

## II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

## DECISIONS

## COMMISSION

## COMMISSION DECISION

of 13 November 2007

**amending Decision 2003/757/EC on the aid scheme implemented by Belgium for coordination centres established in Belgium**

(notified under document number C(2007) 5416)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2008/283/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 <sup>(2)</sup>**

- (1) The legal basis for the scheme for coordination centres is Royal Decree No 187 of 30 December 1982. By Decisions of 2 May 1984 and 9 March 1987, the Commission had authorised the scheme since, in its view, it did not give rise to any objections as regards the applicable State aid rules of the Treaty.
- (2) As it had undertaken to do so under the code of conduct for business taxation (hereinafter the code of conduct), adopted by resolution of the Council and of the rep-

resentatives of the Member States' Governments meeting within the Council of 1 December 1997 <sup>(3)</sup>, the Commission re-examined the scheme in the light of the applicable state aid rules of the Treaty and its notice on the application of the State aid rules to measures relating to direct business taxation <sup>(4)</sup>.

- (3) On 11 July 2001 the Commission proposed appropriate measures designed to remove the effects of the scheme for all the undertakings concerned by 31 December 2005 at the latest. Belgium did not accept these appropriate measures since, in its view, it was required by law to comply until their expiry with the ten-year authorisations, some of which ceased to apply after 31 December 2005.
- (4) On 27 February 2002, in the absence of any acceptance of the appropriate measures, the Commission initiated the formal investigation procedure <sup>(5)</sup> provided for in Article 88(2) of the Treaty in accordance with Article 19(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty <sup>(6)</sup>. On that occasion, the Commission called on interested third parties to submit their comments, notably on the circumstances making it possible to establish the existence of a legitimate expectations on the part of the interested parties.

<sup>(1)</sup> OJ C 110, 16.5.2007, p. 20.

<sup>(2)</sup> For details of the procedural steps that preceded the present Decision, see the Commission Decision of 27 February 2002 initiating the procedure and Decision 2003/757/EC.

<sup>(3)</sup> OJ C 2, 6.1.1998, p. 2.

<sup>(4)</sup> OJ C 384, 10.12.1998, p. 3.

<sup>(5)</sup> OJ C 147, 20.6.2002, p. 2.

<sup>(6)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

- (5) The Commission terminated the formal investigation procedure by a negative final decision, Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium<sup>(7)</sup>, which was notified to Belgium on 18 February 2003. Since existing aid was involved, the Commission did not seek recovery of aid already granted. However, as a transitional measure, Decision 2003/757/EC allowed the coordination centres to enjoy the benefits of the scheme until expiry of their current authorisation and until 31 December 2010 at the latest. Belgium and the association Forum 187, which represents the coordination centres, appealed to the Court of Justice of the European Communities with a view to having all or part of that Decision suspended or annulled (Cases C-182/03 and T-140/03, which became C-217/03).
- (6) By order of 26 June 2003<sup>(8)</sup>, the President of the Court suspended the operation of Decision 2003/757/EC 'inasmuch as it prohibits the Kingdom of Belgium from renewing coordination centre authorisations effective at the date of notification of the decision.' He went on to state that 'the effects of renewals made pursuant to this order shall not extend beyond the day on which judgment is given in the main action.'
- (7) At Belgium's request, Council Decision 2003/531/EC of 16 July 2003 on the granting of aid by the Belgian Government to certain coordination centres established in Belgium<sup>(9)</sup> stated, in accordance with the third subparagraph of Article 88(2) of the Treaty that 'the aid which Belgium plans to grant in the period up to 31 December 2005 to undertakings authorised as at 31 December 2000 to act as coordination centres under Royal Decree No 187 of 30 December 1982, and whose authorisations expire between 17 February 2003 and 31 December 2005, shall be considered compatible with the common market'. The effect of the aid in question was to maintain the effects of the coordination centre scheme for the above mentioned undertakings. The Commission brought an action against Decision 2003/531/EC before the Court (Case C-399/03).
- (8) On 16 July 2003 the Commission responded to Decision 2003/531/EC in a press release, stating 'The reasoning and indeed the wording of the President's order suggest that the aid granted on this basis will not be recoverable from the centres even if the Court should ultimately dismiss Belgium's action on the substance.' (IP/03/1032).
- (9) By its judgment of 22 June 2006<sup>(10)</sup>, the Court annulled in part the Commission decision 'insofar as it does not lay down transitional measures for those coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time or shortly after the notification of the decision.' That same day it also annulled Decision 2003/531/EC<sup>(11)</sup>.
- (10) By letter of 4 July 2006<sup>(12)</sup>, the Commission asked Belgium to provide it with certain information so that it could decide on the proper follow-up action to be taken following the judgment by the Court of 22 June 2006 in Cases C-182/03 and C-217/03. This information concerned the way in which Belgium had implemented Decision 2003/757/EC, as suspended in part by the order of 26 June 2003. Belgium was given 20 working days, i.e. in principle until 2 August 2006, to provide the information requested.
- (11) On 23 August 2006 as it had not received a reply, the Commission sent Belgium a reminder<sup>(13)</sup>. Belgium was given a further period of 10 working days, i.e. in principle until 7 September 2006, to provide the information requested.
- (12) On 13 September 2006 an informal e-mail including copies of the two aforementioned letters was sent to Belgium. By letter of 14 September 2006, which mentioned the said e-mail and the attached letters, Belgium stated that it had never received the letters. By letter of 29 September 2006, the Commission called on Belgium to provide the information initially requested on 4 July and to inform it of its intentions regarding the coordination centres. A technical meeting was also proposed. Since Belgium's reply, dated 12 October 2006, did not contain any of the information requested, the Commission, by letter of 10 November 2006, once again recalled the importance of the information requested and insisted that Belgium provide the desired replies by 22 November 2006 at the latest. A letter from Belgium dated 17 November 2006 still did not provide any answer as to substance.
- (13) On 16 January 2007 Belgium sent the information requested by the Commission. It provided further details by letters of 8 and 16 February 2007. Three meetings also took place on 5 and 15 February and 5 March 2007 between the Commission and Belgium.

