

JUDGMENT OF THE COURT (Second Chamber)

22 June 2006*

In Case C-399/03,

ACTION for annulment under Article 230 EC, brought on 24 September 2003,

Commission of the European Communities, represented by G. Rozet, V. Di Bucci and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by A.-M. Colaert and F. Florindo Gijón, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Schintgen, P. Kūris (Rapporteur) and J. Klučka, Judges,

Advocate General: P. Léger,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 9 February 2006,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks annulment of 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 (OJ 2003 L 184, p. 17; the 'contested decision').

Legal context

- 2 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) provides:

‘For the purpose of this Regulation:

...

(b) “existing aid” shall mean:

...

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) “new aid” shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...’

The contested decision and its background

³ By Royal Decree No 187 of 30 December 1982 on the creation of coordination centres (*Moniteur belge* of 13 January 1983), the Kingdom of Belgium provided for a tax exemption, for a period of 10 years, applicable to tax on the profits of coordination centres which carry out, for undertakings of the group to which they belong, some administrative, preparatory or auxiliary tasks and some financial centralising activities.

⁴ On 3 February 1983, the Commission informed the Belgian Government that the intervention provided for by that royal decree was caught by Article 92(1) of the EEC Treaty (which became Article 92(1) of the EC Treaty, now, after amendment, Article 87(1) EC), and requested that it notify the Commission of that tax scheme and suspend its implementation without delay.

- 5 Following the notification, on 3 April 1984, of a draft law amending the tax scheme applicable to coordination centres, the Commission decided on 2 May 1984 that the scheme as amended no longer contained any element of aid for the purposes of Article 92(1) of the Treaty. The Belgian Government was informed of that decision by letter of 16 May 1984.

- 6 However, in the light of the fact that the amendments introduced by the law did not completely correspond to that draft, on 12 December 1985 the Commission initiated the procedure provided for in Article 93(2) of the EEC Treaty (which became Article 93(2) of the EC Treaty, now Article 88(2) EC).

- 7 Following another amendment to the law on 4 August 1986, the Commission terminated the procedure and communicated its decision to the Belgian Government on 9 March 1987.

- 8 The Council, first of all, unanimously adopted on 1 December 1997 a series of conclusions and a resolution on a code of conduct for business taxation. A Council report of 29 February 2000 classed the Belgian provisions relating to the coordination centres as harmful tax measures which had to be abolished by 31 December 2005. Then, on 26 and 27 November 2000, the Council (Ecofin) decided that that final date for the harmful measures to produce effects would apply to those subject to such measures on 31 December 2000. Finally, on 21 January 2003, the Council ruled in favour of maintaining the effects of some harmful arrangements beyond 2005, and specifically in respect of the Belgian coordination centres until 31 December 2010.

- 9 In connection with the examination of all the tax schemes in force in the Member States, the Commission asked the Belgian authorities on 12 February 1999 to provide it with information on the coordination centres. By letter of 17 July 2000, it informed the Belgian authorities that the tax scheme applicable to the coordination centres appeared to constitute State aid within the meaning of Article 87(1) EC.

- 10 On 11 July 2001, the Commission adopted proposals for appropriate measures which provided, as a transitional measure, that the coordination centres authorised before the date of acceptance of those measures might continue to qualify for the tax scheme until 31 December 2005.
- 11 By a letter of 27 February 2002, the Commission notified the Kingdom of Belgium that it had decided to initiate the investigation procedure laid down in Article 88(2) EC, before adopting Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ 2003 L 282, p. 25). That last decision has been the subject of two actions for annulment before the Court.
- 12 Following the notification made to it of a preliminary draft law to amend Royal Decree No 187, the Commission, by letter of 23 April 2003, notified the Kingdom of Belgium of its decision to initiate an investigation procedure concerning part of the measure contemplated.
- 13 As early as 6 March 2003, the Kingdom of Belgium sent simultaneous applications to the Commission and the Council for 'the necessary to be done in order for the coordination centres whose authorisation expir[ed] after 17 February 2003 to be maintained until 31 December 2005'. That request was renewed on 20 March and 26 May 2003 on the basis of the third subparagraph of Article 88(2) EC.
- 14 The Council, meeting on 16 July 2003, adopted the contested decision, by which it concluded that the aid which the Kingdom of Belgium planned to grant to undertakings authorised as at 31 December 2000 to act as coordination centres under Royal Decree No 187, and whose authorisations were to expire between 17 February 2003 and 31 December 2005, was compatible with the common market. That aid involved application of the normal corporate taxation rate to a taxation base determined according to the 'cost plus' method, application of a special annual

tax of EUR 10 000 per employee with a ceiling of EUR 100 000, exemption from the *précomptes immobiliers* (property taxes) on buildings owned by the centres, exemption from the *précompte mobilier* (withholding tax) on dividends, interest and royalties paid by the centres and on revenue which the centres receive from money deposits, and exemption from registration tax on subscriptions of capital and on increases in authorised capital.

The action

- 15 The Commission puts forward four pleas in support of its action, alleging, respectively, the Council's lack of competence, misuse of powers and abuse of process, breach of the Treaty and other general principles and, in the alternative, a manifest error of assessment.

The first plea

Arguments of the parties

- 16 By its first plea, the Commission claims that the Council did not have the competence to adopt the contested decision.
- 17 It submits, in the first place, that the provisions of the Treaty and Regulation No 659/1999 grant it alone the competence to adopt a decision such as that contested. The power held by the Council in that sphere is of an exceptional character only, and its exercise must be subject to strict interpretation lest it

generate a risk of conflict between the competences of the two institutions. Moreover, the Council's competence in this instance has lapsed, since the conditions laid down in Article 88(2) EC for operation of the time-bar were fulfilled.

