OPINION OF ADVOCATE GENERAL
LÉGER
delivered on 9 February 2006 [1]

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1 — Original language: French.

I — Introduction

1. The three actions for annulment before the Court concern the tax scheme applicable to coordination centres adopted by the Kingdom of Belgium.

2. A coordination centre is an undertaking created by a group of multinational companies for the purpose of providing various services to those companies, in particular in the financial field. In 1982, the Kingdom of Belgium introduced a special tax scheme for the benefit of such centres under which individual approvals might be granted for a period of 10 years. Such approvals were renewable.

3. The Commission of the European Communities, to which the scheme had been notified, held that it did not constitute State aid. However, following studies undertaken by the Council of the European Union in 1997 on tax competition between Member States, it carried out a fresh investigation into the scheme.

4. By decision of 17 February 2003, [2] the Commission held that the scheme constituted State aid incompatible with the common market. It ordered the Belgian Government not to grant benefits under it to new coordination centres or to renew the 10-year approvals after 17 February 2003. However, it allowed the approvals then in force to remain in effect until their expiry or 31 December 2010, at the latest.

5. After that decision was adopted, the Belgian Government requested the Council to authorise it to grant until 31 December 2005 a similar tax treatment to that of the scheme applicable to coordination centres to centres having an approval which expired between 17 February 2003 and 31 December 2005. The Council allowed that request by decision of 16 July 2003. [3]

6. An application for the annulment of the Commission Decision was brought by the Kingdom of Belgium and by Forum 187 ASBL, [4] an association formed under Belgian law which is a federation of coordination centres in Belgium, in Joined Cases C-182/03 and C-217/03, respectively.

7. An application for annulment was brought by the Commission against the Council Decision in Case C-399/03.

8. As the legal and factual background to both those actions is the same, I shall consider them together in this Opinion.

9. In so doing, I shall consider the following six points: whether the Council had the power to adopt the Decision of 16 July 2003, whether the action brought by Forum 187 is admissible, whether the Commission was entitled to alter its previous determination as to the existence of aid, whether the classification of the tax scheme applicable to the coordination centres as State aid was well founded and, finally, whether, in ordering the Kingdom of Belgium not to renew, even temporarily, approvals expiring after the notification of its decision of 17 February 2003, the Commission failed to have regard to the legitimate expectations of the coordination centres and the general principle of equal treatment.

2 — Commission Decision C(2003) 564 final concerning the aid scheme implemented by Belgium in favour of coordination centres established in Belgium, as amended by Corrigendum of 23 April 2003 ('the Commission Decision' or the 'Decision of 17 February 2003').

3 — Decision 2003/531/EC on the granting of aid by the Belgian Government to certain coordination centres established in Belgium (OJ 2003 L 184, p. 17) ('the Council Decision' or the 'Decision of 16 July 2003').

4 — 'Forum 187'.

II — Community legal framework

10. The EC Treaty contains a prohibition in principle of State aid, coupled with certain exceptions. Article 87(1) EC states:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

11. Article 87(2) and (3) EC go on to list the types of State aid which are automatically compatible with the common market and those which may be considered to be compatible with it. The latter include aid to promote the economic development of areas where there is serious underemployment and aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

12. Article 88 EC provides:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid operating in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the

aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

13. Article 89 EC authorises the Council to make regulations for the application of Articles 87 EC and 88 EC. Pursuant to that power, the Council has adopted Regulation (EC) No 659/1999, [5] which sets out detailed rules concerning the procedures to be followed for the purposes of the application of Article 88 EC.

5 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1).

14. Article 1(b) of Regulation No 659/1999 defines the concept of 'existing aid'. It provides that for the purposes of that regulation, 'existing aid' is to mean:

'(i) ... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(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 [6] or prior to this Regulation but in accordance with this procedure;

6 — Article 4 of Regulation No 659/1999 provides that where the Commission has received complete notification of a national measure it must, within two months, take a decision that the measure does not constitute aid, or that the aid is compatible with the common market, or that doubts are raised as to the compatibility with the common market of the measure which require that the formal investigation procedure be initiated. Pursuant to Article 4(6) of the regulation, where the Commission has not taken a decision within that two-month period, the aid is to be deemed to have been authorised.

(iv) aid which is deemed to be existing aid pursuant to Article 15; [7]

(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 aid, and subsequently became 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'.

15. Articles 17 to 19 of Regulation No 659/1999 set out the procedures for the monitoring of existing aid. Article 17 provides that the Commission is to review existing aid schemes in cooperation with the Member States. Where it considers that such a scheme is not, or is no longer, compatible with the common market, it is to inform the Member State concerned of its preliminary view and to give it the opportunity to submit its comments within a period of one month, which may be extended.

16. Article 18 of the regulation states that where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it is to issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular: substantive amendment of the aid scheme, the introduction of procedural requirements, or the abolition of the aid scheme.

17. Pursuant to Article 19 of the regulation, where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it is to initiate the formal investigation procedure under Article 88(2) EC.

III — The tax scheme applicable to the coordination centres

18. The tax scheme applicable to coordination centres adopted by the Kingdom of Belgium was introduced by Royal Decree of 30 December 1982. [8] It is common ground that no material amendments were made to

7 — Article 15 of Regulation No 659/1999 sets out the rules governing limitation and provides that the powers of the Commission to recover aid are to be subject to a limitation period of 10 years. Article 15(3) of the regulation states that any aid with regard to which that period has expired is to be deemed to be existing aid.

8 — Royal Decree No 187 on the creation of coordination centres (*Moniteur belge* of 13 January 1983).

it between the time when the Commission notified the Belgian Government that it considered that it did not constitute State aid, in 1984, in 1987 and then in 1990, and its decision of 17 February 2003. [9]

19. A coordination centre may be created as a Belgian company having legal personality or as a branch in Belgium of a foreign company. To benefit from the tax scheme introduced by Royal Decree No 187, a centre must first receive individual approval by royal decree. In order to obtain that approval, the centre must form part of a multinational group of companies. That condition requires, inter alia, that the members of the group be established in at least four countries. The group must also have capital and reserves of at least BEF 1 thousand million. It must in addition have an annual turnover of at least BEF 10 thousand million. Banks and insurance companies are excluded from the scheme.

20. The centre in question must have as its exclusive object the development and centralisation of one or more activities of a preparatory or auxiliary nature, which must be undertaken exclusively for the benefit of all or some of the group companies. [10]

21. At the end of the first two years of its operations, it must have the equivalent of at least 10 full-time employees in Belgium.

22. The approval granted to a centre is valid for 10 years and renewable for the same period.

23. The tax scheme for approved coordination centres comprises the following measures:

— the centres' taxable income is determined at a standard rate. It represents a percentage of their total operating expenses and costs, under exclusion of staff costs, financial charges and corporation tax;

9 — Commission's defence in Case C-217/03, paragraphs 27 and 31.

10 — Article 1(2) of Royal Decree No 187 refers to the following activities: 'advertising, the provision and ingathering of information, insurance and reinsurance, scientific research, relationships with national and international authorities, centralisation of accounting, administrative and information technology functions, centralisation of financial operations and the covering of risks arising from fluctuations in exchange rates, together with any other activity of a preparatory or auxiliary nature for the members of the group'.

— the centres are exempt from property tax on the buildings they use to carry on their business activities;

— the 0.5 per cent registration fee is not payable on contributions made to a centre or on increases to its registered capital;

— the centres are exempt from withholding tax. They are thus exempt from withholding tax on dividends, interest and royalties distributed by those centres, with certain exceptions, and on income received by such centres on their cash deposits;

— the centres pay an annual tax fixed at BEF 400 000 per full-time member of staff, but which cannot exceed BEF 4 000 000 per centre.

IV — Facts and procedural background

A — *Facts prior to the Commission Decision*

24. The tax scheme applicable to the coordination centres was investigated for the first time by the Commission in 1984. In a decision of 16 May 1984, it held that the scheme did not constitute aid. However, the scheme that was implemented in practice differed from the scheme that had been notified to it. The Commission therefore initiated the formal investigation procedure in December 1985. After alterations were made to the scheme by the Belgian Government, the Commission held that it no longer contained an aid element and, by letter of 9 March 1987, it informed the Government that the procedure had been closed.

25. That assessment was confirmed in the answer given on behalf of the Commission by Leon Brittan, the Commissioner responsible for competition, on 24 September 1990 to Written Question No 1735/90 by Mr Gijs de Vries, Member of the European Parliament. [11]

11 — OJ 1991 C 63, p. 37. The Written Question raised several questions and was worded as follows:
'On the basis of the "Coordination Centre Statutes" (1982), Belgium offers an attractive fiscal environment to businesses that operate internationally. 213 firms now benefit from this arrangement, and there are plans for a further 54 coordination centres ... .
1. Is it true that Ireland, Luxembourg and Austria operate similar arrangements?
2. Do Member States other than Ireland and Luxembourg intend to introduce similar arrangements?
3. Has the Commission received notification of all such arrangements, which constitute a major tool in competition between Member States, pursuant to Article [88(3) EC]? Are they compatible with Articles [10 EC] and [87 EC]?
4. In this regard, does the Commission intend to use its power to propose the "appropriate measures required by the progressive development or by the functioning of the common market" (Article [88(1)] EC])?'
The Commissioner responsible for competition replied as follows:
'Several Member States (France, the Federal Republic of Germany, Luxembourg, the Netherlands and the United Kingdom) have indeed introduced rules governing taxation of the European headquarters of multinational groups. The rules are designed to avoid double taxation, in particular by determining profits on a flat-rate basis. The Commission takes the view that such rules do not fall within the scope of Articles [87 EC] and [88 EC].
The Commission decided that the rules applicable to coordination centres in Belgium were unobjectionable as regards Article [87 EC], following the Belgian Government's amendments to the provisions originally notified to it.'

26. Following a review of tax competition between the Member States, the 'Economic and Financial Affairs' Council (Ecofin) adopted a code of conduct for business taxation. [12] It set up an ad hoc group, to be called the 'Code of Conduct Group', to assess national tax measures having harmful consequences for the common market.

27. Following that action by the Member States, the Commission undertook to draw up guidelines on the application of Articles 87 and 88 EC to measures relating to direct business taxation and committed itself 'to the strict application of the aid rules concerned'. On 11 November 1998, the Commission accordingly adopted a notice on the application of the State aid rules to measures relating to direct business taxation. [13] On the basis of that notice, the Commission investigated or re-investigated the tax schemes in force in the various Member States.

28. In the course of those investigations, the Commission asked the Belgian authorities in February 1999 for information regarding the tax scheme applicable to the coordination centres, which was cited by the Code of Conduct Group as one of the 66 national measures that had potentially harmful consequences for the functioning of the common market. Those authorities replied in March 1999.

29. In July 2000, the Commission services informed those authorities that the scheme appeared to constitute State aid. For the purpose of initiating the cooperation procedure with those authorities in accordance with Article 17 of Regulation No 659/1999, the Commission services invited them to submit their observations within one month.

30. At its meeting of 26 and 27 November 2000, the 'Ecofin' Council noted that, in accordance with its resolution of 1 December 1997, all harmful measures relating to direct business taxation were to have been eliminated by 1 January 2003. It adopted a proposal from the Presidency that, as regards undertakings benefiting from a harmful tax scheme on 31 December 2000, the effects of those schemes would expire at the latest on 31 December 2005, whether they were schemes granted for a fixed period or not. It also decided that it could, on a case-by-case basis and in order to take account of particular circumstances, decide following a report from the Code of Conduct Group to extend the effects of certain harmful tax schemes beyond 31 December 2005. [14]

12 — Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997, on a code of conduct for business taxation (OJ 1998 C 2, p. 2).

13 — OJ 1998 C 384, p. 3.

14 — Annexes 17, p. 5, and 18, pp. 7 and 8, to the application by the Kingdom of Belgium.

31. Following an exchange of correspondence with the Belgian authorities, the Commission wrote to those authorities on 11 July 2001 to propose, on the basis of Article 88(1) EC, a number of appropriate measures to render the tax scheme applicable to the coordination centres compatible with the common market. In that letter, the Commission also indicated to those authorities that, as a transitional measure, coordination centres approved before those appropriate measures were accepted might continue to benefit from that tax scheme until 31 December 2005. [15]

32. As the Belgian authorities did not accept the measures proposed by the Commission, the latter initiated the formal investigation procedure by decision notified by letter of 27 February 2002 and published in the *Official Journal of the European Communities* on 20 June 2002. [16] In particular, it invited the Kingdom of Belgium to inform it of the number of coordination centres that had been approved at the date of that letter and, in respect of each of them, the date of the most recently granted approval or renewal. It also invited that Member State and interested third parties to submit observations and to supply any relevant information for determining whether the beneficiaries of the scheme at issue had legitimate expectations that transitional measures would be laid down. [17]

33. By letter of 16 May 2002, the Belgian authorities notified a new tax scheme applicable to the coordination centres to the Commission, which was registered by the Commission as new aid under reference N 351/2002.

34. On 21 January 2003, the 'Ecofin' Council approved the extension of the effects of certain harmful tax schemes beyond 2005. As regards the Belgian tax scheme applicable to the coordination centres, it provided that centres subject to the scheme on 31 December 2000 could continue to benefit from it until 31 December 2010. [18]

B — *The Commission Decision*

35. On 17 February 2003, the Commission adopted the contested decision, which was notified on the same day to the Kingdom of Belgium.

36. In that decision, the Commission first of all gives its reasons for classifying the tax scheme applicable to the coordination centres as 'existing aid' and the legal basis for the procedure it followed. The decision

15 — Paragraph 33 of the Commission letter set out in Annex 23 to the application by the Kingdom of Belgium.

16 — OJ 2002 C 147, p. 2.

17 — Points 76 and 77 of the decision to initiate the formal investigation procedure.

18 — Point 10 of Annex 29 to the application of the Kingdom of Belgium.

states that Article 1(b) of Regulation No 659/1999 could serve as a legal basis in the matter and that, failing that, Articles 87 and 88 EC were to be treated as the true legal basis of the Commission's action.

37. The decision of 17 February 2003 also indicates that, if it were to be regarded as a withdrawal or amendment of the decisions of 1984 or 1987, it satisfies the conditions for the exercise of the Commission's right to withdraw or amend any unlawful favourable measure.

38. In the remainder of the decision, the Commission sets out the reasons why it takes the view that the various measures which form the tax scheme applicable to the coordination centres satisfy the conditions laid down under Article 87(1) EC, but do not qualify for any of the derogations provided for in Article 87(2) and (3).

39. The Commission lastly considers the legitimate expectations of the coordination centres. It recognises the existence of such expectations and indicates that they justify its allowing centres having an approval on 31 December 2000 to continue to enjoy the benefits of the tax scheme in question until the expiry of their period of approval current when the Decision of 17 February 2003 was notified and 31 December 2010, at the latest. It indicates that its position is based on the following grounds.

40. The Commission states that the approval granted by the Belgian authorities constitutes acknowledgement in advance that the approved centre will satisfy the requirements for benefiting from the derogating scheme laid down under Royal Decree No 187 for 10 years, without having to provide evidence of doing so each year. However, it indicates that that approval does not represent an undertaking on the part of those authorities to the approved centre that it will maintain the benefits conferred by that scheme for 10 years. It also notes that, in so far as it used the procedure for monitoring existing aid, its decision cannot have retroactive effect and that it must ensure legal certainty by setting, if necessary, a transitional period for the phasing out of the effect of the scheme at issue.

41. The Commission considers in that regard that it should take into account the substantial investments made by the coordination centres and the groups to which they belong relating to the creation and development of the infrastructure for the centres and the changes made to the organisation of the structures, networks, procedures and the distribution of activities within the group. It must also take into account the long-term commitments made to staff, property companies and financial institutions. The Commission states that, although approval provides no guarantee as to the continued existence of the tax scheme in question or

of the benefits under it, it recognises that centres were established, investments made and commitments entered into in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the tax scheme. It therefore concludes that it should allow a transitional period so that the scheme for the current beneficiaries may be gradually phased out.

42. However, it adds as the 120th recital:

'Because the approvals do not represent a right to the continuation of the scheme or its advantageous character, even during the approval period, the Commission believes that they cannot, under any circumstances, confer a right to have the scheme renewed when the present approval expires. In view of the explicit restriction of the approval to 10 years it is impossible that a legitimate expectation should have been created as to automatic renewal, which would have amounted to approval that could theoretically last for ever.'

43. The above considerations lead the Commission to draw the following conclusions:

'121. The Commission concludes that the tax scheme covering coordination centres in Belgium is incompatible with the common market and that measures must be taken to remedy the incompatibility of its various components by abolishing or amending them. As of the date of notification of this Decision, new beneficiaries can no longer be covered by this scheme or sections thereof, nor can it be maintained by renewing existing approvals. The Commission notes that centres approved in 2001 have not benefited from the scheme since 31 December 2002.

122. As regards the centres currently covered by the scheme, the Commission acknowledges that the 1984 Decision approving Royal Decree No 187 and the reply to a Parliamentary question given by the Member of the Commission responsible for competition ... gave rise to a legitimate expectation that the scheme did not violate the rules on State aid enshrined in the Treaty.

123. In view of the substantial investments made on this basis, as well as the need to respect legitimate expectations and the legal certainty of the beneficiaries, it is justifiable to allow a reasonable period for eliminating the scheme's impact on the existing approved centres. The Commission takes the view that this reasonable period comes to an end on 31 December 2010. The centres whose

approval expires before this date can no longer make use of their approval after the deadline. After the date on which approval lapses and at any rate after 31 December 2010, it will be unlawful to grant or maintain the tax concessions in question.'

44. The operative part of the Decision of 17 February 2003 originally provided as follows:

'*Article 1*

The tax scheme which currently operates in Belgium for the benefit of coordination centres approved under Royal Decree No 187 constitutes aid incompatible with the common market.

Article 2

Belgium is required to withdraw the aid referred to in Article 1 or to amend it in such a way as to make it compatible with the common market.

As of the date of notification of this Decision, the benefits of this scheme or sections thereof may no longer be granted to new beneficiaries or maintained by renewing existing agreements.

With regard to centres approved before 31 December 2000, the scheme may be maintained until the expiry date of the individual approval applying on the date hereof and until 31 December 2010 at the latest. In accordance with the second paragraph, if approval is renewed prior to that date the benefits of the scheme dealt with in this Decision may no longer be granted, even temporarily.

...'

45. As it decided that the words 'on the date hereof' in the first sentence of the third paragraph of Article 2 of the decision might lead to confusion, the Commission decided to replace them with the words 'on the date of notification of this Decision'. It therefore drew up a corrigendum to that effect, which was notified to the Kingdom of Belgium on 25 April 2003.

46. That corrigendum provides that the third paragraph of Article 2 of the Decision of 17 February 2003 should accordingly read as follows:

'With regard to centres approved before 31 December 2000, the scheme may be main-

tained until the expiry date of the individual approval applying *on the date of notification of this Decision*[19] and until 31 December 2010 at the latest. In accordance with the second paragraph, if approval is renewed prior to that date the benefits of the scheme dealt with in this Decision may no longer be granted, even temporarily.'

47. In the light of that corrigendum, the scope of the transitional measures laid down under the Decision of 17 February 2003 must be understood as follows, as all the parties accepted in the course of the proceedings. All coordination centres benefiting from an individual approval effective at the date the decision was notified, namely 17 February 2003, may continue to benefit from it until its expiry or, if earlier, 31 December 2010. However, no approval may be renewed after 17 February 2003.

C — *Procedures before the Court against the Commission Decision*

48. By application of 25 April 2003, the Kingdom of Belgium brought proceedings for the annulment of the Decision of 17 February 2003, in its original version. It also requested that application of the decision be suspended.

19 — Author's emphasis in order to show the correction.

49. Following the corrigendum notified to the Kingdom of Belgium on 25 April 2003, the latter submitted a fresh application to the Court dated 9 May 2003, on the basis of Article 42(2) of the Rules of Procedure, seeking to raise two new pleas in law and to bring the Commission Decision, in its corrected version, within the scope of its action for annulment.

50. By application of 28 April 2003, Forum 187 brought proceedings before the Court of First Instance of the European Communities for the annulment of the Commission Decision, in its original version. It also requested that application of the decision be suspended. On 16 May 2003, it brought an additional application against the Commission Decision, as corrected.

51. By order of 16 May 2003, the Court of First Instance declined jurisdiction in that action and that application for interim measures in favour of the Court of Justice, where those matters were registered under numbers C-217/03 and C-217/03 R, respectively.

52. By separate document of 16 June 2003, the Commission raised a plea that the action brought by Forum 187 was inadmissible. The latter lodged its observations in reply to that objection on 7 August 2003. By order of 30 March 2004, the Court reserved a decision on that plea until the final judgment.

53. By order of 26 June 2003, the President of the Court gave a ruling on the requests brought by the Belgian Government and Forum 187 that application of the Commission Decision be suspended. He made the following order:

'1. The operation of the decision of the Commission C(2003) 564 final of 17 February 2003 concerning the aid scheme implemented by Belgium in favour of coordination centres established in Belgium is suspended insofar as it prohibits the Kingdom of Belgium from renewing coordination centre authorisations effective as at the date of notification of the decision.

2. The effects of renewals made pursuant to this order shall not extend beyond the day on which judgment is given in the main action.

...'

54. Cases C-182/03 and C-217/03 were joined for the purposes of the oral procedure and the judgment. The parties presented oral argument at the hearing on 14 September 2005.

D — *Facts subsequent to the Commission Decision*

55. First, the Commission carried out an investigation into the new tax scheme applicable to the coordination centres notified by the Kingdom of Belgium by letter of 16 May 2002.

56. By decision of 23 April 2003, the Commission approved the new scheme in so far as it provides for, in particular, prior authorisation for the coordination centres to be granted for a 10-year period and for the tax base to be calculated by reference to the sum of operating costs, coupled with a suitable profit margin. However, as the new scheme also incorporated an exemption for such centres from withholding tax and capital duty and provided that the 'abnormal and gratuitous' advantages granted to those centres fell outside the charge to tax, the Commission initiated the formal investigation procedure in relation to those three measures.