<sup>(7)</sup> OJ L 282, 30.10.2003, p. 25, as corrected by OJ L 285, 1.11.2003, p. 52.

<sup>(8)</sup> Joined Cases C-182/03 R and C-217/03 R *Belgique et Forum 187 v Commission* [2003] ECR I-6887.

<sup>(9)</sup> OJ L 184, 23.7.2003, p. 17.

<sup>(10)</sup> Joined Cases C-182/03 and C-217/03 *Belgique et Forum 187 v Commission* [2006] ECR I-5479.

<sup>(11)</sup> Case C-399/03 *Commission v Council* [2006] ECR I-5629.

<sup>(12)</sup> Registered under reference No D/55614.

<sup>(13)</sup> Registered under reference No D/57226.

(14) By letter of 21 March 2007, the Commission informed Belgium of its decision to extend the procedure initiated on 27 February 2002 in respect of this aid, in accordance with Article 88(2) of the Treaty.

(15) The Commission decision to extend the procedure was published in the *Official Journal of the European Union* <sup>(14)</sup>. The Commission called on interested parties to submit their comments on the appropriate transitional measures that it should have envisaged pursuant to the Court's judgment.

(16) The Commission received comments in this connection from Forum 187 <sup>(15)</sup> and three coordination centres. It forwarded them to Belgium, giving it the possibility to comment on them, and received its comments by letters dated 19 and 30 July 2007.

## II. DESCRIPTION OF THE SCHEME

(17) The main legal basis for the scheme for coordination centres is Royal Decree No 187 of 30 December 1982. A coordination centre is an undertaking that is part of a multinational group and supplies certain ancillary services (financing, cash management, research and development, etc.) solely for other undertakings in the same group. Since 1983, under a special scheme approved by the Commission, these undertakings qualified in Belgium for a substantially reduced corporate tax base and for various exemptions (registration duty on capital injections, property tax, withholding tax). Eligibility for the scheme was conditional on receiving a 10-year authorisation once it had been ascertained that the coordination centre met the conditions laid down by Royal Decree No 187. Authorisations were renewable on expiry of the 10-year period under the same conditions <sup>(16)</sup>.

(18) On 27 December 2006 Belgium adopted a law <sup>(17)</sup> under which the authorisation for any coordination centre that so requested could be extended until 31 December 2010, where necessary with retroactive effect. In addition to the centres whose authorisation was renewed between 17 February 2003 and 31 December 2005, the possibility of extension would also be available to centres whose authorisation expires between 1 January 2006 and 31 December 2010 and to an unspecified number of centres whose authorisation would have expired by 31 December 2005 at the latest but which had not submitted any renewal request by that date. The Law has not been notified to the Commission in accordance

with Article 88(3) of the Treaty but its entry into force has been suspended and is conditional on confirmation by the Commission that it has no objections.

(19) Of the 243 coordination centres that existed in 2002, 173 are still operational in 2007. Of these, 27 have been granted an authorisation that is valid until 31 December 2010 in accordance with Decision 2003/757/EC. The authorisations for the other 136 coordination centres expire before 31 December 2010 and it is these centres, therefore, that are concerned by the possibility of extension afforded by the Law. It would seem that an unspecified number of coordination centres that have since ceased operations could also benefit from the extension provided for by the Law of 27 December 2006.

## III. PURPOSE OF EXTENDING THE FORMAL PROCEDURE

(20) Following the order of 26 June 2003 suspending the effects of the prohibition on the renewal of coordination centre authorisations that had expired, Belgium was able to renew the authorisations. The effects of such renewal could not, however, extend beyond the date of the judgment as to substance. The Court of Justice delivered its judgment on 22 June 2006.

(21) On the basis of the information available, the Commission expected that Belgium would simply extend the coordination centre authorisations until the end of 2005, as had been decided pursuant to the code of conduct and as requested by Belgium on several occasions. The Commission sought confirmation from Belgium by letter of 4 July 2006. Belgium confirmed that it had restricted to 31 December 2005 the renewals granted pursuant to the order of 26 June 2003, except for four centres whose authorisation had been extended indefinitely. It also informed the Commission that, on the basis of its interpretation of the Court's judgment, it intended to extend the authorisations for all the coordination centres up to the end of 2010 and to adopt in December 2006 a law permitting such a general extension beyond 2005, where necessary with retroactive effect.

(22) On 21 March 2007, for want of an agreement on the interpretation placed on the Court's judgment, the Commission took the view that it would have to extend the formal investigation procedure so as to give its own interpretation of the judgment and to make public the particulars on which, in its view, it would have to base itself in order to determine the 'new' transitional period requested by the Court. It also expressed doubts as to the interpretation of the Court's judgment as presented by Belgium and as to the latter's intention of renewing the authorisations for all the coordination centres until the end of 2010.

<sup>(14)</sup> See footnote 1.

<sup>(15)</sup> Forum 187 is the professional federation of coordination centres, distribution centres, service centres and call centres in Belgium.

<sup>(16)</sup> For a full description of the scheme, see the decision of 27 February 2002 initiating the procedure.

<sup>(17)</sup> Law of 27 December 2006 laying down various provisions (Moniteur belge, 28 December 2006).

#### IV. COMMENT BY BELGIUM AND INTERESTED THIRD PARTIES

(23) Following the extension of the procedure, comments were submitted by Belgium, by Forum 187 and by three coordination centres whose authorisations expired on 31 December 2003 or 31 December 2004 and were renewed until 31 December 2005. It transpires from these comments that Belgium and the coordination centres defend the granting of a transitional period ending on 31 December 2010 for the following reasons:

— the Court's judgment must be taken to mean that the general principle of equality, invoked by it, means that all the coordination centres must qualify for the longest transitional period granted to one of them, i.e. until 31 December 2010. If not, the Commission would create new inequalities and new distortions of competition between coordination centres, with some of them continuing to qualify for the scheme and others ceasing to do so before 2010.