18 In the second place, the Commission states that the contested decision seeks to preserve the effects of the tax scheme, whose compatibility with the common market gave rise to doubts which it expressed in its letter of 23 April 2003, and that that decision does not concern a new aid scheme or individual measures but aid considered to be existing aid within the meaning of the Treaty.

19 The Council argues that the solution upheld in Case C-110/02 *Commission v Council* [2004] ECR I-6333 cannot be applied in the instant case since the Council authorised a new aid, distinct from that declared incompatible with the common market by the Commission.

20 To that end, it claims that the authorised aid, granted by new legal provisions, is allocated to a restricted number of undertakings, all identifiable, that is to say about 30 coordination centres, authorisation for which was to expire between 17 February 2003 and 31 December 2005. In addition, that decision would have produced effects for a limited period, as it would not have extended beyond 31 December 2005. According to the Council, that aid is less profitable for the undertakings than the previous scheme.

21 In any event, it is of the view that the contested decision authorised the Kingdom of Belgium not to continue the scheme declared incompatible by the Commission, but to adopt a new legal measure.

22 As regards the period which elapsed between the submission by the Kingdom of Belgium of an application under Article 88(2) EC and the adoption of the contested decision, the Council has argued that the letter of that Kingdom's Permanent Representative of 20 March 2003 is only a preparatory document, intended to facilitate translation, in order that discussions on the proposed measures might take place. The application of the Kingdom of Belgium was accordingly not submitted to it until 26 May 2003.

Findings of the Court

23 In *Commission v Council*, the Court defined the circumstances in which the Council can take a decision authorising State aid where the Commission has adopted a decision stating such aid to be incompatible with the common market.

24 Firstly, the Court interpreted in paragraph 31 of that judgment the scope of the third subparagraph of Article 88(2) EC, holding that the power held by the Council was clearly exceptional in character. It inferred from that that if the Member State concerned has made no application to the Council under that provision before the Commission declares the aid incompatible with the common market, the Council is no longer authorised to exercise the exceptional power conferred upon it by that provision in order to declare such aid compatible with the common market (*Commission v Council*, paragraph 33).

25 The Court holds that such an interpretation, which makes it possible to avoid the same State aid being the subject of conflicting decisions taken successively by the Commission and the Council, contributes to legal certainty (*Commission v Council*, paragraph 35).

- 26 Secondly, the Court examined whether the fact that the Council lacks that power implies that it also lacks the power to decide on an aid measure whose aim is to allocate to beneficiaries of the illegal aid previously declared incompatible by a Commission decision a sum designed to compensate for the repayments which they are obliged to make pursuant to that decision.
- 27 It pointed out that, according to settled case-law, to hold that a Member State is able to grant to beneficiaries of such unlawful aid new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly undermine the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC (*Commission v Council*, paragraph 43).
- 28 The Court thus ruled that the Council can neither counter a Commission decision finding an aid incompatible with the common market by itself declaring that aid compatible with the market, nor undermine the effectiveness of such a decision by declaring compatible with the common market, in accordance with the third subparagraph of Article 88(2) EC, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the common market for the repayments they are required to make pursuant to that decision (*Commission v Council*, paragraphs 44 and 45).
- 29 In the light of that case-law, it is necessary to conclude that the Council could not validly adopt the contested decision.
- 30 In the first place, it is common ground that the Kingdom of Belgium applied to the Council after the adoption of Decision 2003/757 declaring incompatible with the common market the aid allocated by the Belgian State to the coordination centres.

31 Secondly, it is necessary to examine whether the aid described in Article 1 of the contested decision is the same as that covered by Decision 2003/757.

32 In this respect, it is apparent from the documents in the file, and in particular from the note addressed by the Kingdom of Belgium to the Council on 6 March 2003, that the aid scheme which the Council was to declare compatible with the common market was that covered by Decision 2003/757.

33 Furthermore, the note dated 26 May 2003, in which the Permanent Representative of the Kingdom of Belgium to the European Union describes the content of the aid, leaves no doubt as to the fact that the measures concerned are the same.

34 Lastly, the contested decision authorises measures which involve the application of the same methods for determining taxable profits and liability to tax on the basis of the number of employees as those laid down under the tax scheme applicable to the coordination centres. It also comprises the same exemptions from withholding and property taxes and from capital duty.

35 Thirdly, it is necessary to ascertain what the effects are of the contested decision. It is enough to state that the very terms of the statement of reasons on which that decision is based indicate that its object was to overcome the effects of Decision 2003/757 as regards the coordination centres having an authorisation which expired between 17 February 2003 and 31 December 2005.

36 Therefore, the contested decision was contrary to Decision 2003/757. The fact that it applies to only a restricted number of undertakings and is of limited duration has no bearing on the finding that it is inconsistent with Decision 2003/757 which, in Article 2, provides that, as of the date of its notification, the benefits of the scheme in

question may not be maintained by the renewal of existing agreements and that, if the approval is to expire before 31 December 2010, the benefits of the scheme may no longer be granted, even temporarily.

37 It follows from all of the foregoing that the Council was not able to validly adopt the contested decision.

38 Therefore, the Commission's first plea in support of its action, arguing that the Council lacked the competence to adopt the contested decision, is well founded, and that decision must, accordingly, be annulled.

The other pleas

39 Since the Commission's first plea has been accepted and the contested decision must be annulled on that account, it is not necessary to examine the Commission's other pleas in support of its action.

Costs

40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Annuls 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;**

- 2. Orders the Council of the European Union to pay the costs.**

[Signatures]