57. Following the initiation of that procedure, the Kingdom of Belgium undertook to withdraw the exemptions concerned and to replace them by other exemptions or reductions applying to all undertakings established in that country. It also undertook to bring all abnormal and gratuitous advantages received by the coordination centres within the charge to tax.

58. By a decision of 8 September 2004, the Commission held that, in the light of those undertakings, the measures constituting the new tax scheme applicable to the coordination centres did not constitute aid for the purposes of Article 87(1) EC. [20]

59. However, at the hearing on 14 September 2005, the representative of the Kingdom of Belgium stated that the Belgian authorities had been unable to obtain sufficient information from the Commission services to put the new scheme into practice and that it had ultimately been abandoned, as had been notified to the Commission by letter of 28 February 2005. He also indicated that the Kingdom of Belgium had opted for measures of general application, which had been adopted in the summer of 2005.

60. Secondly, the Kingdom of Belgium has adopted measures to benefit coordination centres having an approval which expired after the Decision of 17 February 2003.

61. By letter of 20 March 2003, the Minister for Finance of the Kingdom of Belgium notified the Commission, pursuant to Article 88(3) EC, of his intention to grant, until 31 December 2005, the benefit of tax measures similar to those laid down under the scheme for coordination centres to centres having an approval which expired between 17 February 2003 and 31 December 2005.

62. The Kingdom of Belgium also asked the Council, by letter of the same date, to declare those measures compatible with the common market in accordance with the third subparagraph of Article 88(2) EC.

63. By letter of 25 April 2003, the President of the Commission replied to the Belgian Minister for Finance that the Decision of 17 February 2003 had taken effect, that it was not open to Belgium to suspend its application and that, since the decision expressly governed the grant and renewal of benefits under the tax scheme at issue, the letter of 20 March 2003 could not be considered as notification of new aid for the purposes of Article 88(3) EC.

64. By letter of 26 May 2003, the Kingdom of Belgium again notified the Commission that it intended to take the measures set out in its letter of 20 March 2003. By letter of the same date, it also asked the Council to declare the proposed measures compatible with the common market in accordance with the third subparagraph of Article 88(2) EC.

20 — Commission Decision 2005/378/EC concerning the aid scheme which Belgium is proposing to implement for coordination centres (OJ 2005 L 125, p. 10).

65. At its meeting of 3 June 2003, the 'Ecofin' Council gave agreement in principle to that request and instructed the Committee of Permanent Representatives to the take all measures necessary to allow the Council to adopt the proposed decision at the earliest opportunity, and, in any event, before the end of June 2003.

66. By letter of 17 July 2003, the Commission, in reply to the notification given by the Kingdom of Belgium by letter of 26 May 2003, confirmed its reply of 25 April 2004, without prejudice to the interim order of 26 June 2003.

E — *The Council Decision*

67. In its Decision of 16 July 2003, the Council notes the legal and factual background to the request from the Kingdom of Belgium to authorise the proposed measures relating to the coordination centres having an approval which expired between 17 February 2003 and 31 December 2005.

68. In that context, it states that the Commission had held in 1987 and 1990 that the tax scheme applicable to the coordination centres introduced by Royal Decree No 187 did not give grounds for objection. It refers to the circumstances leading that institution to undertake a further investigation into that scheme and describes the terms of the Decision of 17 February 2003. The Council also notes that at its meeting of 26 and 27 November 2000 proposals were approved whereby undertakings benefiting from a harmful tax scheme as at 31 December 2000 could continue to do so until 31 December 2005 and that it reserved the right to grant an extension beyond that date in order to take account of special circumstances.

69. The Council next states that the centres referred to in the application by the Kingdom of Belgium hold temporary approvals, which, by virtue of Royal Decree No 187, were renewable, that if the proposed measures were not to proceed those centres might be obliged to cease operating in Belgium and that such a cessation of activities would have very negative economic and social repercussions for that Member State.

70. The Council also mentions that the Commission provided in its decision for the effects of the tax scheme applicable to the coordination centres to be maintained in the case of approvals expiring after 31 December 2005 and that other decisions of the Commission specified time-limits of up to 31 December 2010 for competitive tax schemes of other Member States, so that the application of the particular measures proposed by the Kingdom of Belgium should not give rise to potential distortions of competition that were disproportionate having regard to the anticipated advantages.

71. The Council concludes from that that exceptional circumstances indeed exist to justify giving the Kingdom of Belgium leave to grant, until 31 December 2005, the benefit of the proposed tax measures to coordination centres having an approval in force as at 31 December 2000 and an approval which expires between 17 February 2003 and 31 December 2005.

72. In the light of those factors, the Council adopted the following decision:

'*Article 1*

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; by way of derogation from the general rules on taxation, it involves:

— application of the normal corporate tax rate to a theoretical tax base corresponding to a variable percentage of certain operating costs (the "cost-plus" method). However, an alternative tax base is used if it exceeds the tax base resulting from application of the "cost-plus" method; this alternative tax base includes the abnormal or benevolent advantages received by the centres and non-deductible expenses,

— application of a special annual tax of EUR 10 000 per employee, with a ceiling of EUR 100 000,

— exemption from the *précompte immobilier* (property tax) on buildings owned by the centres which they use for their professional activity,

— exemption from *précompte mobilier* (withholding tax) on dividends, interest and royalties paid by the centres except, in the case of interest, where the beneficiary is subject to tax on natural persons or to tax on legal persons,

— exemption from *précompte mobilier* (withholding tax) on revenue which the centres receive from money deposits,

— exemption from the 0.50 % registration tax on subscriptions of capital and on increases in authorised capital.

— ...'

F — *Procedure before the Court against the Council Decision*

73. By application of 24 September 2003, the Commission brought an action for the annulment of the Council Decision before the Court.

74. The Council lodged its defence on 16 December 2003, the Commission lodged its reply on 27 February 2004 and the Council lodged its rejoinder on 18 May 2004.

75. After the end of the oral procedure, the Court delivered its judgment of 29 June 2004 in *Commission* v *Council*,[21] in which it held that the Council no longer had the power to authorise, on the basis of the third subparagraph of Article 88(2) EC, the grant to the beneficiaries of unlawful aid which has been declared to be incompatible with the common market by a decision of the Commission of an amount designed to compensate for the repayments which they are required to make pursuant to that decision.[22]

76. The parties made their submissions as to the consequences to be drawn from that judgment in the context of the present action at the hearing on 14 September 2005.

V — The actions

77. I shall start by considering the action brought by the Commission against the Council Decision.

A — *The action against the Council Decision (Case C-399/03)*

1. Forms of order sought and pleas in law

78. The Commission claims that the Council Decision should be annulled and that the latter should be ordered to pay the costs.

21 — Case C-110/02 [2004] ECR I-6333.

22 — Paragraph 47.

79. In support of its application, it raises three pleas in law alleging, first, a lack of competence on the Council's part, secondly, misuse of powers and abuse of process and, thirdly, infringement of the Treaty and the general principles of Community law and, in the alternative, a manifest error of assessment as to the existence of exceptional circumstances.

80. It argues that the first plea is well founded in the light of the judgment in *Commission* v *Council*. It states that the objective of the Council Decision is to maintain in place the tax scheme at issue which it has held to be incompatible with the common market and that it does not relate to a new aid scheme or to individual measures, as the Council contends.

81. It also submits that the Council was no longer competent, *rationae temporis*, to adopt the Decision of 16 July 2003, as Article 88(2) EC allowed it a period of three months in which to determine its position and that the date on which the Kingdom of Belgium notified the Council of the aid in question should be set at 20 March 2003.

82. The Council's primary contention is that the action should be dismissed and it contends, in the alternative, that its decision should be maintained in force until the date on which the Court delivers its judgment. It also maintains that the Commission should be ordered to pay the costs.

83. The Council submits that the solution adopted in the judgment in *Commission* v *Council* cannot be applied to the these proceedings since, in the present case, it authorised new aid, which was not the same as that in relation to which the Commission had given a ruling.

84. It states that the fact that an aid scheme has been held to be incompatible does not prevent the Member State concerned from granting new aid to the undertakings which might have benefited from the previous scheme, as indeed Regulation No 659/1999 expressly provides.

85. It argues that the aid authorised in its decision is not the same as the tax scheme applicable to the coordination centres classified by the Commission as State aid incompatible with the common market for the following reasons: first, at a formal level, it was introduced by different statutory provisions; secondly, unlike the former tax scheme, it applies to a limited number of identifiable undertakings, that is to say the 30-odd coordination centres having an approval which expires between 17 February 2003 and 31 December 2005; lastly, its decision has no effect beyond 31 December 2005.

86. The Council submits that the fact that the Commission declared the tax scheme applicable to the coordination centres to be incompatible with the common market does not preclude the Kingdom of Belgium granting to certain centres tax advantages similar to those provided for by the previous scheme.

87. The Council goes on to state that its decision is not intended to overturn the effects of the Commission Decision. As the Commission has declared that the tax scheme applicable to the coordination centres henceforth constitutes State aid, the Council and the Commission are entitled to authorise aid measures if they form the view that the circumstances justify them.

88. As regards, lastly, the period which elapsed between the application by the Kingdom of Belgium and the Decision of 16 July 2003, the Council has argued that the letter of the Permanent Representative of Belgium to the European Union 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.

2. Appraisal

89. Having regard to the analysis of the division of powers in State aid matters between the Council and the Commission adopted by the Court in *Council* v *Commission*, which was a judgment of the Full Court, I am of the opinion that the plea alleging lack of competence by the Council to adopt the Decision of 16 July 2003 is well founded.

90. In support of my analysis, I shall start by noting the facts and the reasoning of the Court in that judgment.

91. In 1994 and 1999, the Portuguese Republic introduced various aid schemes in favour of a number of agricultural undertakings in the form of credits, moratoria on the repayment of borrowings and loans at favourable rates. The Commission held that aid to be incompatible with the common market, in whole or in part, and ordered that it be repaid by the beneficiaries, together with interest on the sums due.

92. Following the decisions of the Commission, the Portuguese Republic requested the Council, on the basis of the third subparagraph of Article 88(2) EC, to authorise it to grant aid to the Portuguese farmers obliged to repay that aid. The new aid was of the same amount as the sums due.

93. The Council granted that request. [23] It stated that repayment of the aid granted by the Portuguese Republic would threaten the economic viability of a number of beneficiaries and would have extremely damaging social effects in certain regions of that Member State. [24] It concluded from that that exceptional circumstances existed, within the meaning of the third subparagraph of Article 88(2) EC, justifying the authorisation of the proposed measure.

94. The Commission brought proceedings for the annulment of that decision before the Court, in which it invoked, inter alia, a plea that the Council was not competent to take such a decision.

95. In its appraisal of that plea, the Court adopted a two-stage reasoning. First, it defined the scope of the third subparagraph of Article 88(2) EC, which lays down the powers of the Council in matters of State aid. It stated that that provision was exceptional in character, as Articles 87 EC and 88 EC reserve a central role for the Commission in determining whether aid is incompatible.

96. It also concluded from the third and fourth subparagraphs of Article 88(2) EC that, if the Member State concerned has made no application to the Council before the Commission declares the aid in question to be incompatible with the common market, the Council is no longer authorised to exercise the exceptional power conferred on it by the third subparagraph in order to declare such aid to be compatible with the common market. [25]

97. It added that such an interpretation, which avoids the same State aid being the subject of contrary decisions taken successively by the Commission and the Council, contributes to legal certainty.

98. Secondly, the Court held that the limitation thus imposed on the Council's powers implies that it also lacks the power to rule on an aid measure having the aim of allocating to beneficiaries of the unlawful aid declared to be incompatible by a Commission decision an amount designed to compensate for the repayments which they are obliged to make pursuant to that decision.

99. It stated that it had consistently been held that the abolition, by means of recovery, of State aid which has been unlawfully

23 — Council Decision 2002/114/EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998 (OJ 2002 L 43, p. 18).

24 — 13th recital in the preamble to Decision 2002/114.

25 — *Commission* v *Council*, paragraph 33.

granted is the logical consequence of its being found to be unlawful, since the aim of obliging the Member State granting it to abolish aid is to restore the previous situation and that objective is obtained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient.

100. It concluded from that that to hold that a Member State may grant to beneficiaries of unlawful aid, which has been declared to be incompatible with the common market by a decision of the Commission, 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 amount to thwarting the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC.

101. The Court stated that, in the same way that the Council cannot paralyse the effectiveness of a decision of the Commission finding aid to be incompatible with the common market by itself declaring the aid compatible with the common market, nor can the Council thwart the effectiveness of such a decision by declaring compatible with the common market, in accordance with the third subparagraph of Article 88(2) EC, aid designed to compensate the beneficiaries of the unlawful aid declared to be incompatible for the repayments they are required to make pursuant to that decision. [26]

102. The application of those rules in the present case leads to the conclusion that the Council could not validly adopt the Decision of 16 July 2003.

103. It was only after the Decision of 17 February 2003 that the Kingdom of Belgium brought an application before the Council under the third subparagraph of Article 88(2) EC. Accordingly, the effect of the judgment in *Commission* v *Council* [27] is that the Council was no longer authorised to exercise the exceptional power conferred on it by that provision in order to declare compatible with the common market the national scheme which the Commission had declared to be incompatible in that decision. Similarly, the judgment provides that the Council could not thwart the effectiveness of that decision.

104. Contrary to what the Council maintains, I am of the opinion that in adopting its Decision of 16 July 2003 it infringed both those rules.

26 — *Commission* v *Council*, paragraphs 44 and 45.
27 — Paragraph 33.

105. Thus, a comparison of the measures described in Article 1 of the Council Decision and in the letters from the Kingdom of Belgium of 28 March and 26 May 2003 shows that the content of those measures is the same as those laid down under the tax scheme applicable to the coordination centres which was the subject of the Commission Decision. The measures authorised by the Council involve the application of the same method for determining taxable benefits, together with liability for the same tax in respect of the number of employees as in the tax scheme applicable to the coordination centres. They also comprise the same exemptions from withholding tax, property tax and capital duty.

106. It should next be noted that the measures referred to in the Council Decision are authorised for the benefit of the coordination centres having rights on 31 December 2000 under the tax scheme declared to be incompatible with the common market and having an approval which expired between 17 February 2003 and 31 December 2005. Those measures are accordingly authorised for the benefit of undertakings which had rights under the aid scheme declared to be incompatible by the Commission Decision and which, under that decision, could not obtain a renewal under that scheme.

107. Lastly, it is clear from the statement of reasons in the Council Decision that its object is to overcome the effects of the Commission Decision as regards the coordination centres having an authorisation which expired between 17 February 2003 and 31 December 2005. [28]

108. In so authorising the Kingdom of Belgium to treat the coordination centres having an approval expiring between 17 February 2003 and 31 December 2005 in the same way for tax purposes as under the scheme which was declared to be incompatible by the Commission in its Decision of 17 February 2003 in order to overcome the inability to renew that scheme for the benefit of those centres, the Council did indeed rule on the compatibility of a scheme in relation to which the Commission had already adjudicated and it did indeed seek to negate the effects of that decision in their regard.

109. None of the arguments relied on by the Council appears to me to be capable of calling that analysis into question. Thus, the fact that the measures authorised by the Council were based, in terms of form, on new legislative provisions enacted by the Kingdom of Belgium and not on a request that the effects of the tax scheme introduced by Royal Decree No 187 be extended justifies their being treated as separate measures. It is plain that the division of powers between the Council and the Commission laid down by

28 — Support for that analysis it also to be found in the grounds put forward by the Permanent Representative of the Kingdom of Belgium to the European Union in support of the application for authorisation of the measures in question, which are set out in his letters to the Council of 28 March and 20 May 2003. In those letters, he essentially states that his Government was of the view that the Commission Decision, inasmuch as it did not allow the renewal of the authorisations of the centres concerned, infringed their legitimate expectations and that he intended to maintain the tax scheme applicable to the coordination centres in place for their benefit until 31 December 2005.

the Court in its judgment in *Commission* v *Council* could be easily circumvented and the effectiveness of a decision of incompatibility could be largely undermined if it were to be sufficient for the Member State concerned to reproduce in identical terms, in new legislation, the provisions of an aid scheme declared to be incompatible with the common market and to submit it to the Council.

110. In the light of the judgment in *Commission* v *Council*, it is necessary to have regard to the effects of the measures to which the decisions taken by the Commission and thereafter by the Council relate in order to determine whether the latter acted within the scope of the powers conferred on it by the third subparagraph of Article 88(2) EC.

111. Similarly, the arguments that the Council Decision covers only a precise and determined number of undertakings and has effects which are limited as to time do not justify the conclusion that the Council was entitled to authorise the measures concerned on the basis of the third subparagraph of Article 88(2) EC.

112. As the reasoning set out in the judgment in *Commission* v *Council* makes clear, the object of the division of powers between the Council and the Commission in matters of State aid is to contribute to legal certainty by avoiding the same aid being the subject of contrary decisions taken successively by those institutions. [29] Where the Commission has declared aid to be incompatible with the common market, it is for the Member State and the beneficiaries of that measure to make use of the means of obtaining redress before the Community judicature and the national courts in order to challenge, directly or indirectly, that decision. Legal certainty also requires that, where the Commission's decision has become final, it cannot be annulled by a Council Decision. Lastly, it is necessary to avoid any conflict between a decision of the Council and a judgment of the Community Courts delivered in relation to the previous decision of the Commission.

113. Having regard to those objectives, the determinative criterion is whether the Council Decision is, or is not, in conflict with the Commission Decision or deprives it of all effect. It is therefore of little relevance that the Council Decision applies to a smaller number of undertakings than the Commission Decision or that the measures it authorises have a shorter duration than the tax scheme declared to be incompatible by the Commission. In the present case, it is sufficient to note that Article 2 of the Commission Decision provides that, as of the date of its notification, the benefits of the scheme in question may no longer be extended by the renewal of existing agreements (second paragraph) and that, if the approval is to expire before 31 December

29 — Paragraph 35.

2010, the benefits of the scheme may no longer be granted, even temporarily (third paragraph).

114. It follows that the Council no longer had the power to authorise the Kingdom of Belgium to grant to its centres a tax treatment that was the same as that declared to be incompatible by the Commission. I am therefore of the opinion that the first plea relied on by the Commission, alleging lack of competence on the Council's part to adopt the Decision of 16 July 2003, is well founded and that the latter should accordingly be annulled.

115. In the light of the foregoing, I therefore propose that the Court should annul the Council Decision, without it being necessary to consider the other pleas relied on by the Commission in support of its application. The Council, which is the unsuccessful party to this action, should pay the costs.

116. The Council requests that, should its Decision of 16 July 2003 be annulled, its effects be maintained in force until the date on which the Court's judgment is delivered.

117. I do not consider that that request should be granted for the following reasons. The object of the division of powers in State aid matters laid down under Article 88 EC is, as mentioned above, to avoid conflict, not only between the Commission and the Council in relation to the same national measure, but also between the Council and the Community Courts when the latter rule on an application for the annulment of a Commission decision.

118. In the present case, the Decision of 17 February 2003 is the subject of an action brought by each of the Kingdom of Belgium and Forum 187. The object of the application brought by the Member State is the annulment of the decision in so far as it prohibits the renewal of the approvals expiring after 17 February 2003. It is also the case that the Kingdom of Belgium and Forum 187 have, by virtue of the interim order of 26 June 2003, been granted an order for the suspension of the operation of the Commission Decision in so far as it prohibits any renewal of approvals from that date. It follows that, by virtue of that order, the Kingdom of Belgium may renew the approval granted to those centres having an approval which expires after 17 February 2003. That order therefore has effects which are similar to those of the Council Decision because, as mentioned above, the tax measures covered by the latter are the same as those laid down under the tax scheme applicable to the coordination centres.

119. That being the case, the Council has no interest in requesting that the effects of its decision be maintained until the Court delivers its judgment if the Court grants

the applications brought by the Kingdom of Belgium and Forum 187.

120. If, on the other hand, the Court rejects those applications and negates the effects of the interim order, it would be illogical and contrary to the division of powers laid down under Article 88 EC to provide that the Council Decision is to be effective until the Court delivers its judgment. In so far as that judgment cannot, in fact, be delivered before 31 December 2005, such an approach would mean that the annulment of the Council Decision becomes pointless.

B — *The actions against the Commission Decision (Joined Cases C-182/03 and C-217/03)*

1. Forms of order sought

(a) Case C-182/03 Belgium v Commission

121. The Kingdom of Belgium asks the Court to annul the Commission Decision in so far as it does not authorise it go grant, even temporarily, renewal of 'coordination centre status' to those centres which benefited from it on 31 December 2000.

122. It application seeks the annulment of the second and third paragraphs of Article 2 of the Commission Decision in so far as that article provides that 'as of the date of notification of this Decision, the benefits of this scheme or sections thereof may no longer be ... maintained by renewing existing agreements' and that 'in accordance with the second paragraph, if approval is renewed prior to [31 December 2010] the benefits of the scheme dealt with in this Decision may no longer be granted, even temporarily'. [30]

123. That Member State also asks that the Commission be ordered to pay the costs, including those relating to the interlocutory proceedings.

124. In the document of 9 May 2003, lodged following the corrigendum of 23 April 2003, the Kingdom of Belgium raised two new pleas in law, directed against that corrigendum. The first of those pleas alleged infringement of the principle of legal certainty by reason of the difficulties of interpretation which, according to that Member State, the new wording of the third paragraph of Article 2 of the Decision of 17 February 2003, as amended by that corrigendum, continued to give rise to. However, in the light of the explanations provided by the Commission in its defence as to the meaning of that article and the scope

30 — Application of the Kingdom of Belgium, paragraph 18.

of the interim measures which it lays down, the Kingdom of Belgium expressly withdrew that new plea in its reply. [31] It is therefore unnecessary to consider that plea.

125. The second of those new pleas involves the circumstances in which the corrigendum was adopted. In that plea, the Kingdom of Belgium stated that it had serious doubts as to the propriety of the procedure under which that document was adopted. It also expressly reserved the right to challenge its validity. It argued that it was for the Commission to indicate the decision-making procedure under which the measure had been taken and to supply evidence that it had been attached to the summary note or the day-note, as the case may be, provided for in Article 18 of the Rules of Procedure of the Commission. [32] Failing that, it would be the task of the Court to prescribe the measures of inquiry, by order made pursuant to Article 45 of its Rules of Procedure, which it considered appropriate, while reserving the applicant's rights.