— the equality of treatment also implies that Belgian coordination centres should be granted the same transitional period as that granted by the Commission in its decisions relating to other tax schemes, and in particular the 1929 holding companies in Luxembourg<sup>(18)</sup>, exempt companies in Gibraltar<sup>(19)</sup> and the free zone of Madeira<sup>(20)</sup>.

— the Commission is unable to accept the date of notification of Decision 2003/757/EC as the starting date of the 'new' transitional period that it proposes to set. According to certain interested parties, the new transitional period should begin either on 30 October 2003, the date on which the above Decision was published in the Official Journal, or at the earliest on 22 June 2006, the date of the Court's judgment. Belgium takes the view that transitional measures are traditionally fixed for the future and not for the past. The starting date of the new transitional period should, therefore, be the date of notification of the new final decision, i.e. the present Decision. It is from

<sup>(18)</sup> Commission Decision 2006/940/EC of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies (OJ L 366, 21.12.2006, p. 47).

<sup>(19)</sup> United Kingdom — Aid C 53/2001 (ex NN 52/2000) — Gibraltar exempt companies — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty (OJ C 26, 30.1.2002, p. 13).

<sup>(20)</sup> Commission Decision 2003/294/EC of 11 December 2002 on the application by Portugal of the financial and tax aid scheme for the free zone of Madeira in the period between 1 January and 31 December 2000 (OJ L 111, 6.5.2003, p. 45).

this date that all coordination centres should be allowed an appropriate period (of at least two years) in which to adapt to the new scheme.

— following the partial suspension and annulment of Decision 2003/757/EC and following the annulment of Decision 2003/531/EC, the undertakings again had a legitimate expectation that the scheme would be extended until the end of 2010. Belgium also referred to the cost of dismissing coordination centre employees, which would justify deferring the starting date of the transitional period until the date of the present Decision.

— the particulars set out by the Commission in its decision to extend the procedure in defence of its proposal for a transitional period running to the end of 2005 or even the end of 2006 are not relevant. In particular, the renewals granted by Belgium to coordination centres whose authorisations expired between 17 February 2003 and 31 December 2005 do not go beyond 31 December 2005, a temporary and cautious measure pending the judgment of the Court.

— the Court having delivered its judgment on 22 June 2006, the Commission has not acted promptly to secure adoption of new transitional measures. This is also justification for granting a transitional period to all the coordination centres with effect from the date of notification of the present Decision laying down these transitional measures.

(24) Belgium considers that the Law of 27 December 2006 simply implements the Court's judgment and does not constitute a new aid scheme but an extension of the existing one. One of the coordination centres also takes the view that its request for an extension, made after the Court's judgment but prior to adoption of the Law, is based on a right of renewal recognised by the judgment but not by the Law.

#### V. ASSESSMENT BY THE COMMISSION

(25) The arguments presented by Belgium and the coordination centres are designed to demonstrate that the Commission must authorise all the coordination centres to benefit from the scheme until 31 December 2010, either in accordance with the principle of equality invoked by the Court, which would grant to all the centres the longest transitional period granted, i.e. until 31 December 2010, or under the principle of legitimate expectations, which would require the Commission to fix a date other than 18 February 2003, i.e. the date of the judgment or that of the present Decision, as the starting

date of the appropriate transitional period demanded by the Court. Neither Belgium nor the undertakings concerned have put forward any arguments to show that the appropriate transitional period, defined by the Court as the period necessary for the coordination centres to adapt to the change of scheme, should run from 18 February 2003 to 31 December 2010, i.e. for more than seven years and ten months. For the reasons set out in this section, the Commission takes the view that the starting date of the transitional period must be 18 February 2003 and that the transitional period must be of reasonable duration. On the basis of the information in its possession, the Commission also considers that this appropriate transitional period came to an end on 31 December 2005.

### 1. Limits to the annulment ordered by the Court

- (26) The judgment of the Court states that Decision 2003/757/EC is annulled 'insofar as it does not lay down transitional measures for those coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after the notification of the decision.' In paragraph 163 of the judgment, the Court spelt out that 'the expression 'shortly after' should be understood as referring to a date so close to that on which the contested decision was notified that the coordination centres concerned did not have the time required to adjust to the change in the regime in question.'
- (27) First, it is important to note that the Court confirms the merits of Decision 2003/757/EC in that it deems the State aid scheme for coordination centres to be incompatible with the common market. This view has been challenged before the Court by Forum 187 but not by Belgium. It is not concerned by the partial suspension and annulment of that Decision. The coordination centre scheme is, therefore, compatible as from the date of notification of the Decision.
- (28) Second, the Commission takes the Court's judgment to mean that the annulment is prompted by the finding that Decision 2003/757/EC deprived certain undertakings of the benefit of the appropriate transitional measures that should have been granted to them to enable them to adapt to the change of tax scheme.
- (29) The Court criticises the prohibition with immediate effect of the renewal, even temporarily, of the coordination centre authorisations since it violates the legitimate expectation of certain centres 'with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after the notification of the decision'. It takes the view that these centres could legitimately expect to be granted an appropriate transitional period in which to adapt to the change of scheme and, if necessary in order to benefit from this transitional period, to obtain a temporary extension of their authorisation.
- (30) The Court's judgment thus requires the Commission to authorise renewal of the authorisations in so far as these — temporary — renewals are needed to respect the right of the coordination centres to an appropriate transitional period. The Commission notes, therefore, that the Court does not annul all the effects of the prohibition of renewal — even temporarily — of the authorisations, as requested by Belgium and Forum 187 in their appeals and as proposed in the conclusions of the Advocate-General. This prohibition thus produces its effects except in so far as the renewal of the authorisations is necessary to comply with the judgment as to substance.
- (31) As pointed out in the comments received, the Court also criticises the fact that differing transitional periods have been granted to the undertakings — ranging from a few months to several years — on the ground that this is at variance with the general principle of equality of treatment. It suggests, therefore, that the Commission should have fixed for all the undertakings concerned a single appropriate transitional period, i.e. one enabling them to adapt to the change of scheme.
- (32) The Commission therefore committed an error by recognising for the coordination centres a legitimate expectation based on the duration (10 years) of the authorisations and it granted too short a transitional period (i.e. shorter than the appropriate transitional period) to some centres and too long a transitional period (i.e. longer than the appropriate transitional period) to others.
- (33) However, the wording used by the Court is such as to limit the annulment to the absence of any appropriate transitional period for certain undertakings 'with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after the notification of the decision'. It goes on to explain, in paragraph 163 of its judgment, what it understands by 'shortly after'.

