and the exceptional and gratuitous advantages received.

1. Withholding tax

- (20) Belgium undertakes to abolish the specific application to coordination centres of the exemption from withholding tax provided for by the Law of 24 December 2002. It announced that it intended to replace the specific exemption by a measure of general scope making it possible to maintain the exemption granted to centres while extending it to other companies established in Belgium.

2. Capital duty

- (21) Belgium undertakes to abolish the specific application to coordination centres of the exemption from capital duty provided for by the Law of 24 December 2002. It announced that it intended to replace the specific exemption by a general measure reducing the rate at which capital duty will be levied.

⁽¹¹⁾ This expression covers all the rules generally applicable for calculating tax on companies, whether resident or not, established in Belgium.

⁽¹²⁾ The concept of exceptional or gratuitous advantage, used in Article 26 of the Code des Impôts sur les Revenus 1992 (Income Tax Code), is explained in No 26/16, Commentaire du Code des Impôts sur les Revenus (Com.IR 1992).

3. Exceptional and gratuitous advantages

- (22) Belgium undertakes to adapt the coordination centres scheme, so that the exceptional and gratuitous advantages accorded to centres are subject to the same tax rules as the similar advantages received by other undertakings established in Belgium. Under current law, all the exceptional and gratuitous advantages received will be added to the taxable income obtained by the cost plus method. The alternative tax base, based in particular on these exceptional and gratuitous advantages (see paragraph 15 of the initiating Decision), will be abandoned.

V. COMMENTS FROM INTERESTED THIRD PARTIES

- (23) Three associations or federations submitted comments on behalf of the undertakings they represent: these were the Fédération des entreprises de Belgique (FEB), the American Chamber of Commerce (AmCham) and the Federation of Coordination, Distribution, Service and Call Centres (Forum 187).
- (24) Apart from these three associations, 53 centres or groups owning a coordination centre each submitted comments to the Commission. Basically, these describe their own situation and refer for the rest to the comments made by Forum 187.
- (25) The third parties consider that the measures concerned, which are part of the new scheme for coordination centres, do not meet any of the four criteria for describing a measure as aid and generally refer to the comments already made in proceeding C 15/2002, which was closed by Decision 2003/755/EC. In short, they consider that the scheme does not confer a selective advantage likely to harm competition, since all multinational groups and hence all their competitors can establish a Belgian coordination centre, or an equivalent structure in another country, and thus benefit from comparable provisions.
- (26) Since Belgium has decided to abolish the exemptions from withholding tax and capital duty in the Law of 24 December 2002, which are the subject of this proceeding, the Commission thinks it is unnecessary to give further details of the arguments supplied by third parties on these points.
- (27) As regards the treatment of exceptional and gratuitous advantages, the interested third parties consider it is appropriate not to take account of these advantages in the cost plus method, since, they are not costs; they are a marginal component of the coordination centres scheme; they are a theoretical advantage which, potentially, does not benefit any centre, and any advantages will be corrected by the international conventions preventing double taxation concluded between Belgium and its principal trading partners.

VI. ASSESSMENT OF THE MEASURES

1. Comment concerning the Belgian authorities' interpretation of the Commission decision authorising use of the cost plus method

- (28) Belgium wanted to give its interpretation of that part of the initiating Decision which authorises use of the cost plus method. The Commission will reply to the Belgian authorities concerning their interpretation in a letter to be sent to them shortly.
- (29) This Decision is concerned only with the measures about which the Commission expressed doubts in the initiating Decision; it does not, therefore, concern the cost plus method. The Commission would consequently refer to the initiating Decision on this point, emphasising that the authorisation given assumes compliance with the principles and arrangements described therein.

2. Aid character

- (30) A measure constitutes an aid when it cumulatively satisfies the four criteria set out in Article 87(1) of the Treaty, namely: 1. the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets; 2. the advantage must be conferred from state resources; 3. it must affect competition and trade between Member States, and 4. it must be granted selectively or specifically, i.e. by favouring certain undertakings or the production of certain goods.
- (31) At the end of the formal investigation procedure, and taking account of the arguments already developed in the initiating Decision, the Commission considered that the doubts expressed at the initiation stage about the notified measures from the Law of 24 December 2002 had not been removed and that the measures constituted aid within the meaning of Article 87(1) of the Treaty. They were advantages (tax exemptions) granted selectively to certain undertakings only (approved coordination centres or groups owning such a centre) through state resources (waiver of tax resources) and affecting competition and intra-Community trade (since certain centres or certain groups to which they belong, whose business is by definition international, operate or may operate in sectors which are the subject of trade between Member States).
- (32) In the meantime, Belgium has undertaken to abolish the provisions specific to coordination centres and to replace them with alternative measures which do more than just amend the notified scheme. The Commission considers that it is not necessary to justify in detail its assessment of the measures originally notified. Only the proposed changes to the scheme are assessed in this Decision.

Withholding tax and capital duty

- (33) The exemptions from withholding tax and capital duty will be removed from the Law of 24 December 2002 (see recitals (20) and (21) of this Decision) and replaced by exemption or reduction measures which the Belgian authorities regard as general. Thus no specific economic advantage is granted any longer to approved coordination centres and there is no longer any aid for such centres within the meaning of Article 87(1) of the Treaty.

Exceptional and gratuitous advantages

- (34) The amendment to the Law of 24 December 2002, see recital (22) of this Decision, will have the effect of taxing all the exceptional and gratuitous advantages received by a coordination centre in the same way as they are taxed when they are received by an undertaking liable to tax under the ordinary system. Under current ordinary tax law, this means that all the exceptional and gratuitous advantages will have to be added to the amount obtained by the cost plus method. Under these conditions the Commission considers that no specific economic advantage is granted any longer to approved coordination centres as regards the tax treatment of the exceptional and gratuitous advantages received. Consequently there is no longer any aid within the meaning of Article 87(1) of the Treaty.
- (35) Belgium has announced that it could, in addition, adopt new provisions exempting, in certain cases, income deriving from exceptional and gratuitous advantages. The Commission draws Belgium's attention to the need to determine the conditions of this exemption in such a way that it does not specifically favour certain undertakings or the production of certain goods, and, as appropriate, to the obligation to notify such measures if they are likely to constitute aid.

VII. CONCLUSIONS

- (36) Belgium has undertaken to abolish the exemptions from withholding tax and capital duty provided by Article 29 of the Law of 24 December 2002 for coordination centres approved under Royal Decree No 187 and to replace them by general exemption or reduction measures which do not favour centres over other undertakings established in Belgium.
- (37) Belgium has also undertaken to adapt its legal and/or administrative rules so as to tax all exceptional and

gratuitous advantages received by a coordination centre in the same way as they are taxed when they are received by an undertaking liable to tax under the ordinary system.

- (38) These changes will have the effect of abolishing the grant of advantages specific to coordination centres as compared with other undertakings and hence the grant of aid to such centres within the meaning of Article 87 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measures provided for by Article 29 of the Law of 24 December 2002 amending the system for companies with regard to income taxes and instituting a system of advance decisions on tax matters do not constitute aid under Article 87(1) of the Treaty, subject to Belgium keeping the following commitments:

- (a) abolition of the exemptions from withholding tax and capital duty for approved coordination centres;
- (b) amendment of the scheme for approved coordination centres, so that all the exceptional and gratuitous advantages received by a coordination centre are taxed in the same way as when they are received by another undertaking established in Belgium and subject to the ordinary tax system.

Article 2

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

Article 3

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 8 September 2004.

For the Commission

Mario MONTI

Member of the Commission