126. In its defence, the Commission argued that the corrigendum of 23 April 2003 had had the same official authentication seals applied to it as the original version of the Decision of 17 February 2003. It also maintained that that measure had been adopted under the oral procedure at the meeting of the College of 23 April 2003, and was fully compliant with its rules of procedure.

127. It should be pointed out that in its additional application the Kingdom of Belgium did not ask for the annulment of the corrigendum, but merely reserved the right to challenge its validity at a later stage. It therefore did not bring an actual application before the Court, pursuant to Article 38 of the Rules of Procedure.

128. I should also note that the Kingdom of Belgium has given no reason to believe that the corrigendum was adopted without regard to the Rules of Procedure of that institution and that it is accordingly vitiated by an infringement of its essential procedural requirements. The Kingdom of Belgium does no more in that regard than refer to the fact that the document was a corrigendum. However, the explanations provided by the Commission show that the measure followed the same adoption procedure as the original version of 17 February 2003. [33] Support for that position is to be found in the fact that the Commission's letter of 23 April 2003 and the corrected version of the Decision of 17 February 2003 bear the same authentication seals as the original version of the decision. Lastly, it appears that neither in its reply nor in the oral procedure did that Member State maintain its challenge to the propriety of the procedure followed for the adoption of that corrigendum.

31 — Paragraphs 45 and 46.

32 — OJ 2000 L 308, p. 26.

33 — See, to that effect, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 68.

129. I am therefore of the opinion that the second new plea put forward by the Kingdom of Belgium in its additional application is not admissible, as it is not raised in support of an application or, alternatively, that it should be rejected.

130. In the light of the foregoing, the matter brought before the Court by the Kingdom of Belgium is thus an application for partial annulment of the Commission Decision, in so far as it does not authorise it to renew, even temporarily, the approvals of the coordination centres which benefited from the scheme in question on 31 December 2000 and had an approval which expired before 31 December 2010.

131. The Commission contends that that application should be rejected and that the Kingdom of Belgium should be ordered to pay the costs, including those relating to the interlocutory procedure.

(b) Case C-217/03 Forum 187 v Commission

132. In its application received at the Registry of the Court of First Instance on 30 April 2003, Forum 187 asked that Court to annul the Decision of 17 February 2003 in whole or in part.

133. By that application, Forum 187 seeks primarily the annulment of that decision in its entirety, in particular in so far as Article 1 of the decision holds the tax scheme applicable to the coordination centres to be State aid incompatible with the common market. It also seeks, in the alternative, partial annulment of the Commission Decision inasmuch as it failed to lay down adequate transitional measures.

134. In its original application, Forum 187 complained that the Commission had failed to adopt transitional measures in relation to, first, coordination centres having an approval which was renewed between 31 December 2000 and 17 February 2003 and, secondly, those having an approval which expired after 17 February in 2003 and in 2004. However, following the correction of Article 2 of the Decision of 17 February 2003, Forum 187 withdrew its application as regards the centres having an approval which was renewed between 31 December 2000 and 17 February 2003. [34]

135. Lastly, Forum 187 seeks an order that the Commission pay the costs of Cases C-217/03 and T-276/02. [35]

34 — Paragraph 36 of Forum 187's reply.

35 — *Forum 187* v *Commission*, in which the order of the Court of First Instance of 2 June 2003 was granted ([2003] ECR II-2075).

136. Following the corrigendum of the Decision of 17 February 2003, Forum 187 lodged at the Court an additional application of 16 May 2003, in which it stated that the Commission's error in the wording of Article 2 of the decision had led it to put forward arguments which were no longer relevant. It asked that that institution be ordered to bear the costs thereby occasioned, whatever the result of the action for annulment might be.

137. The Commission contends that the Court should reject the action brought by Forum 187 as being manifestly inadmissible and, in the alternative, unfounded. It also contends that Forum 187 should be ordered to pay the costs.

138. I shall start by considering the plea of inadmissibility raised by the Commission against the action brought by Forum 187.

2. The admissibility of the action brought by Forum 187

(a) Arguments of the parties

139. The Commission submits that Forum 187 does not have *locus standi* to challenge the Decision of 17 February 2003, which is not addressed to it, since it is not directly and individually concerned by the decision.

140. It states that an association such as Forum 187, which was constituted in order to protect the collective interests of a category of persons, cannot be individually concerned by a measure affecting the general interests of that category. Forum 187's application could be admissible only if that association were to show that its own interests are affected by the Decision of 17 February 2003, or that it is acting as representative of a number of its members who themselves would have *locus standi*.

141. As regards the first point, the Commission argues that Forum 187 cannot claim to be directly and individually concerned by the Decision of 17 February 2003 by reason of its position in relation to the Belgian authorities and its participation in the administrative procedure leading to the decision.

142. It states that, according to the judgment in *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission*,[36] the mere fact that Forum 187 has submitted observations on behalf of its members during that procedure is not in itself sufficient to confer the requisite *locus standi* on it. It maintains that it has never

36 — Case T-86/96 [1999] ECR II-179 ('*ADL*').

recognised Forum 187 as being entitled to conduct negotiations on behalf of its members, nor does that association enjoy any official or quasi-official status with the Belgian authorities. The position of Forum 187 is thus different from that of the association involved in the facts leading to the judgment in *AIUFFASS and AKT* v *Commission*, [37] which was in a unique situation in the textile industry sector. Nor is the position of Forum 187 similar to that of the Landbouwschap, whose action was declared to be admissible in *Van der Kooy and Others* v *Commission* [38] and which had negotiated with the Netherlands Government the preferential gas tariff held to be State aid incompatible with the Treaty.

143. The Commission also states that Forum 187 cannot claim that the Decision of 17 February 2003 threatens its *raison d'être*, since the decision does not require in any way that the activities of the coordination centres in Belgium should cease.

144. As regards the second point, the Commission argues that its decision covers an aid scheme which is available to a category of undertakings and not a group of individual measures granting aid to one or more undertakings identified by name. It is therefore a measure of general application which applies to objectively determined situations and which has legal effects in relation to categories of persons denoted in the abstract. The Commission contends that the decision also does not apply to a closed class of persons, the number and identity of which are known or can be ascertained, but to all undertakings, present, past and future, which may have been entitled to claim the benefits of the tax scheme applicable to the coordination centres.

145. The Commission states that Forum 187 does not refer to any feature which would lead to the conclusion that some of its members are concerned 'by reason of certain attributes peculiar to them, or by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed', to adopt the wording which has been used since *Plaumann* v *Commission*. [39] An undertaking which currently manages a coordination centre or which contemplates setting up such a centre in the future would be affected by the Commission Decision only by virtue of its objective status as a current or potential beneficiary of the tax scheme at issue, so that it is not directly and individually concerned by the Decision of 17 February 2003.

146. Moreover, none of the members of Forum 187 was given special treatment by either the Belgian authorities, when the scheme was introduced, or by the Commis-

37 — Case T-380/94 [1996] ECR II-2169.

38 — Joined Cases 67/85, 68/85 and 70/85 [1988] ECR 219.

39 — Case 25/62 [1963] ECR 95, 107.

sion, when it was investigated. The position of the members of Forum 187 differs from that of the beneficiaries of individual aid granted under a sectoral scheme which they are obliged to repay, as was the case in *CETM* v *Commission*,[40] *Italy and Sardegna Lines* v *Commission* [41] and *Italy* v *Commission*.[42] In the present case, no member of Forum 187 had an existing and established right which was affected by the Decision of 17 February 2003. The Commission states in that regard that the transitional measures allowed all the coordination centres to benefit from their current approval until the date of its expiry, save for those having an approval which extended beyond 31 December 2010.

147. As regards more particularly the coordination centres having an approval which expired shortly after the Decision of 17 February 2003, their situation was no different from that of the other members of Forum 187, so that it could be could be said that they were distinguished individually in the same way as an addressee. Where a tax scheme provides a benefit that is limited as to time, it is inevitable that not all approvals will expire at the same point. The date on which such expiry occurs is an objective factor which shows that those centres are affected by a general measure and that such an effect may vary in its application. The Commission also points out that those centres did not have an established right to the renewal of their approval. The question whether they might have a legitimate expectation that their approval would be renewed is one which goes to the merits.

148. Lastly, the members of Forum 187 are not completely precluded from bringing proceedings, as they can challenge any measure taken by the national authorities which affects their tax position before the Belgian courts. They can challenge the validity of the Decision of 17 February 2003 in the context of those proceedings.

149. Forum 187 contests the plea of inadmissibility raised by the Commission and submits that its application should be held to be admissible on two grounds. First, a number of its members are directly and individually concerned by the Commission Decision. These comprise, first, the 30 centres which had their approval renewed during 2001 and 2002 and for which the period during which they may benefit from the tax scheme at issue is restricted to 31 December 2010. Secondly, they comprise the eight centres having an application for renewal which was pending when the Commission Decision was adopted and

40 — Case T-55/99 [2000] ECR II-3207.

41 — Joined Cases C-15/98 and C-105/99 [2000] ECR I-8855.

42 — Case C-298/00 P [2004] ECR I-4087.

which cannot, because of it, benefit from such an application. [43]

150. Forum 187 secondly submits that it is affected by the Commission Decision as it is the representative body for the coordination centres which is recognised by the Belgian authorities, with which it has a quasi-official status, as is evidenced by the documents annexed to its reply to the plea of inadmissibility. It collaborated closely with those authorities when the Commission and the Code of Conduct Group investigated the tax scheme applicable to the coordination centres and the Belgian Government regularly asked it to inform its members of changes in the situation. Forum 187 is therefore individually concerned by the Commission Decision, in accordance with the principles laid down by the Court in *Van der Kooy and Others* v *Commission*.

151. Forum 187 adds that it is individually concerned by the Commission Decision since the decision affects its *raison d'être*. Thus, in the absence of any replacement tax scheme, a large number of coordination centres will be obliged to ask themselves whether they wish to remain in Belgium.

152. Forum 187 lastly claims that it played an important part in the administrative procedure before the Commission and that the latter informed it directly of its decision.

(b) Appraisal

153. As was stated at the hearing and as is clear from case-law, an association such as Forum 187, which is responsible for protecting the collective interests of undertakings, is, as a matter of principle, entitled to bring an action for annulment against a final Commission Decision in matters of State aid only in two cases. Its application is admissible, first, where the undertakings which it represents or some of those undertakings themselves have *locus standi*. [44] The association is then considered to be acting in place of its members. Secondly, its action is also admissible if it can prove an interest of its own in bringing the action. Case-law recognises that such a situation may arise where, in particular, the association's position as negotiator has been affected by the measure which it is sought to annul. [45]

43 — According to the table set out in Annex 4 to the application, the eight renewal applications which were pending when the decision was adopted comprise two applications where the new period of approval might have commenced in July and in October 2003, five applications where the period of approval might have commenced on 1 January 2004 and one application where that period might have commenced on 1 January 2005.

44 — Case C-6/92 *Federmineraria and Others* v *Commission* [1993] ECR I-6357, paragraph 17.

45 — Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 29 and 30, and *AIUFFASS and AKT* v *Commission*, paragraph 50.

154. That delineation of the admissibility of an action brought by an association for the protection of collective interests before the Community Courts flows from the fourth paragraph of Article 230 EC, which makes an action for annulment brought by natural or legal persons against a decision which is not addressed to them subject to the requirement that it concern them both directly and individually. If the measure in question does not satisfy those requirements, an action to challenge it by a natural or legal person is inadmissible. Furthermore, each of those necessary requirements involves a question of public policy, so the Community judicature must raise the inadmissibility of its own motion. [46]

155. An association for the protection of collective interests is therefore not entitled to seek the annulment of a decision which is not addressed to it unless that decision concerns it or its members directly and individually. It follows that, in accordance with settled case-law, an association is not entitled to bring proceedings against such a measure for the benefit of the general and collective interests of the undertakings which it represents. [47] It is thus a question of preventing parties being able, through the creation of such an association, to circumvent the requirements of the fourth paragraph of Article 230 EC. [48]

156. It is in the light of those considerations that the admissibility of the action for annulment brought by Forum 187 against the Commission Decision should be appraised. For that purpose, I shall start by considering whether the action brought by that association is admissible on the basis that it is affected by that decision in terms of its own interests.

(i) The admissibility of the action brought by Forum 187 on the basis that it is itself directly and individually concerned

157. Forum 187 maintains that it is individually concerned by the Commission Decision because, first, its position as negotiator was affected by that decision and, secondly, the decision threatened its very existence. I am of the opinion that Forum 187's arguments cannot be accepted as regards either of these points.

158. As regards, first, the impact on its position as negotiator, it should be noted that

46 — See, inter alia, Case 294/83 *Parti écologiste 'Les Verts'* v *Parliament* [1986] ECR 1339, paragraph 19; *CIRFS and Others* v *Commission*, paragraph 23; and *Italy* v *Commission*, paragraph 35.

47 — Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471, 479 and 480; order of 18 December 1997 in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45; *ADL*, paragraph 55; and order of 29 April 1999 in Case T-78/98 *Unione provinciale degli agricoltori di Firenze and Others* v *Commission* [1999] ECR II-1377, paragraph 36.

48 — Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60, and *ADL*, paragraph 65.

this criterion was laid down by the Court in its judgment in *Van der Kooy and Others* v *Commission*, the facts of which are highly unusual.

159. Thus, the Court held in relation to the circumstances which gave rise to that judgment that the decision given by the Commission classifying preferential tariffs for the supply of gas for glasshouse growers as State aid incompatible with the common market affected the position as negotiator of the Landbouwschap, the body established under Netherlands public law responsible for protecting the interests of operators in the agricultural sector, not only because that body had actively participated in the formal investigation procedure initiated by the Commission, but also because it had negotiated those tariffs with the supplier, with, moreover, its signature appearing on the agreement establishing those tariffs and that, following the Commission's decision, it had been obliged to undertake fresh negotiations and to enter into a fresh agreement. Accordingly, the Landbouwschap had, in effect, jointly participated in the framing of the national scheme at issue.

160. In *CIRFS and Others* v *Commission*, the Court also accepted that an application brought by an association was admissible, where the latter's position as negotiator was affected in a different way. In that case, the matter before the Court was an action brought by the CIRFS, an association whose membership consisted of the main international producers of synthetic fibres against a decision in which the Commission had held that aid granted by a Member State did not require to be the subject of prior notification because that aid did not fall within the scope of the 'discipline' agreed to by the Member States in relation to aid to the Community synthetic fibre industry, which was set out in a Commission notice.

161. The Court held that the position of the CIRFS as negotiator was affected because that association had pursued, in the interest of the main international producers of synthetic fibres, a number of actions connected with the policy of restructuring that sector of activity and that it had, in particular, acted as the Commission's interlocutor with regard to the introduction of the discipline relating to the conditions for the grant of State aid and its extension and adaptation. The CIRFS had thus actively participated in the development of the discipline setting out the rules for the grant of aid in the sector concerned.

162. As the Court has recently confirmed in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, [49] participation in the formal investigation procedure in order to protect the collective interests of the operators which an association represents does not prove that the latter is affected by the

49 — Case C-78/03 P [2005] ECR I-10737.

decision in question in terms of its own interests. [50] The position as negotiator of such an association is to be considered as affected if, and only if, it participated actively in the investigation adoption of the national measure in question, as was the case in *Van der Kooy and Others* v *Commission*, or the legal rules under which it was enacted, as the CIRFS had done in relation to the discipline applying to the award of aid in the business sector concerned.

163. The matters relied on by Forum 187 does not establish that it participated at such a level. It is true that those matters show that it maintained contacts with the Belgian authorities in order to ensure the proper application of the tax scheme in question. However, that does not mean that it was involved in the determination of the content of the various measures laid down under the scheme at issue which were considered to be State aid by the Commission. It neither negotiated nor signed any agreement establishing the tax scheme applicable to the coordination centres. Nor, in order to give effect to the contested decision, did it initiate fresh negotiations or conclude a new agreement concerning those provisions. [51] I am accordingly of the view that it cannot be affected by the Decision of 17 February 2003 in its 'position as negotiator'.

164. As regards, next, the argument that the Commission threatened the very existence of Forum 187, were that argument to be well founded it could lead to that association's application being found to be admissible, because its own interests would then be affected. However, I am of the view that that argument is not be well founded in the present case for the following reasons.

165. Forum 187 submits that the effect of the Commission Decision is that, in the absence of a replacement scheme, the coordination centres will be forced to cease their activities in Belgium. As the Commission points out, its Decision of 17 February 2003 does not prohibit the carrying on by those centres of their activities in Belgium, nor does it impose any restrictions on those activities. It extends only to the tax scheme applying to those centres and does not prevent the Kingdom of Belgium from establishing a replacement tax scheme. Furthermore, Forum 187 argues in its second plea, alleging infringement of Article 87(1) EC, that the various tax measures laid down by the scheme in question and classified as 'State aid' by the Commission do not confer any economic advantage on those centres. That being the case, it is thus difficult to accept that the abolition of that tax scheme will lead all the coordination centres or a significant number of them to cease their activities in that Member State.

166. I am therefore of the opinion that Forum 187 is not individually concerned by the Decision of 17 February 2003 by virtue of

50 — Paragraph 56. See also Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraphs 42 and 45.

51 — See, to that effect, *ADL*, paragraph 62.

being affected by it as regards its own interests.

167. It is necessary at this point to consider whether the application for annulment brought by Forum 187 is admissible on the ground that some of its members themselves have *locus standi* to bring such an action before the Community Courts.

(ii) The admissibility of the application brought by Forum 187 on the ground that it is acting in place of some of its members

168. Forum 187 submits that its application should be held to be admissible since it represents two groups of coordination centres which are directly and individually concerned by the Commission Decision. Those groups comprise, first, 30 centres having an approval which was renewed in 2001 or 2002 and for which that decision limits the period of application of the tax scheme in question to 31 December 2010 and, secondly, eight centres which had a pending application for renewal and which are, by virtue of that decision, prevented from obtaining such a renewal.

169. As the Court expressly confirmed in *Codorniu* v *Council*,[52] the fact that a Community measure has a general sphere of application does not prevent it from being of direct and individual concern to certain traders and thus constitute a decision in their regard. The fact, in the present case, that the Commission Decision is, in relation to traders, to be regarded as a measure of general application, inasmuch as it holds the tax scheme applicable to the coordination centres, that is to say to a category of traders referred to in a general and abstract manner, to be incompatible with Community law, does not prevent it from being of direct and individual concern to some of those centres by reason of their own characteristics.

170. There is no challenge on the Commission's part in relation to the first condition laid down by the fourth paragraph of Article 230 EC, which requires that the centres belonging to the two groups represented by Forum 187 must be directly concerned by the Decision of 17 February 2003. I am also of the opinion that that condition is satisfied. It is clear from case-law that natural or legal persons who are concerned by the contested measure are directly concerned by it where that measure leaves no discretion to its addressees who are entrusted with the task of implementing it, with such implementation being, in terms of the customary expression, 'purely automatic and resulting from Community rules without the application of other intermediate rules'.[53]

52 — Case C-309/89 [1994] ECR I-1853, paragraph 19.

53 — See, inter alia, Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited there.

171. That is indeed the case in these proceedings, since the Commission Decision, having declared the tax scheme applicable to the coordination centres to be incompatible with the common market, goes on to prohibit the Kingdom of Belgium from granting renewals to centres having an approval which expires after 17 February 2003 and provides that approvals renewed before that date cannot extend beyond 31 December 2010. The Belgian authorities thus have no discretion in the application of those provisions.

172. However, the issue in the present case is whether the centres belonging to the two groups referred to by Forum 187 fall to be considered as being individually concerned by the Commission Decision. It is therefore necessary to establish whether the criteria laid down by the Court in *Plaumann* v *Commission* and subsequently confirmed by established case-law, [54] those two groups are affected by the Decision of 17 February 2003 by reason of certain attributes peculiar to them, or by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and distinguishes them individually 'just as in the case of the person addressed'.

173. As the Commission points out, the general sphere of application of a measure as regards certain traders is not called into question by the mere fact that they are affected to a greater extent than or in a different way from other traders. It is in the nature of a general provision that its uniform application may affect interested parties in different ways, depending on their precise situation. In the particular field of State aid, it is also settled case-law that an undertaking cannot, as a rule, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. [55]

174. However, it is also clear from case-law that when the contested measure affects a group of persons which were identified or identifiable at the time when that measure was adopted and in accordance with criteria which are specific to the members of that group, the latter may be considered to be individually concerned by that measure, as members of a limited class of traders. [56]

54 — See, inter alia, Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45.

55 — *Van der Kooy and Others* v *Commission*, paragraph 15; *Federmineraria and Others* v *Commission*, paragraph 14; and *Italy and Sardegna Lines* v *Commission*, paragraph 33.

56 — Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import* v *Commission* [1965] ECR 405, 412 ; Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 31; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11; Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraphs 25 to 30; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 67; and Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 41.

175. An action brought by such persons has thus been declared to be admissible when the contested measure modifies the applicant's rights retrospectively. The Court decided that point in its judgment in *Toepfer and Getreide-Import* v *Commission*, in which it accepted for the first time that a person could be individually concerned by a decision addressed to a Member State. [57] It also adopted that approach in its judgment in *Bock* v *Commission*, [58] and in its judgments in *Agricola commerciale olio and Others* v *Commission* and *Savma* v *Commission*. [59]

176. In its judgment in *CAM* v *Commission*, [60] the Court also accepted that the applicant had *locus standi* when the contested measure concerned situations which existed at the time of its adoption and denied the benefit of acquired rights in respect of future transactions. [61]

177. It follows that where rights previously acquired by individuals are affected by a Community measure, those individuals are entitled to challenge the lawfulness of that measure before the Community Courts.

178. In the light of that case-law, I am of the opinion that the coordination centres having an approval which was renewed during 2001 and 2002 should be held to be individually concerned by the Commission Decision.

57 — The Court held as admissible an action by two companies which imported grain into Germany brought against a Commission decision which retrospectively authorised that Member State to take protective measures pursuant to which their applications for an import licence had been rejected.