(34) Accordingly, the Court's judgment does not require the Commission to restore perfect equality of treatment as between all the coordination centres but to offset the effects of the inequality of treatment for certain undertakings that would have suffered from the lack of an appropriate transitional period. In the present case, the equality of treatment calls for action to ensure that all the undertakings have a transitional period in which to adapt to the scheme. The judgment does not annul the definition of the transitional period for the undertakings granted a transitional period longer than the appropriate transitional period for adapting to the change of scheme and so the Commission may not shorten it in order to restore equality of treatment.

(35) The Commission notes, however, that the Court refrains from specifying the duration of the appropriate transitional measures and that it does not specify either the number of undertakings deprived of such appropriate measures and thus concerned by the annulment. In particular, the judgment does not state that the appropriate transitional period invoked is that ending on 31 December 2010 and does not require the Commission, as Belgium claims, solely by virtue of the principle of equality of treatment, to align the transitional period for all the undertakings on the longest of the transitional periods granted by Decision 2003/757/EC, namely until 31 December 2010. On the contrary, the Court seems to suggest that an identical period for all the coordination centres that was designed solely to allow them to adapt to the change of scheme would have been appropriate and that only those whose authorisation ended shortly after have been deprived of the appropriate period.

(36) Consequently, the Commission takes the view that the transitional period provided for in Decision 2003/757/EC must be adjusted only to the extent of the annulment ordered by the Court. Similarly, it considers that the appropriate transitional period invoked by the Court must be determined on the basis of particulars demonstrating that it is appropriate, i.e. not only sufficient but also necessary. The decision to extend the procedure was designed to give Belgium and interested third parties the opportunity:

— to state their views on the relevance of the particulars already in the Commission's possession that seem to indicate 31 December 2005 as the end of the appropriate transitional period;

— to put forward other particulars liable to demonstrate that the appropriate transitional period should be extended beyond 31 December 2005, and where appropriate until 31 December 2010 or any other date.

(37) The Commission takes pains below to demonstrate that the appropriate transitional period invoked by the Court should have begun on 18 February 2003 and should

have ended on 31 December 2005 for all the coordination centres, and not on 31 December 2010. It then examines situations in which, in its view, a legitimate expectation raised by it obliges it to allow certain coordination centres to benefit from the scheme beyond 31 December 2005.

## 2. Starting date of the appropriate transitional period

(38) The comments from Belgium and interested third parties suggest that the starting date of the transitional period to be determined by the Commission following the Court's judgment cannot be the date on which Decision 2003/757/EC was notified. Various dates are proposed, including the date of publication of that Decision in the Official Journal and the date of notification of the present Decision.

(39) However, the Commission takes the view that the appropriate transitional period invoked by the Court must be calculated as from the date of notification of Decision 2003/757/EC, i.e. as from 18 February 2003.

(40) First, on 22 June 2006 the effects of the order of 26 June 2003 were replaced by those of the Court's judgment as to substance, and this with retroactive effect from the notification of Decision 2003/757/EC. The Court's judgment takes account of the situation of the coordination centres at the date on which that Decision was notified. There is, therefore, no reason to believe that the Court is demanding a transitional period the starting date of which would differ from the date on which the contested Decision was notified.

(41) Second, the wording of the Court ruling refers explicitly to that date since the Decision is annulled 'insofar as it does not lay down transitional measures for those coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time or shortly after the notification of the decision.' (underlining added).

(42) Third, the Commission takes the view that the legitimate expectation that existed for the coordination centres on the basis of the Commission's previous decisions and positions on this matter was infringed at the latest on the date on which Decision 2003/757/EC was notified. In that Decision the Commission described the aid scheme for the coordination centres as being incompatible with the common market and requested that it be amended or terminated. This description was not suspended and was confirmed by the Court in its

judgment of 22 June 2006. Accordingly, it produces its effects as from the date on which Decision 2003/757/EC was notified to Belgium. That Decision was also accompanied by a Commission press release and received wide press coverage. The Commission considers, therefore, that it can regard the date on which Decision 2003/757/EC was notified as the final date of infringement of the legitimate expectation placed by the coordination centres in the compatibility of the scheme with the common market and thus as the starting date of the transitional measures justified by this previous legitimate expectation. Since the legitimate expectation was infringed once Decision 2003/757/EC had been notified, the Commission takes the view that deferment of the start of the transitional period is not justified, not even until the date of publication of that Decision in the Official Journal. Forum 187, the association representing and acting on behalf of the coordination centres and, as it has itself stated, recognised as such by Belgium, lodged a detailed appeal before the Court at the end of April 2003 against 2003/757/EC, i.e. prior to publication of the Decision in the Official Journal. This shows that, through the association charged with defending their interests, the coordination centres were aware of the content of that Decision, and in particular the description of the aid as being incompatible with the common market and the requirement that Belgium amend or terminate the scheme in question.