58 — Case 62/70 [1971] ECR 897. In that judgment, the Court held as admissible an action brought by a company which imported foodstuffs against a Commission decision authorising the Federal Republic of Germany not to apply Community treatment to certain products originating in China and put into free circulation in the Benelux countries, in that that decision also concerned the importing of products in respect of which applications for licences were pending before the German administration at the time when it came into force. Thus, on 4 September 1970, the applicant had requested an import licence from the competent German authority for a consignment of Chinese mushrooms which were in free circulation in the Netherlands. On 11 September 1970, that authority gave the applicant notice that it would reject that application as soon as the Commission had given its authorisation to that effect. By decision of 15 September 1970, the Commission authorised the Federal Republic of Germany to exclude from Community treatment not only future applications to import black mushrooms from China but also pending applications.

59 — Case 232/81 [1984] ECR 3881 and Case 264/81 [1984] ECR 3915. The actions involved applications brought by tenderers against a Commission regulation repealing a previous regulation on the basis of which the Italian intervention agency had put up for sale a certain quantity of olive oil. The Court held that, as the situation between the parties to the sale was determined, 'any intervention on the part of the Community institutions preventing [the Italian intervention authority] from carrying out its obligations to the tenderers designated by the drawing of lots necessarily constitutes a measure of direct and individual concern to them' (paragraph 11 of both judgments).

60 — Case 100/74 [1975] ECR 1393.

61 — The case involved a company which had obtained, on 19 July 1974, an export licence for 10 000 tonnes of barley, valid until 16 October 1974. In terms of a Council regulation, the target and intervention prices applicable inter alia to cereals were to be subject to an increase of five per cent from 7 October 1974. However, by a regulation of 4 October 1974, the Commission had provided that that measure was not to apply to export licences issued before 7 October, thereby depriving the applicant of the benefit of the increase laid down by the Council in respect of the 3 978 tonnes of barley which it was still to export between 7 and 16 October. The Court accepted that the applicant's action against the Commission's regulation was admissible. It held that, by denying to a class of traders the benefit of an increase in the amount of the refund for specific exports, that regulation applied to a fixed and known number of cereal exporters and that, even if the measure was one of a number of provisions having a legislative function, concerned those exporters because of a factual situation which differentiated them from all other persons.

179. Under the tax scheme in question, the renewal of the centres' approval in 2001 or 2002 conferred on them the right to benefit from the application of that scheme for 10 years and that period was restricted by the Commission Decision to 31 December 2010. The rights acquired by those centres on the basis of the Belgian tax scheme and the previous decisions of the Commission, which provided that Community law in the field of State aid did not preclude that scheme, were therefore clearly reduced by the Decision of 17 February 2003.

180. Furthermore, the number of centres in such a position could be known at the time when the decision was adopted and cannot increase. They therefore plainly form a restricted class or a closed class of economic operators within the meaning of the case-law, who are particularly affected by the Commission Decision.

181. Lastly, the *locus standi* of those centres can also be inferred, in my opinion, from the judgments in *Italy and Sardegna Lines* v *Commission* and *Italy* v *Commission*. It was held in those cases that an undertaking to which aid had been granted under a sectoral scheme fell to be considered as individually concerned by a Commission decision declaring that aid scheme to be incompatible with the common market and ordering the recovery of sums paid under that scheme to each beneficiary. The Court held that such an undertaking was concerned by the decision not only as an undertaking in the sector of activities in question, being a potential beneficiary of the aid scheme at issue. It was also concerned by virtue of being the actual beneficiary of individual aid granted under that scheme. [62]

182. In my view, that case-law also applies to the present case. Just as with the applicants in the cases which led to the judgments referred to above, the coordination centres having an approval which was renewed in 2001 and 2002 and which was limited in time to 31 December 2010, are concerned by the Commission Decision not only as centres which potentially benefit from the tax scheme at issue. They are also concerned by virtue of being the actual beneficiaries of that scheme, upon renewal of their individual approval.

183. For all of the above reasons, I am of the opinion that the action brought by Forum 187 is accordingly admissible inasmuch as it represents the 30 centres having rights to benefit from the scheme at issue which were restricted in time to 31 December 2010.

184. That suffices to substantiate the admissibility of the action brought by Forum 187 for the annulment of the Decision of 17 February 2003 in so far as that decision holds

62 — *Italy and Sardegna Lines* v *Commission*, paragraph 34, and *Italy* v *Commission*, paragraph 39.

that the tax scheme applicable to the coordination centres constitutes State aid incompatible with the common market.

185. However, Forum 187 also seeks the partial annulment of the Decision of 17 February 2003 in so far as the decision did not lay down transitional measures for the benefit of those coordination centres having an approval which expires after 17 February in 2003 or in 2004. Of the two groups of coordination centres which, according to Forum 187, are entitled to bring proceedings directly before the Community Courts, only the eight centres having an application for renewal which was pending when the Decision of 17 February 2003 was adopted have an interest to bring such an application.

186. The partial annulment of that decision in so far as it does not lay down transitional measures for the coordination centres having an approval which expires after 17 February in 2003 or in 2004 can be of no benefit to those centres having an approval which was renewed in 2001 or in 2002. An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure, which presupposes that the action must be liable, if successful, to procure an advantage for the party who has brought it. [63] Moreover, the lack of interest in bringing proceedings constitutes an absolute bar to proceeding. [64]

187. The admissibility of that alternative claim by Forum 187 is accordingly subject to the condition that those eight centres also have *locus standi*. The fact that that claim for partial annulment of the Commission Decision is encompassed within the claim made by the Kingdom of Belgium, the admissibility of which is agreed and does not appear to be capable of being disputed, [65] does not mean that the matter does not require to be considered, should the primary claim by Forum 187 be rejected and should it accordingly be necessary to adjudicate on its alternative claim.

188. Were that to be the case, I am also of the opinion that the action brought by Forum 187 is admissible, since the coordination centres having an application for renewal which was pending at the time when the Commission Decision was notified clearly have *locus standi* to bring proceedings for the annulment of the decision before the Community Courts.

63 — Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited there.

64 — Ibid., paragraph 45 and the case-law cited there.

65 — The action brought by the Kingdom of Belgium, as a privileged applicant, is admissible and case-law provides that a Member State has an interest in challenging a measure of an institution on the ground that it frustrates the legitimate expectations of certain traders (Case C-284/94 *Spain* v *Council* [1998] ECR I-7309, paragraph 42 and the case-law cited there).

189. The admissibility of an action brought by the members of a group of persons which were identified or identifiable at the time when the contested measure was adopted and in accordance with criteria which are specific to the members of that group has been accepted where the Community law provision on which such a measure is based expressly obliged the institution which was its author to take into account the particular circumstances of the applicants. [66]

190. I am of the opinion that that case-law may be applied to the coordination centres having an application for renewal which was pending at the time when the Decision of 17 February 2003 was adopted.

191. First, those centres are clearly part of a closed class, as defined by case-law, the members of which are particularly affected by the Commission Decision. That decision provides that centres approved on 31 December 2000 and having an individual approval which was in place on 17 February 2003 may continue to benefit from it until its expiry or 31 December 2010, at the latest. It also provides that approvals expiring before 31 December 2010 may no longer be renewed, even temporarily. Those centres which were already approved on 31 December 2000 and having a ten-year approval expiring between 17 February 2003 and 31 December 2010 thus constitute a group which was clearly identifiable at the time when the Commission Decision was adopted and which cannot increase thereafter.

192. Furthermore, those centres are affected in a particular way, by comparison with the other coordination centres and all of the companies which could have established such centres. They are distinguished by the fact that they possessed a 10-year approval expiring between 17 February 2003 and 31 December 2010, that, in terms of the Belgian legislation referred to in the decisions of the Commission of 1984 and 1987, that approval was renewable and that, by virtue of the Commission Decision, it could not be renewed.

193. Secondly, as the judgment in *Sofrimport* v *Commission* makes clear [67] and as the Court confirmed in *Antillean Rice Mills and*

66 — Thus, in *Piraiki-Patraiki and Others* v *Commission* exporters of cotton were held to be individually concerned by a Commission decision authorising the French Republic to take protective measures against imports of cotton from Greece on the ground that the applicants had already entered into contracts which were prevented from being performed by that decision and that the Commission was required by Article 130 of the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties (OJ 1979 L 291, p. 17), pursuant to which the decision had been taken, to inquire into the negative effects which it might have for the undertakings concerned. Similarly, in *Sofrimport* v *Commission*, Sofrimport was held to be individually concerned by two Commission regulations suspending the issue of licences for the importation into the European Community of apples from Chile, on the ground that it was an importer of products in transit and that the measure which had formed the basis of the regulations at issue required the Commission to take account, when adopting measures suspending import licences, of the particular circumstances of those goods.

67 — Paragraph 12.

Others v *Commission*, [68] the fundamental point to be determined in assessing whether persons who are affected in a particular way by a measure of general application are individually concerned by it is the protection which they are afforded under Community law. Forum 187 invokes the principle of the protection of legitimate expectations and argues that the coordination centres concerned had a legitimate expectation that their approval would be renewed.

194. I am in no doubt that a general principle such as the principle of the protection of legitimate expectations may protect the applicants in such a way as to distinguish them individually, as may an express provision of a measure of Community law on the basis of which the contested measures were adopted and which obliges the author of the measure in question to take account of their particular situation, as the Court accepted was the case in *Piraiki-Patraiki and Others* v *Commission* and *Sofrimport* v *Commission*. In my view, the protection guaranteed by a general principle is indeed a factor which is capable of distinguishing an applicant and of allowing him to bring an action for annulment directly before the Community Courts. [69]

195. It is true, as the Commission states, that the question whether the coordination centres could have a legitimate expectation in the renewal of their approval is the subject of a substantive challenge. However, it is my view that at the stage when the admissibility of the action is under consideration it is sufficient to note that, in its Decision of 17 February 2003, the Commission analysed, in the 117th to 120th recitals in the preamble, the nature of the legitimate expectation on which the coordination centres having an approval in force at the time when the decision was notified might rely. The fact that the Commission undertook such an analysis clearly shows that those centres benefited from a particular protection, by comparison with all the other coordination centres and companies of multinational groups which had contemplated the establishment of such centres, on the basis of the principle of the protection of legitimate expectations.

196. In my opinion, that point suffices to distinguish the coordination centres having an approval which expired between 17 February 2003 and 31 December 2010 from the other traders concerned by the Commission Decision. Those centres thus clearly constitute a closed class which is sufficiently distinguished from those other traders and to which the principle of the protection of legitimate expectations provides a particular protection, which they should be entitled to assert by bringing legal proceedings before the Community Courts.

68 — Paragraph 28.

69 — See, to that effect, *Parti écologiste 'Les Verts'* v *Parliament*, where the Court held as admissible the action brought by that political party against the acts of the bureau of the European Parliament which determined the allocation of appropriations on the ground that to hold the action to be inadmissible would lead to the creation of inequality in the protection afforded by the Court to competing groupings (paragraph 36).

197. I am therefore of the opinion that the second group of coordination centres which Forum 187 claims to represent in the present action should be recognised as having *locus standi*.

3. The merits of the actions

198. In so far as the action brought by Forum 187 is more extensive than that brought by the Kingdom of Belgium, as it seeks the annulment of the Decision of 17 February 2003 in its entirety, I shall start by considering that application.

199. If necessary, I shall next consider the applications by Forum 187 and the Kingdom of Belgium for the partial annulment of the Commission Decision, in so far as it failed to lay down transitional measures for those centres having an approval which expires after 17 February 2003.

(a) The application by Forum 187 for the annulment of the Decision of 17 February 2003 in its entirety

200. In support of that application for annulment, Forum 187 invokes three pleas in law. In the first plea, it argues that that decision lacks any legal basis and infringes the principle of legal certainty, in that it is contrary to previous decisions taken more than 15 years ago. In its second plea, Forum 187 claims that, in classifying the tax scheme applicable to the coordination centres as State aid, the Commission contravened Article 87(1) EC. In its last plea, Forum 187 submits that that decision is vitiated by a lack of adequate reasoning as regards the Commission's basis for going back on its previous decisions.

(i) The plea alleging the lack of any legal basis and infringement of the principle of legal certainty

— Arguments of the parties

201. Forum 187 submits that the principle of legal certainty requires the Commission to comply with its past decisions and that the circumstances in which it may withdraw an unlawful decision are very restricted. The association claims that the Commission's decision to initiate the formal investigation procedure had two bases, namely Article 1 (b)(v) of Regulation No 659/1999 and its general power to correct a previous mistake.

In its decision of 17 February 2003, the Commission added Articles 87 EC and 88 EC. Forum 187 argues that that decision lacks any legal basis on the ground that it could not be adopted under any of those provisions.

202. According to Forum 187, Regulation No 659/1999 cannot provide a legal basis, because Article 1(b)(v), which defines the concept of existing aid, requires that for a measure which did not constitute aid to become existing aid there must have been an evolution of the common market. That provision cannot apply where the Commission seeks to alter its determination that a measure does not constitute State aid.

203. Forum 187 argues that the Commission was also not entitled to base its decision on Article 87 EC and 88 EC for the following reasons. First, the Commission initiated the formal investigation procedure on the basis only of Regulation No 659/1999 and cannot select another legal basis for the decision to close that procedure. Secondly, those articles do not provide the Commission with broader powers than those provided in Regulation No 659/1999, which defines the competence of that institution exhaustively. As the tax scheme applicable to the coordination centres does not fall within the definition of existing aid under that regulation, the Commission could not claim to have based the Decision of 17 February 2003 on Article 88(1) EC.

204. Lastly, Forum 187 states that the Commission cannot claim to have corrected a mistaken decision more than 15 years after adopting it. Case-law provides that the right to correct a mistake must be exercised within a reasonable period. In reversing its decision that the tax scheme did not constitute State aid more than 15 years after it was taken, the Commission infringed the principle of legal certainty since, in particular, its previous decisions are binding on it in their entirety. Furthermore, it has provided no explanation to justify the passage of such a long period of time. Lastly, the Commission cannot rely on the fact that its decision has no retroactive effect. The Decision of 17 February 2003 necessarily has retroactive consequences by reason of the scale of the investments made in the coordination centres.

205. In reply to those arguments, the Commission submits that it was entitled to alter its assessment that the tax scheme in question did not constitute State aid, provided that it complied with the principles of legal certainty and the protection of legitimate expectations and at the same time observed existing rights. Its entitlement to do so can be inferred from its power to keep existing aid under constant review, which allows it to amend, as regards the future, a

decision holding aid to be compatible with the common market. As regards the procedure to be followed, it is clear, according to the Commission, that the scheme at issue could not be considered as new aid and that it is the procedure applicable to existing aid which should be applied by analogy.

— Appraisal

206. I should state at the outset that I consider it to be important to note that the Commission does not provide in the Decision of 17 February 2003 that its previous decisions relating to the tax scheme applicable to the coordination centres are to be withdrawn. Neither in the statement of reasons nor in the operative part of that decision does it indicate that its decisions of 1984 and 1987 and its reply to the Parliamentary question of 1990 are to be retroactively annulled and that its Decision of 17 February 2003 was intended to replace them. Had that been the case, it would have been beyond doubt that such a decision would have been contrary to the principles of legal certainty and of the protection of legitimate expectations.

207. While an institution is entitled retroactively to withdraw a decision which appears to it to be mistaken, it has consistently been held that such withdrawal must take place within a reasonable time and that regard must be had to how far the beneficiaries of the measure in question might have been led to rely on its lawfulness.[70] Those conditions would plainly not have been satisfied if the Commission had wished retroactively to annul its decision that the tax scheme applicable to the coordination centres does not constitute State aid 19 years afterwards and at a time when the Member State to which its previous decisions had been addressed had implemented the scheme.

208. The true position is that it is clear from the Decision of 17 February 2003 and the documents before the Court that the decision was taken after the Commission had decided to carry out a new investigation into the tax scheme applicable to the coordination centres, by applying to it the monitoring procedures for an existing aid, which implies that its final decision cannot have retroactive effect. Those documents also show that the Commission took the view that, from that time on, the scheme constituted State aid incompatible with the common market.

209. In considering this plea, it is therefore necessary to determine whether the Commission was entitled to change its determination as to whether that scheme of general application, which had not been significantly amended since its previous determinations

70 — Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12; Case C-248/89 *Cargill* v *Commission* [1991] ECR I-2987, paragraph 20; Case C-90/95 P *De Compte* v *Parliament* [1997] ECR I-1999, paragraph 35; and Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 140.

of 1984, of 1987 and of 1990, constitutes aid within the meaning of Article 87(1) EC and, if so, whether the Commission was justified in applying the procedure relating to existing aid schemes.

210. It is true that the principle of legal certainty requires that Community legislation must be certain and its application foreseeable by those subject to it. [71] The principle aims to ensure that legal situations and relations under Community law are foreseeable. [72] It applies all the more strongly when the secondary legislation is capable of having financial consequences, [73] as may be the case with decisions taken by the Commission in the field of State aid. Furthermore, the obligation to notify State aid laid down under Article 88(3) EC has in particular the objective of dispelling any doubts as to whether a national measure does, or does not, constitute State aid within the meaning of Article 87(1) EC.

211. The principle of legal certainty and that of the protection of legitimate expectations, which represents the same concept, expressed in subjective terms, as the former, therefore require that the Member State which took the precaution of notifying the Commission of the tax scheme which it intends to put into place, as also the beneficiaries of the scheme, may rely on the lawfulness of a decision declaring that that scheme does not constitute State aid.

212. It is also common ground that Regulation No 659/1999, which, according to the second recital in the preamble, codifies the rules relating to the exercise by the Commission of the powers conferred on it by Article 88 EC, makes no express provision for the situation which arises in these proceedings. Thus, it is only in Article 1(b)(v) of the regulation, that the concept of existing aid is defined so as to include a measure which did not constitute aid when it was put into effect, but is none the less to be treated as existing aid, namely when that measure 'subsequently became an aid due to the evolution of the common market'.

213. Regulation No 659/1999 does not define what is meant by the 'evolution of the common market'. However, it may be interpreted as meaning a change to the economic and legal framework in the sector affected by the measure in question. The expressions 'evolution' and 'common market' suggest that the market on which the national measure in question produces its effects has been altered in such a way that that measure, which did not originally constitute aid, henceforth falls within the scope of Article 87(1) EC. That concept accordingly does not apply where, as in the present case, the Commission alters its assessment on the basis only of a more rigorous application of the Treaty rules in the field of State aid.

71 — Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18.

72 — Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20.

73 — Ibid.

214. However, unlike Forum 187, I do not consider that the principle of legal certainty and the provisions of Regulation No 659/1999 preclude the Commission changing its determination as to whether a tax scheme of general application constitutes aid, when it takes the view that that is the conclusion to which the proper application of the rules of the Treaty must lead it.

215. In my opinion, Articles 87 EC and 88 EC support that approach. First, as the Court has already held, the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but its application must be combined with that of the principle of legality. [74] Secondly, as the Commission has argued, it is on the basis of Articles 87 EC and 88 EC that the scope of its powers and obligations in the field of State aid falls to be assessed. Regulation No 659/1999, which constitutes a measure of secondary legislation adopted in order to apply Articles 87 EC and 88 EC, cannot therefore be interpreted so as to restrict the scope of the rules laid down by the Treaty.

216. Article 88 EC entrusts the Commission with the task of undertaking not only a preliminary investigation of plans by Member States to grant new aid but also with keeping all existing aid under constant review. In carrying out that review, the Commission may, in cooperation with the Member State which has granted the aid in question, propose to that Member State that it make such alterations as regards the future operation of the aid as shall appear necessary for such aid to remain compatible with the common market. Article 88(2) provides that, where that procedure is unsuccessful, the Commission may require that State to alter the aid or to abolish it, within such period of time as it may determine.

217. The aim of the powers conferred on the Commission by Article 88 EC is therefore to prevent a scheme of general aid continuing to be applied and to permit the grant of new individual aid when it appears that that scheme is no longer compatible with the common market. The task of the Commission is therefore to act in such a way as to ensure that no aid scheme which is contrary to the proper working of the common market is authorised or gives rise to new applications.

218. Article 88 EC also has the effect of ensuring equality between the Member States and traders. Developments in the economic and legal framework may mean that a new aid scheme, identical in content to an existing scheme in operation in another Member State, should be the subject of a negative decision on the Commission's part. It would therefore be contrary to the general

74 — Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53, 87.

principle of equal treatment to allow traders to benefit from new applications of the existing aid scheme.

219. In the light of those points, I am of the opinion that the Commission is entitled to alter its determination as to the existence of aid, if it considers that that is the position to which the proper application of the Treaty rules must lead it. While the Commission is thus obliged to respect the principles of legal certainty and the protection of legitimate expectations, that requirement, important as it may be, must be reconciled with the principle of legality and, hence, the rules imposed by Articles 87 EC and 88 EC. It would be contrary to those provisions to allow a national scheme to continue to be implemented when it is apparent that it impedes the proper working of the common market. It would also be contrary to the equality of treatment between Member States and traders, as a new scheme which was identical to the national scheme originally held not to constitute aid would be the subject of a negative decision.

220. That being the case, I am of the opinion that the Commission properly carried out the functions entrusted to it by the Treaty in the field of State aid when it decided in the present case to undertake an investigation or a re-investigation of all tax schemes in operation in the Member States which the Code of Conduct group had declared harmful to the common market as it considered that those schemes were liable to fall within the scope of Article 87(1) EC.

221. I am accordingly of the view that legal certainty does not preclude the Commission altering, as regards the future, its determination as to whether or not a measure constitutes aid. Similarly, the Decision of 17 February 2003 does not lack any legal basis, as Forum 187 maintains, but is based on Articles 87 EC and 88 EC, as is mentioned in the 69th recital in the preamble.

222. As regards the procedure which is to apply when the Commission alters its determination in that way, I am also of the opinion that it is only the procedure applying to the monitoring of existing aid which can apply. Regulation No 659/1999, which codifies the rules relating to the exercise by the Commission of the powers conferred on it by Article 88 EC, recognises only two kinds of national measures: new measures and existing aid. In the circumstances under consideration, the Commission is contemplating altering its assessment of a national scheme which had been notified to it and which, *ex hypothesi*, as in the present case, has not been significantly altered since its previous decision. That scheme cannot therefore be considered as a new measure, which has just been notified to the Commission and has not yet been implemented, or as unlawful aid, that is to say aid granted without having been previously notified to it or before it has given

a ruling within the prescribed period. It is therefore an existing measure as far as the Commission is concerned, since it was aware of it, and is similar, for the purposes of determining the applicable review procedure, to existing aid within the meaning of Article 1(b) of Regulation No 659/1999.

223. Moreover, such a classification will ensure the greatest legal certainty for the Member State which introduced the measure in question and for the traders which benefit from it. It therefore means that such a measure will continue to be implemented until the Commission finds it to be incompatible with the common market. Furthermore, if the Commission does take such a decision, that decision can take effect only as regards the future and within a timescale which it is for the Commission to determine. [75]

224. Lastly, such a procedure does not deny the undertakings which have benefited from the application of the general scheme at issue the right to challenge the substance of the Commission's new finding that the scheme in question constitutes State aid, as they may either bring proceedings for annulment before the Community Courts, as Forum 187 has done, or raise a plea of illegality before, inter alia, the national court, as the Court held they may do in its judgment in *Unión de Pequeños Agricultores* v *Council*. [76]

225. There is also no foundation for Forum 187's complaint that the Commission did not indicate in its letter to the Belgian Government informing it of the initiation of the formal investigation procedure that the applicable procedure was that laid down in Articles 17 to 19 of Regulation No 659/1999, nor that it changed the legal basis during the procedure, as the purpose of that regulation is merely to codify the rules relating to the exercise by the Commission of the powers conferred on it by Articles 87 EC and 88 EC.

226. As to the question whether, in its Decision of 17 February 2003, the Commission correctly took account of the legitimate expectations of the coordination centres, that will be considered, if necessary, in the context of the application for partial annulment of that decision. However, the answer to that question will not call into question the conclusion that the Commission was entitled to alter its opinion as to whether the tax scheme applicable to the coordination centres constitutes State aid and to apply the procedure relating to existing aid laid down under Articles 17 to 19 of Regulation No 659/1999.

75 — *Italy* v *Commission*, paragraph 42 and the case-law cited there.

76 — Case C-50/00 P [2002] ECR I-6677, paragraph 40.

227. In the light of all of the above points, I am of the opinion that the first plea should be rejected.

(ii) The plea alleging infringement of Article 87(1) EC

228. Forum 187 puts forward a number of arguments to show that the Commission wrongly applied Article 87(1) EC in classifying the tax scheme applicable to the coordination centres as State aid for the purposes of that provision. First of all, it challenges the method used by the Commission to analyse the tax scheme in question. Next, it contends that the various measures constituting the scheme do not satisfy the conditions laid down under Article 87(1) EC. Forum 187 thus maintains that those measures confer no advantages on the coordination centres, that they do not involve a transfer of State resources, that the Commission has failed to establish that they affect competition and intra-Community trade, that the scheme in question is not selective and that, in any event, it is justified by the nature and the general scheme of the Belgian tax system.

229. The Commission contests all of those objections.

230. For the sake of clarity, I shall set out in greater detail the various arguments put forward by the parties against the point to which they relate.

— The method of analysis of the scheme in question

231. Forum 187 complains that the Commission failed to have proper regard to the competence of the Member States in tax matters. It states that, in the absence of harmonisation of the rates and structure of corporation tax in the Community, the Kingdom of Belgium is entitled to determine the rules applying to the liability to tax of subsidiaries of multinational groups. It maintains that where those rules distort competition, the provisions of Articles 96 EC and 97 EC apply, and not those relating to State aid.

232. Forum 187 also contends that the Commission's analysis of the scheme in question was unduly general. It argues that the tax scheme applicable to the coordination centres applies to 230 centres which belong to groups carrying on their activities in very different sectors. The economic impact of the measures in question varies considerably depending on whether the group sells motor cars or foodstuffs. The Commission should therefore have undertaken a much more detailed analysis of the impact of the measures in question.

233. I agree with the Commission that the investigation of a national tax scheme under Article 87 EC does not of itself constitute a failure to have proper regard to the competence of the Member States in tax matters. While it is true that direct taxation is indeed within their competence, so that each Member State is free to lay down its own rules relating to corporation tax, it is also common ground that those rules do not fall outside the scope of Article 87 EC. It follows that measures taken by a Member State in the exercise of its powers in tax matters may, in some cases, be shown to be incompatible with that article.

234. As the Commission rightly states, the question to be decided in considering this plea is whether the scheme in question does, or does not, constitute State aid. As the concept of State aid, as defined in Article 87(1) EC, is a legal concept which must be interpreted on the basis of objective factors,[77] it is necessary to consider whether, irrespective of the fact that the Commission had adopted a contrary position in 1984, in 1987 and in 1990, the tax scheme applicable to the coordination centres does in fact meet the conditions necessary for it to fall within the scope of that provision.

235. As regards, next, the level at which the Commission should have considered the effects of the scheme in question in the present case, it is true that, as the Commission rightly points out, where the measure in question is an aid scheme and not an individual aid measure, case-law provides that it may confine itself to examining the general characteristics of the scheme in question without being required also to examine its effects on the particular situation of certain undertakings.[78] The question whether, in the present case, that case-law is applicable and whether the Commission was thus entitled to restrict itself to such an examination where the scheme in question benefits centres where the groups concerned carry out their activities in very different sectors, effectively calls into question the Commission's finding that the measures laid down under the scheme at issue each satisfy the conditions set out under Article 87(1) EC. I shall therefore consider that complaint when analysing those conditions.

236. It should also be stated at this point, first, that those conditions are cumulative.[79] Secondly and as mentioned above, in so far as, the concept of State aid is a legal concept which must be interpreted on the basis of objective factors, the Community Courts must in principle, where the Commission's

77 — Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25. See also Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 37.

78 — *Italy and Sardegna Lines* v *Commission*, paragraph 51, and Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24.

79 — Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68; Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74; and Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 21.

analysis is not based on a complex economic appraisal, carry out a comprehensive review as to whether a national scheme falls within the scope of Article 87(1) EC. [80]

237. I shall now consider whether the tax scheme applicable to the coordination centres satisfies each of the conditions laid down by that provision. It is therefore necessary to determine whether the measures laid down under that scheme confer an advantage on certain undertakings, whether that advantage is granted by a Member State or through State resources and whether it distorts or is liable to distort competition in intra-Community trade.

— Whether an advantage is conferred on certain undertakings

238. I shall first consider whether the tax measures contained in the tax scheme applicable to the coordination centres is capable of conferring an advantage on its beneficiaries. I shall next consider whether such an advantage is selective. I shall, if necessary, go on to consider whether that selectivity is justified by the objectives of the system of which that scheme forms part.

80 — *France* v *Ladbroke Racing and Commission*, paragraph 25, and *Valmont* v *Commission*, paragraph 37.

The existence of a commercial advantage

239. Case-law law provides that the concept of aid is to be widely construed. It covers not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are 'normally' included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect. [81] Thus, 'a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of [Article 87 EC]'. [82]

240. The Commission held in the Decision of 17 February 2003 that the method of assessment of taxable income, the exemption from property tax, the exemption from capital duty and the system of a notional withholding tax constitute advantages for the coordination centres. Forum 187 challenges that determination as regards each of those

81 — See, inter alia, Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 32 and the case-law cited there, and *GEMO*, paragraph 28 and the case-law cited there.

82 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16.

measures. I shall therefore examine them in turn, starting with the method of assessment of taxable income.

Assessment of taxable income

241. The tax scheme applicable to the coordination centres provides that the taxable profit of those centres is not to be based on the difference between the income and the charges of the undertaking, as is the case under the ordinary tax law in Belgium. It is set at a flat-rate amount which represents a percentage of the full amount of operating costs and expenses, from which staff costs [83] and financial charges [84] are excluded.

242. The profit margin of a coordination centre is generally to be calculated on a case-by-case basis, taking into account the work actually carried out by the centre. If the centre itself charges for some of its services at a rate that corresponds to its costs plus a percentage for profits, the same percentage can be used for the profit margin, provided that it is not exceptional. In the absence of any objective criteria for determining the percentage of profits to be taken into account the rate is set at eight per cent.

243. The taxable profits of the centres in question may not, however, be less than the total of the expenditure or charges that are not deductible as business costs (usually non-deductible expenditure) and the exceptional or gratuitous advantages extended to the centre by the members of the group to which they belong.

244. The profits of the coordination centres having been assessed in accordance with those rules, they are taxed at the standard rate of corporation tax.

245. That method of assessment of taxable profits is based on the so-called 'cost-plus' method, which is one of the systems recommended by the Organisation for Economic Cooperation and Development (OECD) for the taxation of services provided by a subsidiary or a fixed establishment on behalf of companies belonging to the same international group and established in other States.

83 — These include, in particular: salaries and direct social benefits of management and staff, employers' social security contributions, employers' non-statutory insurance contributions, together with retirement and survivors' pensions (Circular No Ci.RH.421/439.244 dd. of 29 November 1993, Chapter III, F, paragraph 42).

84 — The concept of 'financial charges' is defined in paragraph 42 of the abovementioned circular as extending to interest, commission and expenses relating to debts; amounts written down in respect of non-trading receivables, on cash investments and disposable assets; losses on the disposal of current assets other than trading receivables, cash investments and disposable assets; provisions of the centre concerned in respect of bad or doubtful debts; foreign-exchange and foreign currency conversion losses, together with all other costs which are deemed to be financial charges pursuant to the applicable accounting law.

246. The objective of that method is as follows. The setting of prices for transactions carried out between companies belonging to the same group may be influenced by tax considerations, so as to reduce the charge to tax borne by the group overall by taking advantage of the rules of assessment in each country. In order to combat such practices and to avoid the adjustments they may require the national administrations to make, together with the risk of double taxation, a number of methods have been developed by the OECD in order to determine the 'transfer prices' of goods or services within a multinational group. The aim of those methods is that the prices charged should correspond to those which would apply in normal conditions of competition. The 'cost-plus' method, which is one of those methods, involves taking as the basis of calculation the costs incurred by the service provider and applying to them a margin representing a reasonable profit, expressed as a percentage. [85]

247. In the Decision of 17 February 2003, it is not that method of flat-rate taxation, as such, which is classified as State aid by the Commission. It is the decision of the Belgian authorities to remove from the whole of the operating expenses which serve as the basis of calculation for the determination of the taxable income of the coordination centres, both staff costs and financial charges, which represent quantitatively significant costs. The Commission also states that, in the absence of any objective criteria for determining the percentage of profits to be taken into account, the rate is to be set at eight per cent. It considers that, when those two exemptions and that percentage are taken into account, the taxable amount to which the normal corporation tax rate falls to be applied is not calculated in such a way that services provided by the coordination centres are to be taxed as if they were supplied by another company, in a context of free competition, pursuant to the principle underlying the OECD's 'cost-plus' method.

248. Forum 187 contests the Commission's analysis for the following reasons.

249. It argues first of all that the exclusion of financial charges and staff costs from the tax base does not infringe the principles laid down by the OECD regarding the setting of transfer prices. Those principles determine what costs are to be taken into consideration when invoicing for goods and services to a connected undertaking, but do not extend to the taxation of those costs, which represents a subsequent stage.

250. As regards, next, the exclusion of financial charges, Forum 187 contends that to bring them within the charge to tax would

85 — See *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD publications, Paris 2001, p. II-12 and p. VII-1.

result in the imposition of a charge to tax that was higher than the profit margin of those centres. That would be the case, in particular, when they entered into transactions that were accounted for on a cost-benefit basis, where no loss or profit is realised.

251. According to Forum 187, it is also necessary to take account of the finances of the international group as a whole. The imposition of a reduced tax rate at the level of the coordination centres may be counterbalanced by a higher charge to tax at group level. There are many countries which tax the parent company on its global income and have a system for taxing controlled foreign companies.

252. Moreover, the Commission failed to take account of the fact that under the 'cost-plus' method, such centres may be taxed even if they have made losses, which is far from being a purely theoretical possibility.

253. As regards the exclusion of staff costs, Forum 187 argues that this is counterbalanced by the tax of EUR 10 000 per employee for the first 10 employees. It is also necessary to take account of the fact that many of the coordination centres employ cross-border staff whose tax situation is complex.

254. Lastly, Forum 187 contests the validity of the Commission's objection to the application of a flat-rate of eight per cent in determining the profit margin. That rate was approved by the Vice-President of the Commission, Leon Brittan, in 1990. It corresponds to the tax rate imposed on foreign branches in Belgium. The fact that an administrative practice is involved does not mean that it has no legal authority. Lastly, the rate is not applied systematically, and the competent authorities may use a lower or higher rate depending on the value added by each centre in question.

255. Forum 187 also states that there is a rule that taxable income may not be lower than the total amount of the charges or expenses which are not deductible by way of trading expenses and exceptional or gratuitous advantages extended to the centre by the members of the group to which it belongs.

256. I am not persuaded by those arguments.

257. I would point out first of all that Forum 187 does not appear to challenge the fact that whether or not an advantage exists falls to be assessed on the basis of the criterion which underlies the OECD's 'cost-plus' method, namely that the transfer prices must be set at a level which results in them being the same as those which would apply in normal conditions of competition. In order to determine that an advantage exists there

must be a point of comparison. As the Commission stated in the 98th recital in the preamble to the Decision of 17 February 2003, the purpose of the 'cost-plus' method drawn up by the OECD is to tax the centres which provide intra-group services on a basis which is comparable to that which would result from the application of the ordinary tax law, based on the difference between income and charges of an undertaking carrying on its business in an environment subject to free competition. It is thus on the basis of that criterion that it is necessary to consider whether the method of determination of the taxable income laid down in the tax scheme applicable to the coordination centres reduces the tax that would 'normally' be imposed on them.

258. Forum 187 maintains that it is not contrary to the principle underlying the OECD's 'cost-plus' method to exclude financial charges and staff costs. I share the contrary view taken by the Commission. As mentioned above, that method seeks to establish transfer prices which are similar to those which would be charged under conditions of free competition. Staff costs and financial charges incurred in connection with cash management or financing represent, as the Commission states in the 89th recital in the preamble to the Decision of 17 February 2003, essential costs which make a major contribution to enabling the coordination centres to earn revenue, as the latter provide services, in particular those of a financial nature. For the same reason, it cannot be denied that both of those categories of expenses represent a material part of the overall operating expenses borne by those centres. [86]

259. I therefore adopt the Commission's view that the exclusion of those charges and expenses from the costs which determine the taxable income of the centres in question does not result in transfer prices which are similar to those which are charged under conditions of free competition. Accordingly, such an exclusion does indeed afford an economic advantage to those centres and the groups to which they belong.

260. That analysis is not undermined by the fact that the inclusion of financial charges could, in some cases, result in a tax base that is unduly high. Were it to be established, such a matter would show that the'cost-plus' method is not appropriate for establishing the transfer prices of the coordination centres. It does not, however, justify the exclusion of financial charges in their entirety.

261. Nor can the economic advantage created by that exclusion be qualified or extinguished in the light of the tax charge borne overall by the international group by

86 — See, in that regard, the example of a calculation set out in paragraph 50 of Circular No Ci.RH.421/439.244 dd. of 29 November 1993.

reason of the liability to tax in other States of the various companies which are members of it. It is necessary to have regard to the tax system of the Member State concerned in determining whether the scheme in question does, or does not, create an advantage in favour of its beneficiaries.

262. Similarly, the fact that such a system provides for a coordination centre to be liable to tax when it has not made any profit does not, in my view, call into question the validity of the Commission's analysis. Such a risk is inherent in the'cost-plus' method, as it is based on operating costs and not on the difference between income and expenditure. That risk cannot therefore justify the systematic exclusion of staff costs and financial charges, which represent expenses that are indispensable to the carrying on of the activity of those centres. Moreover, the fact that some 220 or 230 coordination centres have benefited for a number of years from the application of the scheme in question confirms the Commission's analysis and the fact that a liability to tax may arise notwithstanding that no profit has been made does not detract from the advantageous nature of the scheme.

263. As regards the annual tax imposed from 1 January 1993 of EUR 10 000 per full-time member of staff, the Commission, correctly in my view, inferred from the fact that that tax is capped at EUR 100 000 that it does not counterbalance the beneficial effects of the systematic exclusion of all staff costs. That cap corresponds to the minimum number of 10 employees that the coordination centres are required to employ on a full-time basis once they have been carrying on business for two years. The documents before the Court show that the 220 or 230 coordination centres established in Belgium have allowed 9 000 direct jobs to be created, which represents an average of more than 10 employees per centre.

264. As regards the rate of eight per cent, applied by default to the operating costs in order to assess the tax base, the Commission has argued, in my opinion persuasively, that such a rate is unduly low, as it is applied to a basis of assessment which is significantly reduced and as the coordination centres carry out their activities for the benefit of groups which are active in widely differing sectors, in which profit margins may accordingly vary. The fact, on which Forum 187 relies, that that rate corresponds to the tax rate applying to profits of branches in Belgium is not relevant in my view, since in the tax scheme applicable to the coordination centres that rate serves to calculate the profit margin to which the normal rate of corporation tax applies.

265. Lastly, the Commission is right, in my opinion, to argue that the alternative tax base, intended to avoid possible abuses by laying down a minimum basis of assessment, does not extinguish the advantage conferred by the combined application of the abovementioned exclusions and the rate of eight per cent. It stated in the Decision of 17 February 2003 that that alternative basis includes only amounts which are also liable

to tax in Belgium in the case of companies that are not subject to the scheme in question, and are added to the accounting benefits which the 'cost-plus' method seeks to reconstruct for the coordination centres.

266. In the light of those matters, the Commission held, correctly in my view, that the rules relating to the determination of taxable income constituted an advantage for the coordination centres and the groups to which they belong.

The exemption from property tax

267. The tax scheme applicable to the coordination centres provides that those centres are exempted from property tax on immovable property used for business purposes. Thus, the Decision of 17 February 2003 shows that property tax is ordinarily levied on every company which is entitled in Belgium, as owner or as a person enjoying the usufruct of a property, to immovable property, that term being used to designate built or unbuilt immovable property, including material and equipment which are immovable owing to their intrinsic nature or the use to which they are put.

268. Forum 187 denies that this represents an advantage since, first, that exemption only benefits coordination centres which have their own immovable property, that is to say fewer than five per cent of them. Secondly, there are other exemptions from that tax under Belgian law, from which the exempted centres might have benefited.

269. The Commission's finding that the exemption from property tax does indeed constitute an advantage within the meaning laid down by case-law is in my view correct. I note that the other exemptions from that tax under Belgian law do not apply to all companies established in Belgium. Such an exemption for the coordination centres accordingly constitutes a reduction in a liability which ordinarily affects companies' budgets.

270. The fact that fewer than five per cent of those centres in fact benefit from it, since more than 95 per cent of them lease the building in which they carry on their activities, does not call that analysis into question. It is sufficient to find that that measure confers an economic advantage on the coordination centres which own the building in which they carry on their business in comparison with another company which also owns the building which its uses for business purposes and which does not qualify for any of the other exemptions laid down under Belgian law.

271. The exemption from property tax was therefore rightly considered by the Commission to constitute an advantage for the purposes of Article 87(1) EC.

The exemption from capital duty

272. The tax scheme applicable to the coordination centres also provides that the registration duty of 0.50 per cent which applies under the law of the Kingdom of Belgium is not due on contributions made to coordination centres or on increases of their capital.

273. Forum 187 contends that this does not represent an advantage, as Article 7(1) of Directive 69/335/EC[87] requires Member States to maintain the exemptions on capital transactions which were in place on 1 July 1984[88] and the exemption in favour of the coordination centres was introduced prior to that date.

274. I do not consider that Forum 187's argument can be accepted. As the Commission points out, while Article 7(1) of Directive 69/335 does indeed require Member States to retain the exemption for transactions which were already exempted on 1 July 1984, that provision cannot be interpreted in a manner which contravenes the Treaty rules, such as Article 87(1) EC. The provision cannot therefore authorise a Member State to maintain within its legal system law an arrangement whereunder the exemption from capital duty exists for the benefit only of a particular type of companies, such as the coordination centres, and which thus confers on them an advantage in comparison with other companies established in that State.

275. Such a difference in treatment might, in some cases, have come within Article 9 of Directive 69/335, which provides that certain types of transactions or of capital companies may be the subject of exemptions in order to achieve fairness in taxation, or for social considerations, or to enable a Member State to deal with special situations. However, the exercise of that right was subject to the requirement that the State concerned submitted an application to that effect to the Commission in good time, having regard to the application of Article 97 EC. The Commission indicates that that condition was not satisfied and Forum 187 does not dispute the point.

87 — Council Directive of 17 July 1969 concerning indirect taxes on the raising of capital (OJ 1969 L 249, p. 25), as amended by Council Directive 85/503/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335').

88 — Article 7(1) of Directive 69/335 reads as follows:
'Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less. The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less. ...'

276. In my opinion, the Commission was therefore right to hold that the exemption from capital duty for contributions made to the coordination centres and increases in their capital constitutes an advantage falling under Article 87(1) EC.

The exemption from withholding tax

277. The tax scheme applicable to the coordination centres provides that there is to be exempted from withholding tax, that is to say from deduction at source, dividends, interest and royalties distributed by centres, except, in the case of interest, where it is paid to a beneficiary which is subject in Belgium to tax on natural persons or to tax on legal persons. Income received by those centres on their cash deposits is also exempted from withholding tax.

278. The Commission held in its Decision of 17 February 2003 that that general exemption for income distributed by the coordination centres confers an economic advantage on the centres and the groups to which they belong in so far as it goes beyond the exemptions laid down under the ordinary law. Thus, there is an exemption for income distributed by those centres, which does not apply to other companies, in the following three situations: first, where the beneficiary is a non-resident company established outside the European Union, in a country with which the Kingdom of Belgium has not concluded an agreement on the avoidance of double taxation, secondly, in cases involving a company established in Belgium or in another Member State and which does not satisfy the criteria laid down in Directive 90/435/EEC[89] and, lastly, in cases involving a company established in one of a number of countries with which that Member State has concluded an agreement providing for taxation at source, even if such taxation is limited.

279. The Commission also states that the advantage conferred by that exemption lies either in the deferred payment of final taxes, or in the mitigation of final tax or even in the complete non-taxation of income from movable property.