- (43) Lastly, the Commission notes that no coordination centre has, in practice, suffered from the prohibition on renewing the authorisations and that, pursuant to either Decision 2003/757/EC or the order of 26 June 2003, all have been able since 18 February 2003 to benefit from a transitional period enabling them to adapt to the change of scheme imposed by the Commission. The order of 26 June 2003 also refers explicitly to the date on which Decision 2003/757/EC was notified by suspending the effects of the decision 'insofar as it prohibited the Kingdom of Belgium from renewing coordination centre authorisations effective as at the date of notification of the decision' (underlining added). This suspension thus paved the way for renewal of the authorisations in force on 17 February 2003 and for extension of the effects of the scheme until 22 June 2006 at the latest, the date of the judgment as to substance. On 16 July 2003 the Commission also confirmed that it would not be seeking repayment of the aid granted on the basis of the order of 26 June 2003, thereby assuring the coordination centres of effective and definitive enjoyment of the transitional period resulting from the effects of the suspension.
- (44) The Commission also takes the view that it cannot accept the arguments put forward by Belgium and the coordination centres in support of their request for deferral of the starting date of the appropriate transitional period. This is because the Court confirmed the description of the aid as being incompatible with the common market on 17 February 2003. The legitimate expectation raised by the Commission decisions of 1984 and 1987 authorising the scheme was thus infringed in February

2003 at the latest. If the date of the Court judgment and its content were not known to the coordination centres, this uncertainty did not stem from any actions on the part of the Commission. The judicial procedure was thus not likely to give rise to a legitimate expectation — enforceable against the Commission — that the coordination centre scheme was compatible with the common market. The uncertainty stems from the introduction of appeals which, as such, do not have suspensive effect. The duration of the judicial procedure cannot, therefore, justify extension of the transitional period, which had, in practice, been granted to the coordination centres with effect from 18 February 2003, by deferring the starting date of the transitional period to that date.

### 3. Date of the end of the appropriate transitional period

- (45) In determining the content of the appropriate transitional measures and the exact duration of the appropriate transitional period, the Commission has based itself on the information that is available from the commitments entered into and from the requests and statements made by Belgium or the undertakings concerned before or shortly after adoption of Decision 2003/757/EC. In its opinion, this information provides the best illustration not only of Belgium's position but also of the position of the undertakings concerned as at 17 February 2003. The absence of any reaction to some of the formal — and challengeable — acts of the national authorities or to Decision 2003/531/EC has also been interpreted as a sign of acceptance on the part of the undertakings concerned.
- (46) First, Belgium had, within the code of conduct monitoring group, committed itself to abolishing the effects of the coordination centre scheme by 31 December 2005 at the latest. This undertaking was given in the Council conclusions of 26 and 27 November 2000 <sup>(21)</sup>.
- (47) The conclusions were made public in a press release <sup>(22)</sup> and, on this basis, the Belgian Finance Minister declared on 20 December 2000 before the Chamber of Representatives that 'the coordination centres authorised for the first time on 31 December 2000 [...] will be able to continue to benefit from the scheme until 31 December 2005, either under the initial authorisation or under an authorisation renewal [...]'. <sup>(23)</sup>

<sup>(21)</sup> On that date Belgium had not yet obtained the Council's agreement to extend beyond 31 December 2005 the effects of the authorisations (already in force on 31 December 2000) that expired after 31 December 2005.

<sup>(22)</sup> Ref. Council/00/453.

<sup>(23)</sup> See the reply by the Finance Minister dated 20 December 2000 to a parliamentary question put by Mr Jacques Simonet, No 5 (Doc. Parl., Chambre, Session 2000-2001, COM 343), referred to in letter ref. PH/chw/1467 from Belgium dated 6 March 2003.

- (48) In a letter of 6 March 2003 addressed to the Commission and mentioning the Council conclusions and the statement by the Finance Minister, Belgium commented as follows: 'Under these conditions, Belgium has entered into commitments towards its coordination centres the effects of which will come to an end on 31 December 2005'. It also developed this argument before the Court (paragraphs 141 and 142 of the judgment). Although it was not viewed by the Court as justification for a legitimate expectation vis-à-vis the Commission, the political commitment entered into by Belgium towards its coordination centres seems, by contrast, to be relevant for assessing the transitional period that Belgium deemed appropriate for them.
- (49) Second, in the letter of 6 March 2003, Belgium reacted as follows to the reasonable length of time as defined by the Commission in Decision 2003/757/EC: 'The Commission has rightly granted a reasonable length of time to the coordination centres. The decision to allow the authorisation period in force to run its course is justified, except for the coordination centres with an authorisation that expires in the months following the Commission decision and, more particularly, before the end of 2005 since these centres will not have time to adapt to the early termination of the scheme for coordination centres. In this instance, the reasonable length of time is insufficient.' It also called on the Commission to recast Decision 2003/757/EC and 'to provide for the possibility for the centres with an authorisation expiring before the end of 2005 to obtain a renewal on the basis of the existing scheme until the end of 2005.' The Commission again concludes from this that, in Belgium's view, a reasonable length of time had not been granted to the coordination centres with an authorisation expiring before 31 December 2005 and, if these coordination centres were to be granted a reasonable length of time, this meant that their authorisation would have to be extended until 31 December 2005.
- (50) Third, on 20 March and 26 May 2003 Belgium notified the Commission of its 'intention to maintain the coordination centre scheme for coordination centres that existed on 31 December 2000 and had an authorisation expiring between 17 February 2003 and 31 December 2005 until the latter date'. It also asked the Council to adopt on the basis of the third subparagraph of Article 88(2) of the Treaty a decision authorising that extension. That decision, Decision 2003/531/EC, was adopted by the Council on 16 July 2003. It stipulates in recital 10: 'The new aid planned is temporary. It is intended to [...] by enabling the beneficiaries to continue operating in Belgium, at least for the period necessary to enable Belgium to introduce other measures for coordination centres established on its territory or to facilitate reorganisation of the investments of the multinational groups in question, avoiding abrupt termination of contracts.' A number of press articles reported the request made by Belgium and Decision 2003/531/EC. The Commission reacted to that Decision in a press release on 16 July 2003. Neither Forum 187 nor any of the coordination centres concerned challenged the said decision or contested the restriction of the extension to 31 December 2005.
- (51) Fourth, the Court resumed the request by Forum 187 in the following terms: 'Forum 187, which seeks the annulment of the decision insofar as it does not lay down appropriate transitional measures for the centres with an authorisation which expires between 17 February 2003 and 31 December 2004' and 'the coordination centres with an authorisation that expired during 2003 and 2004 needed a transitional period of two years in which to reorganise themselves or, if appropriate, to leave Belgium'<sup>(24)</sup>. The Commission notes that 34 months elapsed between 17 February 2003 and 31 December 2005.
- (52) Fifth, as authorised by the order of 26 June 2003, Belgium renewed the coordination centre authorisations that expired between 17 February 2003 and 31 December 2005. With the exception of four coordination centres, these authorisations were all renewed for a period ending on 31 December 2005. Neither Belgium nor the undertakings concerned reported any appeals against this explicit restriction of the duration of the authorisations. Similarly, it would seem that none of the undertakings concerned submitted — either before 31 December 2005 or even before 22 June 2006 — any request for a further extension.
- (53) Sixth, since appropriate transitional measures were needed to allow Belgium to adapt its legislation and the coordination centres to adapt to a new tax regime, the following points should be noted:
- the Royal Decree of 16 May 2003 amending, as regards withholding tax, the Royal Decree implementing the Income Tax Code coordinated in 1992 (AR/CIR92) provides for exemption from withholding tax in respect of interest paid by intra-group banks (including coordination centres). It entered into force on 5 June 2003.
- <sup>(24)</sup> See the judgment in Cases C-182/03 and C-217/03, paragraphs 140 and 145; see also the order of 26 June 2003, paragraph 73; and the appeal lodged on 28 April 2003, in particular points 5 and 6 of the request for use of the accelerated procedure, paragraph 6 of the application for interim measures and paragraphs 148 to 150, 154 and 158.