280. Forum 187 denies that that exemption constitutes an advantage for the following reasons. There are numerous exemptions from withholding tax under Belgian tax law and the coordination centres are in the same position as banks and financial centres, which benefit from a similar exemption. The cases referred to by the Commission in which the exemption of those centres derogates from the exemptions which exist in favour of other companies are exceptional. In practice, very few centres benefit from that additional exemption, as the Kingdom of Belgium has concluded agreements on the avoidance of double taxation with many

89 — Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6).

other States and the number of coordination centres which do not satisfy the conditions laid down under Directive 90/435 is very limited. Nor did the Commission take account of the fact that such an exemption may, in some circumstances, be disadvantageous to those centres.

281. Forum 187 argues that it would also be wrong to maintain that the exemption from withholding tax confers an advantage in the form of a deferral of payment of the tax, as all companies, including the coordination centres, are obliged to make a prepayment quarterly. Similarly, the only cases in which such an exemption leads to a complete absence of taxation are those in which the beneficiaries are not subject to corporation tax in Belgium, and no actual advantage is thus conferred.

282. Forum 187's arguments do not go to show that the Commission's analysis is incorrect. The latter sets out examples in its Decision of 17 February 2003 of the advantages which the exemption confers in particular circumstances. It accordingly states that withholding tax is the final Belgian tax for income distributed to non-resident companies which are unable to have this income offset or refunded in the country in which they are established. The exemption from withholding tax for income distributed by the coordination centres does indeed lead, in the case of companies which are in such a situation, to the absence of any charge to tax. Forum 187's argument that such an exemption from withholding tax leads to a complete absence of liability to tax only where the beneficiaries are not subject to tax in Belgium does not undermine the validity of that assessment.

283. In the same way, the Commission's position is in my view persuasive when it states that the exemption from withholding tax creates an advantage in the form of a deferral of the time when the tax has to be paid. It appears that it is more advantageous for the recipients of payments made by the coordination centres to make advance payments in respect of their liability to tax to the Kingdom of Belgium on a voluntary basis, according to a schedule chosen by the undertaking having regard to its estimated taxable income, than to have applied to them a systematic and flat-rate deduction on each amount that is distributed.

284. Furthermore, the Commission has demonstrated that the exemption from withholding tax from which those centres benefit goes beyond the exemptions laid down under the ordinary law applying to undertakings, so that the scheme at issue does indeed create, to that extent, an advantage in comparison with the scheme which applies under the ordinary law.

The notional withholding tax

285. In the tax scheme applicable to the coordination centres, as well as the exemption from withholding tax, there exists a 'notional withholding tax' for payments made by those centres. Under that system, beneficiaries receive the sums paid by the centres without any deduction at source, but they are permitted to deduct a notional withholding amount from the total amount of the tax they are liable to pay.

286. During the formal investigation procedure, the Belgian authorities informed the Commission that that notional withholding tax was no longer granted on interest paid by the coordination centres on the basis of agreements concluded after 24 July 1991 nor was it granted on dividends distributed after that date or on royalties paid or assigned after 1 January 1986.

287. In its Decision of 17 February 2003, the Commission considers that, notwithstanding the fact that its rate was reduced to zero in 1991, the notional withholding tax does constitute an advantage, as it has not been repealed. It states that that reduction to zero for interest paid under agreements concluded after 1991 does not mean that such a system does not continue to apply to interest paid on long-term loans concluded prior to that year. It also states that the rate could be adjusted by ordinary royal decree.

288. Forum 187 contests the Commission's assessment. It submits that, inasmuch as the rate of the notional withholding tax has been set at zero per cent since 1991, the Commission cannot claim that State aid is involved.

289. I agree with the Commission's assessment only as regards the interest paid on long-term loans concluded prior to 24 July 1991. In so far as that notional withholding tax may continue to apply to interest paid under those agreements, the system does indeed constitute, in my opinion, an economic advantage conferred on the coordination centres and the groups to which they belong. That notional withholding tax is, in effect, offset against the tax payable by the recipients of the interest paid by the coordination centres as if there were a deduction at source, which has in fact not been made.

290. By contrast, I do not believe that the system may be considered as an advantage following the reduction of the rate to zero. In order to determine whether aid exists, it is necessary to take into account the effects

which the measure in question is liable to have. [90] In my opinion, the Commission has failed to show how a notional withholding tax that has been reduced to zero might confer an advantage on the recipients of payments made by the coordination centres or, accordingly, on the centres themselves and the groups to which they belong. Merely because the rate might be adjusted by royal decree does not mean that it has to be considered as an advantage, as the possibility is purely hypothetical and a royal decree constitutes a legislative act. The Commission's argument can, in my view, be adopted only where the rate of the notional withholding tax may be increased on an ad hoc basis, by virtue of a purely discretionary practice on the part of the national administration.

291. I am therefore of the opinion that the notional withholding tax constitutes an advantage only in so far as it applies at a rate higher than zero to interest paid under agreements entered into prior to 24 July 1991.

Selectivity

292. Article 87(1) EC provides that State aid is a measure which confers an advantage on 'certain undertakings or the production of certain goods'. A national measure, the application of which is, as in the present case, dependent on objective criteria, therefore comes within Article 87 EC only if it does not constitute a measure of general application. As Forum 187 states, distortions of competition occasioned by national measures of general application are not subject to the provisions of the Treaty relating to State aid but to Articles 94 EC and 96 EC, which relate to the approximation of the laws of the Member States which affect the functioning of the common market. A tax measure is thus covered by Article 87 EC only where it is specific or selective in its nature. [91]

293. Contrary to what Forum 187 maintains, the Commission has indeed established that the tax scheme applicable to the coordination centres is selective in nature. Case-law provides that a national measure is selective where, under a particular statutory scheme, the measure favours certain undertakings over others which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme. [92] In other words, as Advocate General Darmon stated in points 50 and 58 of his Opinion in the *Sloman Neptun* case, [93] the fundamental criterion for establishing the selective character of a national measure is that it is in the

90 — Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52.

91 — Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 26; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 47; and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40 and the case-law cited there.

92 — *Spain* v *Commission*, paragraph 47, and *Heiser*, paragraph 40.

93 — Joined Cases C-72/91 and C-73/91 [1993] ECR I-887.

nature of a derogation from the system in which it is set and a measure constitutes a derogation where it does not apply to all the undertakings which, in view of the nature and the scheme of the system, are capable of benefiting from it.

294. The tax measures laid down under the scheme applicable to the coordination centres satisfy that condition.

295. As mentioned above, the exemptions from property tax, from capital duty and from withholding tax, coupled with the notional withholding tax, constitute derogations from the ordinary Belgian tax law, which would otherwise apply to the coordination centres. The fact, invoked by Forum 187, that there are many other derogations from those taxes and that some coordination centres may also benefit from them does not call into question the fact that the scheme at issue is itself derogatory in nature and restricts the benefit of those exemptions to those centres which satisfy the conditions laid down under it. That is sufficient to show the selective nature of the exemptions concerned.

296. As regards, next, the method for assessing taxable income, Forum 187 argues that the scheme at issue is not selective since it was designed to provide the tax treatment which was most appropriate for multinationals creating coordination centres to provide services within the group to which they belong and which are faced with the risk of double taxation, particularly because of 'cash-pooling' activities. [94] That scheme thus applies to the companies for which it was designed. It would be inappropriate for a small Belgian undertaking and arbitrary were it to apply to all companies.

297. In reply, the Commission argues, rightly in my view, that the tax scheme applicable to the coordination centres is not open to all international groups, but only to those having subsidiaries which are established in at least four different countries, which have capital and reserves equal to or greater than BEF 1 thousand million and which have a consolidated annual turnover equal to or greater than BEF 10 thousand million.

298. If one takes into account the objective which, according to Forum 187, underlies the assessment of the taxable profits of the coordination centres, namely the choice of a system adapted to the taxation of intra-group services and which allows double taxation to be avoided, one finds, as the Commission states in the 112th recital in the preamble to its Decision of 17 February 2003, that the abovementioned conditions exclude from the application of the scheme centres carry-

94 — As described by the parties to the case, that activity consists in the daily pooling by a coordination centre of cash surpluses of some of the companies in the group to which they belong and the lending of those surpluses to other companies in the same group.

ing on identical activities but for the benefit of smaller groups, that is to say groups having subsidiaries established in fewer than four countries and the capital and turnover of which are less than the required thresholds. Once again, this represents a selective measure in that it is reserved to 'certain undertakings'.

299. Lastly, it is clear from the above that, while the Commission indicated in the 104th recital in the preamble to its Decision of 17 February 2003 that the arguments presented to it in the course of the formal investigation procedure 'have done nothing to change [its] views on the selective nature of application', has not reversed the burden of proof, as Forum 187 contends. In fact, the Commission has persuasively set out in the decision the reasons why the measures laid down under the tax scheme applicable to the coordination centres are selective.

Justification on the grounds of the nature and the general scheme of the system

300. Case-law provides that the measure at issue cannot be considered as selective and, accordingly, there is no State aid within the meaning of the Treaty, where different treatment of undertakings in relation to charges is justified by the nature or general scheme of the system of which it is part. [95]

301. It has also been held that it is for the Member State which has introduced such a differentiation in relation to charges into its legal system to show that it is actually justified by the nature and general scheme of the system of which it forms part. [96]

302. Forum 187 here restates the arguments already put forward by it to the effect that the scheme at issue does not constitute a derogation from the ordinary system but a different type of taxation, dictated by fiscal logic and the need to provide a solution to the problem of double taxation of services provided within an international group of companies. It again states that the scheme at issue is open only to multinationals because such a problem becomes truly complex only where a number of subsidiaries are involved. Lastly, the tax scheme applicable to the coordination centres must be seen as a whole and the various measures laid down under it ought not to be analysed separately.

95 — Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 72 and the case-law cited there. For a recent application, see Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 39.

96 — Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 43.

303. Those arguments do not seem to me to show that the tax scheme applicable to the coordination centres is justified by the particular situation of those centres or the groups of which they are a member. In my view, Forum 187 merely raises certain assertions but fails properly to explain why the risk of double taxation justifies restricting the benefit of the scheme at issue to centres created by groups of a certain size. Nor does it demonstrate in what way such a risk of double taxation renders necessary the advantages conferred by the method of assessing taxable income, or the various exemptions laid down under the scheme at issue, or in what way the various measures comprised in the scheme must necessarily be seen as a whole. Nor does Forum 187 establish in what way the various measures laid down under the scheme are justified by the tax system in force in Belgium.

304. Having regard to the matters set out above, the measures laid down under the tax scheme applicable to the coordination centres do indeed constitute an advantage for the purposes of Article 87(1) EC.

— Whether the measure involves the State

305. Case-law provides that for advantages to be capable of being categorised as State aid within the meaning of Article 87(1) EC, they must, first, be imputable to the State and, secondly, be granted directly or indirectly through State resources. [97]

306. It is not disputed that the first of those two cumulative conditions applies, nor does it appear capable of being disputed, as the scheme at issue is a tax scheme adopted by the Kingdom of Belgium.

307. By contrast, Forum 187 argues that the scheme at issue does not satisfy the second condition, since it increased the tax revenues of that Member State. The latter received more that EUR 500 million a year from the tax revenue and social security contributions from the coordination centres. There was therefore no transfer of State resources.

308. That argument cannot be accepted. For the condition that the aid must be financed through State resources to be satisfied, it is sufficient that the measure should receive actual support, directly or indirectly, from the public budget. [98] The waiver, by the Member State concerned, of the right to levy a tax in whole or in part which places the persons to whom the exemption applies in a

97 — See, inter alia, *France* v *Commission*, paragraph 24 and the case-law cited there, and *GEMO*, paragraph 24.

98 — J.-P. Keppenne, *Guide des aides d'État en droit communautaire — Réglementation, jurisprudence et pratique de la Commission*, Bruylant, Brussels, 1999, p. 112, pararagaph 141.

more favourable financial position than other taxpayers constitutes State aid, [99] even if, at the same time, the scheme in question generates tax revenues for that State, by reason, inter alia, of the taxation of profits earned by the companies benefiting from the aid and salaries paid by those undertakings to their employees. The material factor in considering that condition is the public nature of the resource and not the question whether the measure at issue ultimately does, or does not, represent a charge for the budget of the Member State concerned.

309. As the Commission rightly points out, were Forum 187's argument to be adopted, it would be possible for a measure not to fall within the prohibition laid down in Article 87(1) EC where it had the effect of encouraging an undertaking to establish itself in the Member State concerned or allowed it to increase its taxable income or dissuaded it from establishing itself in another country. Such a result could be contrary to the objective pursued by that provision. That argument would also mean that it would be impossible to determine whether State aid existed until after the measure in question had produced its effects, which would run contrary to the system of preventative control of new aid laid down under Article 88(3) EC.

99 — See, to that effect, *Banco Exterior de España*, paragraphs 13 and 14; Case C-6/97 *Italy* v *Commission*, paragraph 16; and Case C-156/98 *Germany* v *Commission*, [2000] ECR I-6857, paragraphs 25 and 26.

— The adverse effect on trade between Member States and on competition

310. Forum 187 argues first of all that the Commission has failed to demonstrate in what way trade between Member States would be affected by the tax scheme applicable to the coordination centres. It maintains that the Commission did not specify whether that effect arises at the level of the centres or the groups of companies to which they belong.

311. Forum 187 next submits that trade between Member States is not affected since, were the scheme in question not to exist, multinational groups would have carried out the same internal operations out of another country. Forum 187 points out in that regard that there are similar schemes to the Belgian scheme in other Member States. The location of the coordination centres is also irrelevant to trade between Member States since the centres carry out intra-group operations.

312. Forum 187 also argues that the Commission has failed to show in what way the position of companies having coordination centres is strengthened in relation to competing companies. It claims that the Commission failed to have proper regard to the principle of the single economic entity, in terms of which activities within a group do not fall to be considered as being in

competition with third parties. Nor can coordination centres compete with one another.

313. Moreover, the scheme in question was open to all multinationals, so that there was no distortion of competition at that level. Similarly, such multinationals are not in competition with small undertakings, which do not carry out cross-border transactions such as 'cash pooling' and are not faced with double taxation of internal financial transfers.

314. In my view, none of those arguments is well founded.

315. First of all, it is clear from the Decision of 17 February 2003 that the Commission did indeed indicate why it took the view that the scheme at issue affects trade between Member States and distorts or threatens to distort competition. Thus, it states in the 100th recital in the preamble to the decision that that the centres, thanks to the advantages they enjoy, are strengthening their competitive position in the sector of services provided to members of the group to which they belong, in which sector they compete directly with organisations including financial institutions, trusts and consultancies specialising in tax, recruitment, information technology, and so forth. Those advantages also strengthen the competitive position of companies in to the group, which are active in numerous economic sectors. The Commission added that those are all sectors characterised by intensive international and intra-Community trade, where large multinational corporations compete directly with other multinational or local undertakings of different sizes.

316. Contrary to what Forum 187 contends, the Commission accordingly indicated that trade between Member States and competition were affected by the strengthened position in which both coordination centres and the groups to which they belong find themselves.

317. I am of the view that that analysis is correct.

318. As regards the effects of the scheme at issue on competition, it should be noted that that concept falls to be widely construed. Case-law provides that it is sufficient that the measure concerned relieves the beneficiary undertaking of charges and thereby strengthens its position in relation to competing undertakings for competition to be distorted. [100]

100 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, and Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24.

319. In my opinion, the Commission was right to hold that the advantages conferred on the coordination centres distorted competition between those centres and service providers in the financial, trust, information technology and recruitment sectors, that is to say providers which offer services identical to those provided by those centres. Forum 187 does not dispute, nor does it appear to be capable of being disputed, that all of those service activities plainly operate in a competitive environment within the Union. The fact, on which Forum 187 relies, that the centres in question may provide their services only to companies within their group does not mean that when they provide those services those centres are not in competition with foreign service providers which supply identical services. As the Commission states, the lower level of tax burden imposed on the coordination centres encourages companies within the group to use the services provided by those centres rather than those provided by other service providers. I do not find in Forum 187's arguments any convincing reason why the services supplied by those centres to companies in their group could not be made available by other service providers.

320. Similarly, I agree with the Commission's analysis as regards the effects on competition at the level of the multinational group companies which have created the 220 or 230 coordination centres active in Belgium. The scheme at issue does indeed strengthen the position of those companies in relation to their competitors, as it allows them to benefit from the services provided by the coordination centres on more favourable terms than those which would result from mere economies of scale arising from the concentration of the corresponding operations. In so far as those companies are active in many sectors of activity, which may be as varied, to take the examples given by Forum 187, as the sale of motor cars or that of foodstuffs, in which there is effective competition, I am of the opinion that such a tax scheme, precisely because of the wide-ranging nature of the activities covered by the multinational groups which it benefits, necessarily has an impact on competition.

321. The argument put forward by Forum 187 that the scheme in question is open to all multinational groups does not in my view require that analysis to be called into question. As the Commission points out, first, that argument is incorrect, in so far as the scheme is open only to groups of a certain size in terms of their establishment, capital and turnover. Secondly, such international groups may also, depending on their activities, find themselves in competition with national undertakings.

322. Lastly, it is not in my view in doubt that the scheme in question affects trade between Member States. That condition is also to be widely construed since case-law provides that when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-

Community trade the latter must be regarded as affected by that aid. [101]

323. The reasons why the Commission was right to hold that the scheme at issue was liable to create distortions of competition also show that it affects trade within the Community. As the coordination centres provide their services to companies within the groups to which they belong which must be established in at least four different countries, there can be no doubt that the scheme in question distorts competition in intra-Community trade.

324. In the light of the above points, I am also of the opinion that it was not necessary for the Commission to enter into detail and to consider the effects of the scheme in question on the particular situation of certain undertakings. In my view, it is sufficiently clear from all of those points that the tax scheme applicable to the coordination centres satisfies the conditions laid down under Article 87(1) EC, without it being necessary to illustrate that determination by concrete examples of the effects arising to the benefit of certain centres or certain groups in particular.

325. Having regard to all of the above matters, the tax scheme applicable to the coordination centres does indeed satisfy the conditions laid down under Article 87(1) EC and thus falls within the scope of that provision.

326. I therefore propose that the plea alleging infringement of Article 87(1) EC be rejected as being unfounded.

(iii) The plea alleging failure to state adequate reasons

327. Forum 187 argues that the scope of the duty to state adequate reasons is dependent on the extent to which individual interests may be affected by the decision in question and that, in the present case, that duty is particularly relevant because the Commission is reversing two previous decisions, taken more than 15 years earlier.

328. Forum 187 argues that the Commission failed to explain why its previous decisions were incorrect. It refers in that regard to the judgment in *Stork Amsterdam* v *Commission*, [102] where the Court of First Instance

101 — *Philip Morris* v *Commission*, paragraph 11, and *Germany* v *Commission*, paragraph 33.

102 — Case T-241/97 [2000] ECR II-309.

annulled, on the grounds of lack of adequate reasons, a Commission decision in which the latter adopted a different position from that adopted in a previous decision.

329. Forum 187 also claims that the Commission failed to state in what way there had been an evolution in the common market.

330. In my view, those objections are not well founded.

331. First of all, the objection alleging a failure to state in what way there had been an evolution of the common market is irrelevant, since, as mentioned above, the change in the Commission's assessment that the scheme in question falls to be classified as State aid is not based on such an evolution.

332. As regards the second objection, Forum 187 is right to submit that the duty to state adequate reasons is particularly relevant where the Commission alters its previous determination as to whether State aid exists. It is settled case-law that the statement of reasons which Article 253 EC requires for a Community measure must be appropriate to the nature of that measure and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court having competence in the matter to exercise its power of review. [103] Where, as in the present case, the Commission classifies as State aid incompatible with the common market a national tax scheme which had been notified to it and which it had decided did not constitute aid, its decision must allow the Member State concerned and the parties interested properly to understand the reasons why it considers that the scheme satisfies each of the conditions laid down under Article 87(1) EC.

333. As was mentioned when considering the previous plea, the Commission complied with the duty to provide adequate reasons as the statement of reasons for its decision allowed Forum 187 to challenge in detail its conclusions in relation to the existence of State aid and, in my opinion, those reasons allow the Court to ascertain whether they are well founded.

334. I do not consider that the Commission was also required in its Decision of 17 February 2003 to explain why it reached a contrary conclusion in its decisions of 1984 and 1987 and in the reply given in 1990 by the Commissioner responsible for competi-

103 — See, inter alia, Case 1/69 *Italy* v *Commission* [1969] ECR 277, paragraph 9, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48.

tion to a Parliamentary question. As mentioned above, the concept of State aid as defined in Article 87(1) EC falls to be objectively construed and the reasons why the Commission reached a different conclusion in its previous decisions are irrelevant to the question whether or not the scheme in question falls within the scope of Article 87(1) EC.

335. In the light of those factors, I am of the opinion that the plea alleging a failure to state adequate reasons, in so far as based on the objections set out above, should be rejected.

(b) The requests by the Kingdom of Belgium and Forum 187 for partial annulment of the Decision of 17 February 2003

336. In its Decision of 17 February 2003, the Commission held that the tax scheme applicable to the coordination centres constituted State aid incompatible with the common market and prohibited the Kingdom of Belgium from granting benefits under the scheme to new traders.

337. As regards existing approvals, the Commission acknowledged that its decisions of 1984 and 1987 and its reply given in 1990 given by the Commissioner responsible for competition to Parliamentary question No 1735/90 had created a legitimate expectation on the part of the coordination centres that the tax scheme in question did not infringe the Treaty rules relating to State aid. It stated that having regard both to the substantial investments that might have been made by those centres and the groups of which they are members and to the long-term commitments undertaken by those centres, observance of the legitimate expectations of the beneficiaries of the scheme in question justified providing that centres already approved on 31 December 2000 which had an approval in force on the date of notification of the decision, that is to say 17 February 2003, could benefit from the scheme in question until the expiry of their approval or 31 December 2010, at the latest.

338. However, it decided that no renewal could be granted for approvals in force at 31 December 2000 which expired after 17 February 2003.

339. In the 121st recital in the preamble to its decision, it stated that since the approvals conferred no right to the continuation of the scheme in question nor to the benefits under it, even during the period to which the approval related, they could not, in any circumstances, confer a right to have the scheme renewed when the present approvals expired. It added that, in view of the explicit restriction of the approval to 10 years, it was impossible for a legitimate expectation to

have been created as to automatic renewal, which would have amounted to approval that could theoretically last for ever.

340. The second and third paragraphs of Article 2 of the Commission Decision thus provide:

'As of the date of notification of this Decision, the benefits of this scheme ... may no longer be granted to new beneficiaries or maintained by renewing existing agreements.

With regard to centres approved before 31 December 2000, the scheme may be maintained until the expiry date of the individual approval applying on the date of notification of this Decision and until 31 December 2010 at the latest. In accordance with the second paragraph, if approval is renewed prior to that date the benefits of the scheme dealt with in this Decision may no longer be granted, even temporarily.'

341. The Kingdom of Belgium seeks the annulment of the Commission Decision in so far as it does not authorise it to grant, even temporarily, renewal of coordination centres status to those centres which benefited from it on 31 December 2000 and had an approval which expired before 31 December 2010.

342. Forum 187, for its part, seeks the annulment of that decision in so far as it fails to lay down adequate transitional measures for centres having an approval expiring after 17 February in 2003 and in 2004.

343. I shall therefore consider these requests together, as that made by the Kingdom of Belgium also covers that made by Forum 187.

344. The Kingdom of Belgium puts forward four pleas in law in support of its application. The first plea alleges infringement of Article 88(2) EC and the principles of legal certainty, the protection of legitimate expectations and proportionality.

345. In its second plea, it alleges infringement of the principle of the protection of legitimate expectations as regards the opportunity to renew the approval.

346. In its third plea, the Kingdom of Belgium contends that the Decision of 17 February 2003 infringes the general principle of equal treatment.

347. The fourth plea alleges a failure to state adequate reasons.

348. Forum 187 puts forward two pleas, alleging infringement of the principle of the protection of legitimate expectations and a failure to state adequate reasons.

349. I shall start by considering the infringement of the principle of the protection of legitimate expectations put forward by the Kingdom of Belgium in its first two pleas, and by Forum 187.

(i) Infringement of the principle of the protection of legitimate expectations

— Arguments of the parties

The Kingdom of Belgium

350. The Kingdom of Belgium submits that the Commission expressly based its decision on the code of conduct and the studies undertaken by the 'Ecofin' Council in determining the transitional period to be granted to the coordination centres. It also points out that the dates of 31 December 2000 and 31 December 2010 are the same as the dates set out in the agreement in principle reached by the Council on 21 January 2003, in terms of which centres subject to the scheme at issue on 31 December 2000 could benefit from it during the existing 10-year period and until 31 December 2010, at the latest. However, it states that the Commission's position was not fully consistent with that adopted by the Council. It points out that on 26 and 27 November 2000 the latter adopted the memorandum of the Presidency which provided that the tax scheme in question was to be continued for all the centres in question until 31 December 2005. The Commission Decision is thus vitiated by a lack of consistency.

351. It also contends that that statement of position on the Council's part led the Belgian Minister for Finance to make an official statement to the Belgian Chamber of Representatives on 20 December 2000, confirming that renewals could be obtained until 31 December 2005. It adds that the opportunity for the coordination centres to benefit from the scheme in question until that date was referred to by the Commission in its proposals for appropriate measures of 11 July 2001.

352. The Kingdom of Belgium infers from that that both it and the coordination centres in question had a legitimate expectation that the centres having an approval which expired prior to the end of 2005 would not be deprived of the benefit of it with immediate effect but could benefit from a renewal of that approval until at least 31 December 2005.

353. The Kingdom of Belgium also contends that the coordination centres had a legit-

imate expectation in their approval being renewed, in the light of the provisions of the tax scheme in question. Such a renewal was automatic when the necessary conditions were satisfied and, on that basis, the centres having an approval which was due to expire shortly after the notification of the Commission Decision had undertaken long-term commitments. It submits that the prohibition on renewal has the effect of subjecting those coordination centres to a significant tax burden, particularly by reason of the imposition of withholding tax on interest paid by those centres, including interest paid under 'cash-pooling' arrangements.

354. In reply to the Commission's argument that there had been a number of 'signals' notifying the Kingdom of Belgium and the coordination centres concerned that the tax scheme in question could not be maintained, the applicant contends that that argument was rejected in the interim order of 26 June 2003, because it is tantamount to saying that the procedure laid down under Article 88 EC serves no purpose. It also points out that until the Decision of 17 February 2003 was notified neither it nor the centres were in a position to know that it was that date that would be adopted by the Commission as the date from which approvals could not be renewed.

Forum 187

355. Forum 187 also argues that, having regard to the approval of the scheme in question by the Commission in 1984, in 1987 and then in 1990, the coordination centres could legitimately believe that they would be entitled to continue to carry out their activities and that Community law would not prevent their approval being renewed.

356. It also maintains that the centres having an approval which expired in 2003 and 2004 required a transitional period in which to reorganise themselves and, if necessary, establish themselves in another country, by reason of the constraints of Belgian employment law, the workload involved in the reconfiguration of their information technology systems and the renegotiation of long-term financial and trading commitments entered into for the purposes of carrying on their activities. Forum 187 claims that those centres required a transitional period of 10 years.

357. Forum 187 also contests the grounds on which the Commission based its conclusion that the provision of transitional measures for those centres was unjustified. The fact that, according to the Commission, the approvals confer no automatic right to renewal is irrelevant to the question whether the centres in question should benefit from a

period for adjustment. The Commission is thus in breach of its obligation to make good the harm caused by its change of position. Nor does it take account of the fact that those centres believed that their approval was to be renewed.

The Commission

358. The Commission first of all denies that the works of the 'Ecofin' Council could have created a legitimate expectation on the part of the Kingdom of Belgium and the coordination centres. It submits that the policies adopted by the Council in the area of corporate taxation, which do not have the force of law, cannot fetter the activities which the Commission is required to carry out pursuant to its exclusive competence in the field of State aid. It argues in the alternative that the Council's position adopted on 26 and 27 November 2000 does not bear the interpretation given to it by the Belgian Government in its statement of to the Belgian Chamber of Representatives.

359. As regards its proposals for appropriate measures, it states that these do not constitute a definitive act and that it may amend them in the light of observations made by the Member State to which they are addressed. It also maintains that its proposals were based on the premiss that all coordination centres should be given an identical minimum period prior to the scheme in question being terminated and that throughout the procedure the Kingdom of Belgium supported the alternative option, which was adopted in the Decision of 17 February 2003, namely that the approvals were to remain in force until their expiry, and could not be renewed.

360. The Commission next denies that the legal rules which applied to the coordination centres conferred on them an automatic right to renewal of their approval. It contends that the Kingdom of Belgium gave no guarantee to the coordination centres that the advantages afforded to them were to continue in existence and that renewal of the approval would be automatic, because it was subject to the same procedure and the same conditions as the initial approval. According to the Commission, the fact itself that the approval was effective for a limited period means that it conferred no rights beyond the end of that period. It adds that, prior to its Decision of 17 February 2003, the scheme in question, had already been amended by the Kingdom of Belgium and that those amendments, which had reduced the advantages initially provided for, were not accompanied by transitional measures.

361. The Commission also states that the Kingdom of Belgium and the coordination centres had received a number of signals prior to the adoption of the Decision of 17 February 2003, notifying them that the scheme in question could not be maintained. It refers in that regard to the code of conduct adopted by the Council and the report of the Code of Conduct Group. It also mentions its notice on the application of the State aid

rules to measures relating to direct business taxation, its request for information to the Belgian authorities relating to the scheme in question in February 1999, its proposals for appropriate measures sent to those authorities on 11 July 2001 and, lastly, its decision to initiate the formal investigation procedure of 27 February 2002. It also states that those measures were published or were referred to in press releases.

362. The Commission argues that the only legitimate expectations on which the centres were entitled to rely were those which its previous decisions gave rise to. It contends that it did indeed satisfy those expectations in allowing a transitional period to the centres having an approval in force at the time the decision was notified and in providing that they could benefit from them until their expiry and 31 December 2010, at the latest. However, for the reasons set out above, it was entitled to provide that access to or the renewal of the application of the scheme should be prohibited after the notification of the decision, in order that the effects of the scheme might gradually be phased out, as and when the approvals expired.

363. The Commission also denies that its decision had the consequence that the activities of the centres which could no longer benefit from the scheme at issue would have to cease their activities immediately. In the first place, its decision does not order the coordination centres to terminate their activities. In the second place, Forum 187 has argued that the measures laid down under the scheme in question confer no advantage on those centres. It does not accept the Kingdom of Belgium's argument that the decision exposed those centres to a disproportionate increase in their liability to tax and to double taxation.

364. Lastly, the Commission rejects the arguments of Forum 187 on similar grounds and claims that it was neither necessary nor appropriate to lay down transitional measures for centres having an approval which expired in 2003 or 2004.

— Appraisal

365. I shall start by describing briefly the nature of the principle of the protection of legitimate expectations.

366. That principle has been progressively accepted into the Community legal order by case-law, which has described it as a 'super-

ior rule of law' for the protection of individuals, [104] 'one of the fundamental principles of the Community' [105] and as a 'general principle'. [106] The principle of the protection of legitimate expectations therefore constitutes a general principle of Community law, allowing the legality of the acts of the institutions to be reviewed.

367. It can thus be seen as the corollary of the principle of legal certainty, which requires that Community legislation must be certain and its application foreseeable by legal persons, in that it seeks, where rules are altered, to ensure the protection of situations legitimately entered into by one or more natural or legal persons in particular. [107]

368. Given its subjective nature, it is difficult to give an exhaustive definition of the principle of the protection of legitimate expectations. Nevertheless, in the light of its application in case-law, it can be said that infringement of the principle is recognised when the following conditions are satisfied. First of all, there must be an act or conduct on the part of the Community administration capable of having given rise to such an expectation. Case-law provides that the principle of the protection of legitimate expectations may be invoked as against a Community act only to the extent that the Community itself has previously created a situation which could give rise to such an expectation. [108] It is that situation which constitutes, in effect, the 'basis' for the expectation of the person concerned. There must, moreover, be specific assurances. [109]

369. Next, the person concerned must not be able to foresee the change to the pattern of conduct previously adopted by the Community administration. Case-law provides that if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead the principle of the protection of legitimate expectations if the measure is adopted. [110] The expectation to which the measure or the conduct of the Community administration gives rise is

104 — Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44, and *Sofrimport* v *Commission*, paragraph 26.

105 — Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52, and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 73.

106 — Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15, and Case C-403/99 *Italy* v *Commission* [2001] ECR I-6883, paragraph 35.

107 — See, to that effect, *Duff and Others*, paragraph 20, and Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 66.

108 — Case 289/81 *Mavridis* v *Parliament* [1983] ECR 1731, paragraph 21; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14; *Rombi and Arkopharma*, paragraph 67; and Case C-459/02 *Gerekens and Procola* [2004] ECR I-7315, paragraph 29.

109 — Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 33; order of 13 December 2000 in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraphs 50 to 52; and Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 113.

110 — Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44; Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 25; Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70; and *VEMW and Others*, paragraph 74.

therefore 'legitimate' and must accordingly be protected where the person concerned might reasonably rely on the maintenance or the stability of the situation thus created, in the same way as a 'prudent and circumspect' trader.

370. Lastly, the Community interest which the contested measure seeks to achieve must not justify the infringement of the legitimate expectation of the party concerned. That condition is satisfied where the balancing of the interests in question shows that, in the circumstances of the case, the Community interest does not prevail over that of the person concerned in seeing the situation maintained that it might legitimately have assumed to be a stable one. [111]

371. I shall therefore consider whether each of those conditions is satisfied in the present case.

The basis for the expectation

372. The Commission acknowledges that its decisions of 1984 and 1987 and the reply given in 1990 by the Commissioner responsible for competition to Parliamentary question No 1735/90 gave rise to a legitimate expectation that there was no incompatibility between the tax scheme applicable to the coordination centres and the Treaty rules in the field of State aid. [112]

373. The parties are in dispute as regards the two following points. First, the Kingdom of Belgium and the Commission disagree as to whether the Council's conclusions of 26 and 27 November 2000 and the proposals for appropriate measures made by the Commission are capable of giving rise to a legitimate expectation that the tax scheme at issue would be maintained until at least 31 December 2005 as regards all coordination centres. Secondly, the Kingdom of Belgium and Forum 187, on the one hand, and the Commission, on the other, are in dispute as to whether, as far as the tax scheme applicable to the coordination centres is concerned, the decisions of the Commission of 1984 and 1987 and the reply given in 1990 by the Commissioner responsible for competition entitle the centres to rely upon their approval being renewed.

374. As regards the first point, which relates to the expectations which the studies carried out by the 'Ecofin' Council and the Commission's proposals for appropriate measures gave rise to, I am of the view that the position of the Kingdom of Belgium cannot be accepted.

111 — For examples of that balancing of the interests concerned *De Compte* v *Parliament*, paragraph 39, and Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 57.

112 — As mentioned above, such a legitimate expectation is expressly recognised by the Commission in the 122nd recital in the preamble to its decision.

375. In the first place, I do not consider that the Council's conclusions of 26 and 27 November 2000 could have given rise to a legitimate expectation on the part of either the Kingdom of Belgium or the coordination centres, that the scheme in question would be maintained until at least 31 December 2005 for the following reasons.

376. As the Commission points out, the conclusions adopted by the Member States at the Council on 26 and 27 November 2000 represent a policy measure, which is declaratory in nature, and which is not, as such, capable of having legal effects. Accordingly, those conclusions can neither bind nor even restrict the Commission's actings in exercising the particular powers which are conferred on it by the Treaty in the field of State aid.

377. Such an analysis of the scope of the conclusions of the 'Ecofin' Council is not disputed by the Kingdom of Belgium. It should be noted in that regard that, in its reply to the Commission of 30 August 2002 to the questions put by that institution in relation to the extent of legitimate expectations in the present case, the latter stated that 'the discussions at Council level regarding the code of conduct fall completely outside the legal framework relating to State aid. They involve questions of policy, which will not be put into effect until the end of 2002'. [113]

378. Given its analysis of the scope of the Council's conclusions, the Kingdom of Belgium cannot therefore claim that those conclusions gave it precise assurances as to the content of the transitional measures which the Commission would be led to adopt, if, at some time, it were to consider that the tax scheme at issue constituted State aid incompatible with the common market. [114]

379. I take the view that the same analysis should be adopted in relation to the coordination centres. It is well known that, in the field of State aid, the right of the beneficiaries of aid to entertain a legitimate expectation that the aid is lawful is subject to the condition that the procedure laid down in the Treaty has been followed. It is also settled case-law that a diligent businessman should normally be able to determine whether that procedure has been followed. [115] Those requirements are based on the mandatory nature of the monitoring undertaken by the Commission pursuant to Article 88 EC.

380. It can be inferred from that that, in the field of State aid, traders can, as a rule, entertain a legitimate expectation only in a case which does not infringe the powers given to the Commission by Article 88 EC. In

113 — Annex 36 to the application by the Kingdom of Belgium, p. 9.

114 — See also, to that effect, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraph 59.

115 — Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25 and the case-law cited there.

other words, traders are deemed to be aware of the powers conferred on the Commission by the Treaty in the field of State aid.

381. In the light of that case-law, I am of the opinion that, even if the coordination centres were to have been aware of the Council's conclusions of 26 and 27 November 2000, they were not entitled to rely on those conclusions being binding on the Commission.

382. Furthermore, as the Commission points out, the meaning of the proposal by the Presidency adopted at the Council on 26 and 27 November 2000 is not free from doubt. The proposal is worded as follows: 'the Presidency proposes to the Council ... that as regards undertakings benefiting from a harmful scheme on 31 December 2000, the effects of those harmful schemes should expire at the latest on 31 December 2005, whether they were schemes granted for a fixed period or not'. [116] It could therefore be construed as meaning that the date of 31 December 2005 represented the last date on which the 10-year approvals in force as at 31 December 2000 could have effect. It does not necessarily mean that all approvals, including those expiring prior to 31 December 2005, were to remain in force until that date.

116 — Annex 17 to the application by the Kingdom of Belgium.

383. It follows from that that the Council's conclusions of 26 and 27 November 2000 could therefore not, in any event, give the Kingdom of Belgium and the coordination centres precise assurances, as required by case-law, that all those centres could benefit from the scheme at issue until at least 31 December 2005.

384. As regards, next, the proposals for appropriate measures notified to the Kingdom of Belgium by the Commission under the procedure for monitoring existing aid, I am also of the opinion that they were not capable of giving that Member State and the coordination centres the precise assurances which that State relies on.

385. As the Commission points out, the transitional measures set out in those proposals are not binding on it where those proposals are not accepted by the Member State to which they are addressed. Those transitional measures may therefore be amended, where the circumstances so require, in the decision given at the end of the formal investigation procedure. Such a possibility is the logical corollary of the right of the Member State concerned to reject the appropriate measures proposed to it by the Commission and to challenge the classification of the measure in question as State aid during the formal investigation procedure.

386. It therefore cannot be accepted that the proposals for appropriate measures sent by the Commission to the Kingdom of Belgium in its letter of 11 July 2001 could have conveyed precise assurances as to the content of the transitional measures which that institution would, if appropriate, include in its decision ending the formal investigation procedure.

387. In the light of the above, I am of the opinion that neither the Council's conclusions of 26 and 27 November 2000, nor the proposals for appropriate measures made by the Commission, could have created a legitimate expectation on the part of the Kingdom of Belgium and the coordination centres that the tax scheme at issue would be maintained until at least 31 December 2005 for all those centres.

388. By contrast, I agree with the Kingdom of Belgium and Forum 187 that, given the provisions of the Belgian tax scheme, the Commission decisions of 1984 and 1987 and the reply given in 1990 by the Commissioner responsible for competition to Parliamentary question No 1735/90 entitled the coordination centres to rely on the fact that the Treaty rules relating to State aid would not preclude their 10-year approval being renewed and that the tax scheme would continue to apply.

389. In its decisions of 1984 and 1987 and in its reply given in 1990 by the Commissioner responsible for competition, the Commission stated that there was no incompatibility between the tax scheme applicable to the coordination centres and the Treaty rules in the field of State aid.

390. Consideration of the provisions of the scheme shows that it provided several advantages, the benefit of which was subject to a number of conditions, compliance with which was to be confirmed by royal decree. It is also true, as the Commission points out, that that scheme further provided that the approval granted by royal decree was to be valid for a period of 10 years. However, that does not justify the Commission's finding that a coordination centre could not rely on the scheme being renewed at the end of that period.

391. I am of the opinion that the tax scheme applicable to the coordination centres was of the nature of a permanent scheme. It was established for an indefinite period. The coordination centres which satisfied the requirements of the scheme on the expiry of their 10-year approval were therefore entitled to have their approval renewed. That was expressly confirmed by the Law of 23 October 1991, the draft of which included confirmation in its statement of reasons that it was not intended to change the law but simply to dispel any concerns the coordination centres might have as to the

possibility of obtaining a renewal. [117] I therefore consider that the permanent nature and the continuity in the application of the tax scheme for the centres which satisfied the conditions laid down under it form an intrinsic part of the national scheme on which the Commission ruled in 1984, in 1987 and in 1990.

392. The Commission puts forward a number of arguments against that analysis of the tax scheme in question. It notes in that regard that renewal was subject to compliance with the same formal procedure and the same conditions as applied when it was originally obtained. However, those factors do not in my view mean that the coordination centres could not rely on the tax scheme continuing. The conditions attaching to the renewal of the approval were the same as those applying to its original grant and were objective in nature. It should also be pointed out, as the Commission indicated in its Decision of 17 February 2003, that the decision whether to grant or withhold such a renewal was not one in relation to which the Belgian authorities had any discretion. [118]

393. That being the case, the fact that the approval came to the end of its 10-year term did not mean that the scheme in question ceased to apply to a coordination centre. It was the point at which the centre required to demonstrate to the Belgian authorities that it continued to meet the conditions which needed to be satisfied in order to benefit from it. The fact that the benefit of the scheme was granted for a fixed period of 10 years therefore did not undermine the continuity of the benefit of the tax scheme applicable to the coordination centres.

394. The Commission also argues that at no time did the Belgian authorities guarantee that the advantages conferred by the scheme would continue in existence and, moreover, that the authorities reduced the extent of those advantages, by introducing, for example, an annual charge of EUR 10 000 per full-time staff member from 1 January 1993.

395. In my opinion, those arguments also fail to show that the coordination centres having an approval which had just expired could not rely on the tax scheme at issue continuing. In support of that conclusion, I would refer, first, to the fact that the Commission itself acknowledged in its Decision of 17 February 2003 that although approval provides no guarantee as to the continued existence of that scheme or of the benefits under it, the coordination centres were entitled to rely on a 'reasonable and legitimate expectation of a certain degree of

117 — Annex 39 to the application by the Kingdom of Belgium.

118 — 105th recital in the preamble. The fact that that recital forms part of the analysis of the selective nature of the scheme and not of the appraisal of legitimate expectations, as the Commission pointed out in paragraph 172 of its defence, has no bearing on the significance of the statement or its relevance to the appraisal of legitimate expectations.

continuity in the economic conditions, including the tax regime'. [119] Secondly, the amendments made by the Kingdom of Belgium to the scheme in question since its introduction by Royal Decree No 187 were a relatively peripheral in nature and did not affect the principal elements of the scheme, that is to say the method of calculation of the tax base and the exemptions from withholding tax, property tax and capital duty.

396. The tax scheme at issue accordingly entitled the coordination centres to rely in its continuing in existence and on their approval being renewed provided they satisfied the objective requirements laid down under the scheme. It follows that, in indicating in its decisions of 1984 and 1987 and in the reply given in 1990 by the Commissioner responsible for competition to Parliamentary question No 1735/90 that the scheme did not fall within the scope of Article 87(1) EC, the Commission did indeed allow the coordination centres having an approval in place on 31 December 2000 to rely on the fact that the Treaty rules on State aid would not prevent their 10-year approval being renewed upon its expiry.

119 — 119th recital in the preamble.