- On 23 April 2003 the Commission approved the advance tax ruling scheme implemented by Belgium on 1 January 2003<sup>(25)</sup>, which also applied to coordination centres. It also approved part of the new scheme for coordination centres notified in May 2002. In Decision 2005/378/EC of 8 September 2004 concerning the aid scheme which Belgium is proposing to implement for coordination centres<sup>(26)</sup>, the Commission took the view that the new scheme as amended by Belgium in line with its commitment to do so did not constitute State aid.
- The Law of 22 June 2005 introducing a tax deduction for risk capital<sup>(27)</sup> provides for a scheme of notional interest deductions that entered into force on 1 January 2006. Although not limited to the coordination centres, this scheme was developed with the explicit objective in mind of offering an attractive alternative to the coordination centre scheme, and in particular for those centres with an authorisation terminating on 31 December 2005. This measure was announced at the end of 2004 and was presented at the beginning of 2005 to the representatives of the coordination centres, who seemed to have welcomed it<sup>(28)</sup>. The measure also received broad press coverage.
- The Law of 22 June 2005 also provides for the — general — abolition of the 0,5 % registration duty on capital transfers with effect from 1 January 2006.
- (54) Consequently, on 1 January 2006 at the latest, the undertakings concerned that had decided to stay in Belgium could opt for a replacement scheme that was simple (since it did not involve any major reorganisation<sup>(29)</sup>) and attractive. On this basis too, the date of 31 December 2005 thus seems to be a reasonable date for the expiry of the appropriate transitional period demanded by the Court in so far as it allows all the coordination centres to move seamlessly from one scheme to another. The Commission also notes that 70 of the 243 coordination centres present in 2002 have ceased operations in Belgium.
- (25) Belgium — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty concerning measure C 26/03 (ex N 351/02) — Change to the scheme for coordination centres (OJ C 209, 4.9.2003, p. 2).
- (26) OJ L 125, 18.5.2005, p. 10.
- (27) *Moniteur belge*, 30 June 2005.
- (28) See the reply by the Finance Minister to the oral parliamentary questions put by Ms Pieters (QP No 5852 of 15 March 2005), Mr Devlies (QP No 5911 of 15 March 2005) and Ms Anseeuw (QP No 3-4179 of 20 January 2006).
- (29) The exemptions from withholding tax and capital duty were maintained for coordination centres and extended to other undertakings; the deduction for notional interest is a purely tax transaction and thus simple to apply.
- 4. Situation of coordination centres with an authorisation that was extended between 17 February 2003 and 31 December 2005**
- (55) For the reasons given above, the Commission considers that the appropriate transitional period sought by the Court should have run from 18 February 2003 to 31 December 2005. For most of the coordination centres with a renewed authorisation based on the order of 26 June 2003, the renewal period was restricted by Belgium to 31 December 2005, in line therefore with the appropriate transitional period defined in Sections 2 and 3.
- (56) However, as regards the four coordination centres with a renewed authorisation based on the order of 26 June 2003, the authorisation was renewed by Belgium for an indefinite period. The Commission notes that the order of 26 June 2003 explicitly restricts the effects of such renewals to the date of the judgment as to substance. Consequently, provided that the coordination centres concerned had not opted out of the coordination centre scheme in favour of the notional interest scheme for income in 2006, these authorisations were covered by the said order until 22 June 2006.
- (57) While the Commission is of the opinion that the appropriate transitional period ended on 31 December 2005, it does acknowledge that its press release of 16 July 2003 could have given rise among the coordination centres concerned to the legitimate expectation that there would be no request for repayment of the aid from which they benefited up to the date of the Court judgment as to substance.
- (58) Lastly, the coordination centre scheme is a tax scheme applicable by tax year. Now, in many cases, the tax year corresponds to the calendar year. Since the judgment was delivered in mid-2006, the Commission takes the view that the principle of legitimate expectation must apply for each enterprise concerned until the end of the normal tax period running on the date of the judgment.
- 5. Situation of the coordination centres with an authorisation that was renewed prior to notification of Decision 2003/757/EC**
- (59) Decision 2003/757/EC recognised for all the coordination centres the existence of a legitimate expectation based on the 10-year duration of the authorisations in

force on the date of notification of that Decision and defined the appropriate transitional period on that same basis. The Court ruled that, in the case of a scheme that had become permanent, renewal of authorisation was a simple administrative formality. The coordination centres could, therefore, legitimately expect to benefit from an appropriate transitional period and, as expiry of their authorisation approached, they could also expect to have their authorisation renewed so that they could benefit from that appropriate transitional period.