Whether the expectation was legitimate

397. The Commission argues that, at the time when its Decision of 17 February 2003 was notified to them, the coordination centres were not entitled to rely on a legitimate expectation that that scheme would continue or that their approval would be renewed since the centres had been given a number of signals that the scheme could not be maintained. The Commission refers in that regard to the code of conduct adopted by the Council and the report of the Code of Conduct Group. It also mentions its notice on the application of the State aid rules to measures relating to direct business taxation, its request for information to the Belgian authorities relating to the scheme in question in February 1999, its proposals for appropriate measures sent to those authorities on 11 July 2001 and, lastly, its decision to initiate the formal investigation procedure of 27 February 2002.

398. The Commission's position is essentially that those factors signify that the coordination centres ought, when its Decision of 17 February 2003 was notified, to have foreseen that the Treaty rules on State aid would preclude any extension of their approval. I do not consider that that argument can be accepted and that the signals referred to by the Commission mean in this case that the right to rely on a legitimate expectation in the renewal of their approval should be denied to those centres.

399. I reach that conclusion on the basis of, first, the general scheme and the objectives of the procedure for the monitoring of State aid and, secondly, on the nature of the tax scheme in question.

400. As mentioned above, the aim of the obligation to give prior notice of State aid laid down under Article 88(3) EC is in particular to dispel any doubts on the part of the Member State which is considering introducing a measure as to whether it does, or does not, constitute aid for the purposes of Article 87(1) EC.

401. I have already stated that the concept of State aid, as defined in that provision, is objective in nature. Contrary to what the Commission suggested in its defence in Case C-182/03, [120] whether a national measure falls, or does not fall, within the scope of Article 87(1) EC is not a matter of discretion. The fact that the Commission has a wide margin of latitude in determining whether a national measure falls within the scope of that provision where consideration of the conditions laid down under it involves complex financial assessments does not mean that it may amend its determination that a measure constitutes aid at any time and on an entirely discretionary basis.

120 — Paragraph 98.

402. The Commission's position is contrary to the objective underlying the mechanism laid down by Article 88(3) EC and the consequences which have been drawn from it by case-law. It is established that the purpose of the requirement to give notice set out in that provision is to provide legal certainty. [121] It is with that objective in mind that it has been held that the Member State should receive prompt notification as to whether aid is compatible with the Treaty and that the period of two months laid down by Article 4(5) of Regulation No 659/1999 in which the Commission is to give its opinion is mandatory. [122] It is also with that principle in mind that it has been held that, once a general scheme of aid has been approved by the Commission, individual grants of aid under it which are merely measures in implementation of it do not need to be notified. [123]

403. Accordingly, the decision by which the Commission finds that a measure does not constitute State aid for the purposes of Article 87(1) EC does not create a legal situation which may be regularly altered by

121 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 73 and 85.

122 — Ibid., paragraph 73.

123 — Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraph 21, and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 57. The Court stated that 'if it did not do so, the Commission could, whenever it examined an individual aid, go back on its decision approving the aid scheme which already involved an examination in the light of [Article 87] of the Treaty. This would jeopardise the principles of the protection of legitimate expectations and legal certainty from the point of view of both the Member States and traders since individual aid in strict conformity with the decision approving the aid scheme could at any time be called in question by the Commission' (Case C-47/91, paragraph 24).

the institutions in the exercise of their discretionary power, as may be the case particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances. [124]

404. Accordingly, where a national measure has been notified to the Commission in accordance with Article 88(3) EC and the latter has given a decision that the measure does not constitute aid for the purposes of Article 87(1) EC, both the State which introduced the measure and the beneficiaries of it can, once the time-limit for bringing proceedings to challenge the decision has passed, be certain that the scheme does not contravene the Community rules on State aid. The parties concerned are thus entitled to believe that such a decision may generally be qualified only where there has been an evolution in the common market.

405. While, as mentioned above, the Commission may, by virtue of the principle of legality, also reverse such a determination where it considers that, contrary to what it had previously indicated, the scheme concerned falls within the scope of Article 87(1) EC, I am of the view that, should such a case arise, the expectation which its previous determination gives rise to should benefit from a particularly high degree of protection.

406. I am therefore of the view that such an expectation will cease to be legitimate only if the traders concerned are possessed with information which leads them to believe with a sufficiently high degree of probability that the Commission was to reverse its previous assessment. In other words, the fact that the Commission is reviewing the national measure in question and the possibility that it may, once the formal investigation procedure has been completed, adopt a negative decision, is not of itself sufficient to prevent the traders concerned relying on a legitimate expectation that the existing situation will prevail.

407. Next, it is also necessary to ensure that, having regard to the nature of the national measure in question, the traders to which it applies have been given adequate time in which to take account of any alteration in the Commission's assessment of its compatibility with the Treaty rules on State aid.

408. Having regard to those considerations, I do not consider that the various signals relied on by the Commission, whether emanating from the 'Ecofin' Council or itself, justify denying the coordination centres the right to rely on a legitimate expectation that their approval would be renewed.

124 — See, inter alia, *Atlanta* v *European Community*, paragraph 52.

409. With respect, first of all, to the code of conduct adopted by the Council and the report of the Code of Conduct Group, I am of the view that they are irrelevant for the following reason. The undertaking given by the Member States in the code to repeal tax measures held to be harmful to the common market and the fact that the scheme in question was included in the report of the Code of Conduct Group as one of the national measures considered harmful could, it is true, indicate to the coordination centres that the Belgian Government would, in due course, require to amend or to repeal the scheme within a timescale fixed by the Council.

410. However, as already mentioned, the resolution is one of a policy nature, which did not bind the Commission in the exercise of the powers given to it by the Treaty and, accordingly, in its determination as to whether the objective conditions laid down under Article 87(1) EC existed. As a result, the Council's code of conduct and the report of the Code of Conduct Group cannot, in my opinion, be considered as factors which should have led the coordination centres to believe that the Commission would decide that the scheme in question constituted State aid incompatible with the common market.

411. As regards, next, the notice on the application of the State aid rules to measures relating to direct business taxation and the fact that, in the notice, the Commission announced its intention to examine, or to re-examine, all tax schemes in force in the Member States, I am again of the view that they cannot be considered as a signal that the tax scheme applicable to the coordination centres fell within the scope of Article 87(1) EC and could not, as the Commission contends, remain in force.

412. The object of the notice is to provide clarification as to the application of Article 87(1) EC in the field of tax measures applying to undertakings. [125] Its content is thus much too general for it to be possible, merely by reading it, to be aware that the tax scheme applicable to the coordination centres met each of the requirements laid down under that provision. Moreover, in that notice, the Commission gives no indication of an amendment to the criteria on the basis of which it had previously determined whether a tax scheme did, or did not, constitute aid for the purposes of Article 87(1) EC.

413. With regard, lastly, to the request for information to the Belgian authorities relating to the scheme in question in February 1999, the proposals for appropriate measures sent to those authorities on 11 July 2001 and the decision to initiate the formal investigation procedure of 27 February 2002, I am

125 — See paragraph 2 of the notice.

again of the view that these did not allow the coordination centres to foresee with a sufficient degree of certainty what the final decision of the Commission would be.

414. The true position is that those matters informed the coordination centres that the tax scheme was being re-examined by the Commission. However, as was pointed out in the interim order of 26 June 2003, neither the proposals for appropriate measures sent to the Kingdom of Belgium nor the decision of 27 February 2002 to initiate the formal investigation procedure had any independent legal effect against that Member State or the coordination centres. [126]

415. Furthermore, the classification in both of those measures of the tax scheme applicable to the coordination centres as existing aid did not mean either that the Commission was going to adopt a negative decision and to decide in its final decision to reverse its findings reached in 1984, in 1987 and in 1990. As the Court of First Instance pointed out in its order in *Forum 187* v *Commission*, in which it rejected as inadmissible the application brought by Forum 187 against the decision of the Commission of 27 February 2002 to initiate the formal investigation procedure, that classification was provisional in nature. Article 7 of Regulation No 659/1999 provides that that procedure may also be closed by a decision that, contrary to the classification adopted when the procedure was initiated, the national measure under consideration does not constitute aid, or that it is aid that is compatible with the common market.

416. The press notices describing the Commission measures likewise did not mention the reasons why that the tax scheme applicable to the coordination centres was henceforth considered by that institution to constitute State aid for the purposes of Article 87(1) EC. [127] It was only after the publication of the decision to initiate the formal investigation procedure in the *Official Journal of the European Communities* on 20 June 2002 that all the coordination centres could have become aware of the particular reasons why the Commission considered that the measures laid down under the tax scheme in question appeared to it to meet each of the conditions laid down under that provision and that they were incompatible with the common market.

417. However, even if the reasons set out in that decision should have led the coordination centres to foresee that the Commission might reverse its previous decisions, they also required to have adequate time, prior to the decision to close the formal investigation procedure being taken, in which to take

126 — Paragraph 119.

127 — See press releases of 11 July 2001 and 27 February 2002, set out in Annexes B3 and B5 respectively to the Commission's defence in Case C-182/03.

account of such a possibility. Having regard to the specific features of the tax scheme in question, I do not believe that that consideration was possible.

418. The scheme at issue is, as mentioned above, a scheme which derogates from the ordinary tax law and which comprises a number of exemptions and a method for determining the particular tax base. The possibility that measures of that kind may be repealed is therefore much harder for an undertaking to take into account than that of the withdrawal of a subsidy. It requires not only that the economic consequences of such a repeal, which may be material, be taken into consideration, but also a significant degree of restructuring, particularly in relation to accounting matters.

419. It is also necessary to take account of the fact that the scheme had been in force from 1982 and that its benefits were granted for 10 years, renewable for a similar period. Having regard to the length of time in which it had been in effect and the period of the approvals which gave rise to an entitlement to benefits under it, it seems reasonable to believe, as the Kingdom of Belgium and Forum 187 maintain, that the coordination centres having an approval as at 31 December 2000 and which was in force when the Decision of 17 February 2003 was notified, had, with a view to ensuring continuity and stability, organised their long-term activities on the basis not only of the 10-year duration of the original approval but also, to some degree, of its renewal.

420. It thus appears very unlikely that the agreements entered into by those centres for the purposes of carrying on their activities, both with their employees and with third parties, would have been limited as to time and would have been set to expire at the end of their 10-year approval. On the contrary, there is every reason to believe that the activities of the coordination centres were organised on the basis that the tax scheme in question would continue to apply.

421. In those circumstances, I do not consider that the coordination centres had the time that was necessary to review their investments and reorganise their activities in the period between 20 June 2002, when the decision to initiate the formal investigation procedure was published, and 17 February 2003, so as to be able to take into account the possibility that the Commission might adopt a negative decision.

422. There is all the more justification for such reasoning, in my opinion, if one considers the position of the centres having an approval which expired shortly after the notification of the Decision of 17 February 2003. Even if it is accepted that the publication of the decision to initiate the formal investigation procedure in the *Official Journal of the European Communities* should have led them to take account of the

possibility that the Commission might adopt a negative decision, those centres only had a few months available to them in which to adjust to a possible withdrawal of the approvals. Such a short period is all the more inappropriate since, as the Commission states in its defence in Case C-182/03, [128] many of the centres are in their second period of approval, so that their investments and their manner of working were determined in the light of a tax scheme in place for almost 20 years.

423. In the light of all of those factors, I am of the opinion that the coordination centres having an approval on 31 December 2000 and which approval was in force when the Decision of 17 February 2003 was adopted were entitled to have a legitimate expectation that they might benefit from the renewal of their approval when that decision was notified to them. That applies, in particular, to the centres having an application for renewal of an approval which was due to expire shortly after that notification.

The balancing of the interests concerned

424. Case-law provides that the legitimate expectations of traders may be disregarded only where there is public policy interest which prevails over the beneficiary's interest in the maintenance of a situation which it was justified in believing to be stable. It cannot be disputed that the Community interest requires that existing State aid schemes which distort competition between Member States cease to have effect.

425. In the present case, the Commission gives no explanation as to why that Community interest was sufficiently overriding to justify prohibiting any renewal from the time the decision was notified. The main aspect of its argument was that the tax scheme at issue did not entitle the coordination centres to have a legitimate expectation in their approval being renewed and, as I have just explained, I do not consider that that argument can be accepted.

426. The Commission also contends that a failure to renew would not give rise to a material or significant liability to tax on the part of the coordination centres. However, I am of the view that that argument cannot be accepted and that the transitional measures adopted in the decision of 17 February 2003 are vitiated by a lack of consistency. In my opinion, the Commission could not provide both that approvals in force as at the date of notification of its decision, including those renewed in 2001 and 2002, could remain effective until 31 December 2010 and prohibit any renewal after notification was made.

128 — Paragraph 199.

427. The opportunity given to the coordination centres having an approval in force when its decision was notified to benefit from those approvals until their expiry and 31 December 2010, at the latest, proves that the Commission took the view that the effects of the scheme on intra-Community trade are not unduly harmful, as it acknowledges that those effects will continue for another seven years. Moreover, the Commission did not refer in its Decision of 17 February 2003 to complaints from competitors or other factors which would allow the extent of the harmful effects of the scheme in question on intra-Community trade to be precisely determined.

428. Similarly, the Commission, in the 119th recital in the preamble to its decision, justified allowing the current approvals to continue in force until their expiry by reason of the substantial investments made by the coordination centres and the groups to which they belong together with the long-term commitments entered into by those centres. In deciding on that basis that those investments and commitments justified the approvals remaining effective until their expiry and 31 December 2010, at the latest, the Commission necessarily acknowledged that the withdrawal of the scheme in question would prejudice the planned for benefits of those investments and the implementation of those commitments.

429. The Commission cannot therefore effectively argue in the proceedings before the Court that failure to renew to scheme at issue is incapable of materially increasing the liability to tax of the coordination centres and, accordingly, of causing them manifest harm. It is sufficient in that regard to refer to the nature of the measures laid down under the scheme at issue, which comprise exemptions from liability to tax, and, with respect to the method of calculation of taxable income, a particularly advantageous system of derogations.

430. It should also be pointed out that on the date on which the Commission Decision was adopted there was no substitute scheme in place to mitigate the effects of a failure to renew for the coordination centres having an approval which expired after the notification of the decision. The refusal to allow the Belgian Government to authorise any renewal of approvals from the time the Decision of 17 February 2003 was notified is therefore indeed capable of causing manifest harm to the coordination centres having an approval in force at that date which is due to expire prior to 31 December 2010.

431. In the light of those considerations, I am of the opinion that the balancing of the interests involved did not justify prohibiting the Belgian Government from renewing, even temporarily, the approvals which expired after the Commission Decision was notified.

432. Having regard to all of the above, I am of the view that the plea alleging infringement of the principle of the protection of legitimate expectations is well founded. The application for the annulment of the Commission Decision, in so far as it prohibits the Kingdom of Belgium from granting any extension of approvals to the coordination centres having an approval in force as at 17 February 2003, is accordingly justified.

433. However, the Kingdom of Belgium also requests the annulment of Article 2 of the Commission Decision, in so far as it prohibits it from renewing, even temporarily, approvals that were in force as at 17 February 2003 and expire before 31 December 2010. Consideration of that request, inasmuch as it essentially seeks a declaration that all renewals expiring before 31 December 2010 may be renewed and continue in effect until that date, requires that the plea alleging infringement of the principle of equal treatment be examined.

(ii) Infringement of the principle of equal treatment

— Arguments of the parties

434. The Kingdom of Belgium contends that the Commission Decision discriminates without justification between those centres having an approval expiring shortly prior to its adoption, which accordingly benefit from the effects of the scheme in question until 31 December 2010, and those centres having an approval which expires after the notification of the decision and which are therefore denied the benefit of any transitional measure. It states that such discrimination is unjustified because those centres are in similar a economic situation.

435. The Kingdom of Belgium submits that the Commission Decision thus has the effect of treating the coordination centres which have benefited from the scheme in question for many years less favourably than those which obtained their approval more recently. It states that in order to avoid any discrimination the Commission should have provided that all those centres might benefit from the application of the scheme until 31 December 2010.

436. The Commission contests those arguments. It states that all the coordination centres are in the same position under Belgian law, in that they benefit from a 10-year approval. It maintains that it treated those centres in the same way, by providing that each of them could benefit from the whole of its period of approval until such approval expired. It thus took into account the investments made and the commitments undertaken for the period of the 10-year approval. It takes the view, however, that where those investments and commitments

exceed the period of the approval, such a situation reflects a risk assumed by the undertaking.

437. The Commission considers that, in such circumstances, the grant of a transitional period in the form of the extension of the application of the scheme at issue to centres having an approval which expires after the notification of its decision would constitute unequal treatment. The existence of investments and long-term commitments is a matter which affects all centres in the same way, whatever the date on which their approval expires in the period between 2003 and 2010.

— Appraisal

438. Case-law provides that the general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified. [129]

129 — Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 14, and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49 and the case-law cited there.

439. In the present case, the Commission argues that it did not disregard that principle because all the coordination centres are in the same position under Belgian law, all of them are affected in the same way as regards the existence of investments and long-term commitments, and it treated all of them in a similar manner in providing that they were to have the benefit of their approval until its expiry.

440. I do not consider that the Commission's position can be accepted, as it is based on the premiss that at the time when its decision was adopted the coordination centres did not have the benefit of a legitimate expectation that their approval would be renewed. I have already stated that in my opinion that premiss is incorrect. If one starts from the opposing premiss, that those centres were legitimately entitled to believe that the Treaty rules in the field of State aid did not preclude the renewal of their approval, the conclusion becomes inevitable that the approach underlying the transitional measures adopted by the Commission in its Decision of 17 February 2003 leads to unequal treatment.

441. First, if one adopts the position that the coordination centres were legitimately entitled to expect that the tax scheme in question would continue to apply, it seems undeniable that the prohibition of any renewal, whatever its period might be, creates an inequality of treatment between them depending on the date on which their approval expires, as those of them having an approval which was renewed in 2001 or 2002

will be able to benefit from the scheme at issue until 31 December 2010, while those having an approval which expires before that date will not be able to benefit from the scheme in question after the approval expires.

442. Secondly, I do not believe that that difference in treatment can be justified by the fact that the coordination centres obtained their original approval on different dates. In other words, I do not consider that the fact that a coordination centre was approved for the first time in 1985 and obtained a renewal of its approval in 1995 justifies its right to benefit from the scheme in question terminating in 2005, while a centre which was granted an approval for the first time in 1990, renewed in 2000, will be able to benefit from it until 2010.

443. It can equally well be argued that a coordination centre which had benefited from the scheme for over 18 years at the time when the Commission Decision was adopted deserves just as much as a centre which began operating 13 years ago to benefit from the scheme in question until the end of the period laid down by the Commission for the full abolition of the scheme, since it has organised and developed its activities on the basis of the tax scheme in question and against an assumption that it would remain in place, for a longer period of time.

444. In my opinion, the lack of any justification for the difference in treatment created by the scheme in question is also confirmed by the fact that the choice of the date from which no approval could be renewed for any period at all is the date of notification of the decision closing the formal investigation procedure, which is largely discretionary in nature. Thus, it would have been sufficient for the Commission to give its decision closing that procedure at the end of the 18-month period laid down under Article 7 of Regulation No 659/1999 [130] for a coordination centre having an approval expiring on 30 June 2003 to obtain a renewal of it and, by virtue of Article 2 of the Commission Decision, also to benefit from the scheme at issue until 31 December 2010.

445. In the light of those matters, I am of the view that, in its Decision of 17 February 2003, the Commission failed to have regard to the general principle of equal treatment inasmuch as it provided that approvals in force at that date could remain effective until 31 December 2010 and that approvals expiring before that date could not be renewed and could not remain effective until that date.

130 — Article 7(6) of Regulation No 659/1999 provides that the Commission 'shall as far as possible endeavour' to adopt its decision within a period of 18 months from the opening of the procedure, but that that time-limit may be extended by common agreement between the Commission and the Member State concerned.

446. In the light of all those matters, I propose that the Court should annul the Commission Decision in so far as it prohibits the Kingdom of Belgium from renewing, even temporarily, approvals that were in force on the date of notification of the decision and which expire before 31 December 2010.

447. Inasmuch as that proposal would lead to the Kingdom of Belgium's application and Forum 187's alternative application being granted, it is unnecessary to consider the other pleas relied on by the applicants.

4. Costs

448. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3), the Court may, where each party succeeds on some and fails on other heads set out in their application, order that the costs be shared.

449. Forum 187 claims that the Court should order the Commission to pay the costs, including those relating to Case T-276/02. However, the costs in that case were the subject of an award by the Court of First Instance in its order of 2 June 2003, which declared its action against the decision to initiate the formal investigation procedure to be inadmissible. Forum 187's application for costs can therefore be considered only in relation to those of these proceedings and those relating to the application for interim measures, which were reserved in the order of 26 June 2003.

450. If the Court accepts my proposals, in so far as Forum 187 would fail in part in its application in Case C-217/03, I propose that the costs be allocated as follows: Forum 187 should bear one half of its costs in Case C-217/03; the Commission should bear its own costs in that case and one half of the costs of Forum 187; lastly, the Commission should bear the costs in Case C-217/03 R.

451. Similarly, in so far as the action brought by the Kingdom of Belgium is held to be well founded, I propose to the Court that the Commission be ordered to bear its own costs and those of that Member State in Cases C-182/03 and C-182/03 R.

VI — Conclusions

452. In the light of all the above matters, I propose to the Court that it should:

— In Case C-399/03

(1) Annul 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) Order the Council of the European Union to pay the costs.

— In Joined Cases C-182/03 and C-217/03

(1) Annul Commission Decision C(2003) 564 of 17 February 2003 concerning the aid scheme implemented by Belgium in favour of coordination centres established in Belgium, as rectified by the corrigendum of 23 April 2003, in

so far as it prohibits the Kingdom of Belgium from renewing, even temporarily, approvals that were in force on the date on which that decision was notified and expire prior to 31 December 2010.

(2) Dismiss the remainder of the action brought by Forum 187 ASBL.

(3) Order Forum 187 ASBL to pay one half of its costs in Case C-217/03, order the Commission of the European Communities to pay its costs and one half of the costs of Forum 187 ASBL in that case, and order the Commission of the European Communities to pay the costs in Case C-217/03 R.

(4) Order the Commission of the European Communities to pay the costs in Cases C-182/03 and C-182/03 R.