- (60) As indicated in paragraphs (31) to (34), the Court also ruled that the granting of different transitional periods as a function of the date of expiry of the authorisations amounted to an inequality of treatment. The Commission concludes from this that it should have fixed a single — appropriate — transitional period for all the coordination centres.
- (61) However, the Court annulled the definition of the transitional measure contained in Decision 2003/757/EC only insofar as the measure was insufficient, i.e. shorter than the appropriate transitional period, for certain coordination centres with authorisations due to expire shortly. As it has already explained, the Commission considers that the annulment pronounced by the Court relates only to the coordination centres with authorisation renewed between 17 February 2003 and 31 December 2005 and that the appropriate transitional period ended on 31 December 2005.
- (62) Consequently, the Commission considers that the Court's judgment did not annul the definition of the transitional period contained in Decision 2003/757/EC for the coordination centres with an authorisation still running on 17 February 2003 and due to expire on 31 December 2005 or at a later date. Although, in the light of the Court's judgment, the Commission now takes the view that the transitional period set for those coordination centres was too long, it notes that, inasmuch as it provides for a transitional period ending for each centre concerned on the expiry of the authorisation in force on the date of its notification, Decision 2003/757/EC has not been annulled and is still, therefore, applicable. Accordingly, in so far as Decision 2003/757/EC is still applicable, it does not allow the Commission to shorten the duration of the transitional period as fixed in that Decision for the coordination centres concerned.
- (63) Any Commission decision introducing for all the coordination centres an identical transitional period ending on 31 December 2005 would, moreover, be deprived of any practical effect on account of the legitimate expectation raised by Decision 2003/757/EC for the coordination centres referred to in paragraph (62).

## 6. Status of the Law of 27 December 2006

- (64) The Commission notes that, although it did not notify the provisions of the Law of 27 December 2006 extending the authorisations of all the coordination centres until the end of 2010, Belgium suspended its entry into force pending explicit approval of the scheme by the Commission. For the reasons set out below, the Commission takes the view that it is unable to approve those provisions and thus calls on Belgium not to apply them.
- (65) At the end of 2005, with the exception of the authorisations for the four coordination centres referred to in Section 4, the authorisations that were renewed on the basis of the order of 26 June 2003 expired. Apparently, no further extension was envisaged, either by Belgium or by the coordination centres, until the judgment was delivered on 22 June 2006. The new legal basis for the renewal of all the coordination centres' authorisations until the end of 2010 was not adopted until 27 December 2006, i.e. one year after the expiry of the said authorisations. The Law also allows retroactive application, where appropriate to undertakings no longer covered by the coordination centre scheme.
- (66) Unlike Belgium, the Commission regards the Law of 27 December 2006 not as an act that simply implements the judgment of 22 June 2006 with regard to the existing measure, but as a new scheme which, if it entered into force without the prior approval of the Commission, would probably trigger the procedure applicable to unlawful aid.
- (67) The judgment of 22 June 2006 confirms the incompatibility of the coordination centre scheme as of the date of notification of Decision 2003/757/EC. From that date at the latest, the scheme ceased to be a scheme involving existing aid and the coordination centres are now in the transitional period during which they may continue to benefit from the scheme but may no longer rely on the legitimate expectation based on the Commission decisions or notices in 1984, 1987 and 1990<sup>(30)</sup>. The appeals lodged and the confirmation by the Court, only in June 2006, of the scheme's incompatibility are not apt to alter this fact. As such, the appeals do not have suspensory effect and the order of 26 June 2003 did not suspend the description of the aid scheme as being incompatible. For the same reasons, Belgium's legitimate expectation regarding the compatibility of the scheme was infringed at the latest by Decision 2003/757/EC and Belgium knowingly restricted to 31 December 2005 the authorisation extensions granted on the basis of the order of 26 June 2003.

<sup>(30)</sup> Answer given on 12 July 1990 to Written Question No 1735/90 by Mr G. de VRIES to the Commission (OJ C 63, 11.3.1991, p. 37).

(68) The Commission considers *a fortiori* that the decision taken by Belgium following the Court's judgment definitively confirming the incompatibility of the scheme with the common market to renew upon request the authorisations for all the coordination centres until the end of 2010 cannot form part of the existing measure or even be covered by some legitimate expectation or other raised by the Commission. In particular, the legitimate expectation raised for the coordination centres with approvals that were renewed on the basis of the order of 26 June 2003 could not be extended to renewals granted under the Law of 27 December 2006. As they were granted after the date of the Court's judgment as to the substance, they would no longer be covered by the effects of the order of 26 June 2003 and no legitimate expectation would, therefore, flow any longer from the Commission press release of 16 July 2003.

(69) Accordingly, any future extension of the incompatible aid scheme would probably have to be regarded as illegal aid that could be recovered.

#### 7. Comparison with the transitional periods defined in other Commission decisions

(70) As stated in paragraph (23), Belgium is also seeking application of the principle of equality of treatment in relation to tax measures which, like the coordination centre scheme, were the subject of a State aid decision. Particular reference is made to the schemes for 1929 holding companies in Luxembourg, exempt companies in Gibraltar and the free zone of Madeira, for which the Commission approved transitional measures until 2010 and even authorised new members to join.

(71) The Commission takes the view that each case is special. In each of the decisions concerned, the transitional measures were determined in the light of the special characteristics peculiar to each scheme, to its beneficiaries and to the Member State concerned. It considers that it took this same approach in the case of the Belgian coordination centres by fixing in Decision 2003/757/EC for the above reasons the date of the end of the appropriate transitional period at 31 December 2010 at the latest.

(72) The Commission notes in particular that the present Decision follows on from a Court judgment which it must carry out. Under no circumstances can it replace implementation of that judgment with a simple comparison of the duration of the transitional measures granted in other cases.

(73) In addition, without going into a detailed justification as to substance as in the decisions referred to in paragraph

(23), the Commission notes as to form that some decisions were taken a long time ago while others were taken much more recently, that some of them authorise new entrants while others do not, and that some of them are subject to conditions. Furthermore, other points of comparison could be used that, in the Commission's opinion, are also valid. For instance, in the case of the Dutch scheme for international financing activities (*Concernfinancieringsactiviteiten*), which was terminated, also on 17 February 2003, by Commission Decision 2003/515/EC<sup>(31)</sup>, the transitional measures were defined in the same way as for the coordination centres, i.e. on the basis of the expiry of the 10-year authorisations. Similarly, although they were not the subject of a Commission decision, Belgium terminated the special distribution centre and service centre schemes for all undertakings on 31 December 2005. The relevant administrative circular, published on 20 September 2005, states that those schemes were replaced by the rules on advance decisions introduced on 1 January 2003 (Article 20 of the Law of 24 December 2002).

(74) For these reasons, the Commission considers that it cannot accept the arguments based on a comparison with other cases.

#### 8. Legal uncertainty generated by the Commission's failure to act

(75) Belgium considers that a longer transitional period would be justified by the legal uncertainty resulting from the Commission's inability to set promptly new transitional measures following the annulment ordered by the Court.

(76) The Commission takes the view that responsibility for the delay referred to cannot be imputed to it.

(77) First, neither the interpretation given by Belgium nor its resulting intention to extend the authorisation for all the coordination centres until 31 December 2010 has been the subject of a notification — or even of an information memo — to the Commission.

(78) Second, the Commission addressed to Belgium on 4 July 2006 a letter aimed at gathering the information necessary to apply the Court's judgment and to obtain confirmation of the proper implementation of Decision 2003/757/EC, due regard being had to the effects of the order of 26 June 2003 and of the said judgment. Since

<sup>(31)</sup> OJ L 180, 18.7.2003, p. 52.

Belgium did not reply, a first reminder was sent on 23 August 2006. Despite subsequent reminders, both formal and informal, and although Belgium was, on more than one occasion, given further time in which to reply, the information requested was not sent to the Commission until January 2007. It transpires from the explanatory memorandum and from Article 379 of the Law of 27 December 2006 that, on 20 July 2006, the Finance Minister had been instructed to accept as quickly as possible the renewal requests for coordination centres.

(79) On the basis of the information at its disposal at the time (see paragraph (21)), the Commission expected Belgium to extend the authorisations for all the coordination centres until the end of 2005, as this would, in the Commission's opinion, correspond to the appropriate transitional period ordered by the Court. However, the information provided by Belgium in January 2007 made it clear that Belgium intended to extend the authorisations for all the coordination centres until the end of 2010 on the basis of a law adopted in December 2006 but not notified to the Commission. These new facts justified the adoption on 21 March 2007 of the decision extending the procedure and the analysis of the new arguments presented by Belgium and third parties.

(80) Belgium replied on 16 January 2007 to the questions put by the Commission on 4 July 2006.

## VI. CONCLUSIONS

(81) First, the Commission must amend Decision 2003/757/EC to the extent that it was annulled by the Court judgment of 22 June 2006.

(82) The Court judgment of 22 June 2006 in Joined Cases C-182/03 and C-217/03 annuls Decision 2003/757/EC 'insofar as it does not lay down transitional measures for those coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after the notification of the decision'.

(83) Following this judgment, the substantive provisions of Decision 2003/757/EC must be amended so that:

— it provides for special transitional measures for the coordination centres with an application for renewal

pending on the date on which that Decision was notified or with an authorisation which expired at the same time as or shortly after the notification of that Decision, i.e. between 18 February 2003 and 31 December 2005;

— it authorises as part of these special transitional measures the coordination centres concerned to benefit from the incompatible state aid scheme until 31 December 2005;

— it authorises to this end the temporary renewal of the authorisations of the coordination centres concerned insofar as this is necessary to enable them to benefit from the scheme until 31 December 2005 at the latest. For the rest, the renewal prohibition must be maintained.

(84) No further amendments are needed to the Decision. In particular, the Commission does not call into question the transitional periods granted by Decision 2003/757/EC insofar as the latter allows certain coordination centres to benefit from the incompatible scheme until expiry of their current authorisation and until 31 December 2010 at the latest. This aspect of the Decision has not been annulled by the Court and is, therefore, still applicable.

(85) Second, the Commission must also acknowledge that its press release of 16 July 2003 was such as to give rise for the four coordination centres with an authorisation renewed for an indefinite period on the basis of the order of 26 June 2003 to the legitimate expectation that they could benefit from the incompatible scheme until the date of the Court's judgment as to substance. Since that judgment was delivered on 22 June 2006 and given the fiscal nature of the measure, enjoyment of the legitimate expectation must be extended to allow those coordination centres to benefit from the incompatible scheme until the end of the normal taxable period running on the date of the judgment.

(86) Third, the Commission must call on Belgium to refrain from implementing the provisions of the Law of 27 December 2006 aimed at extending the authorisations of all the coordination centres until 31 December 2010 as those provisions are incompatible with the common market,

HAS ADOPTED THIS DECISION:

*Article 1*

The following text is hereby added to Article 2 of Decision 2003/757/EC:

'The coordination centres with an application for renewal pending on the date on which the present Decision is notified or with an authorisation which expires at the same time as or shortly after such notification, i.e. between the date of notification and 31 December 2005, may continue to benefit from the scheme for coordination centres until 31 December 2005. Renewal of the authorisation for the said coordination centres is hereby authorised until 31 December 2005 at the latest.'

*Article 2*

The four coordination centres in Belgium with an authorisation that has been renewed for an indefinite period on the basis of the order of the President of the Court of Justice of the European Communities of 26 June 2003 deferring implementation of Decision 2003/757/EC may benefit from the scheme for coordination centres until the end of the normal taxable period running on 22 June 2006.

*Article 3*

The Law of 27 December 2006 is incompatible with the common market in so far as its provisions are designed to

extend by way of new decisions to renew authorisations the scheme for coordination centres beyond 31 December 2005.

Accordingly, the Commission calls on Belgium to desist from implementing the relevant provisions of the Law of 27 December 2006.

*Article 4*

Article 1 shall apply with effect from 18 February 2003.

*Article 5*

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 6*

This Decision is addressed to the Kingdom of Belgium

Done at Brussels, 13 November 2007.

*For the Commission*

Neelie KROES

*Member of the Commission*