ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber, Extended Composition)
2 June 2003 *

In Case T-276/02,

Forum 187 ASBL, established in Brussels (Belgium), represented by A. Sutton and J. Killick, Barristers,

applicant,

v

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

defendant,

APPLICATION for annulment of the Commission decision of 27 February 2002 to initiate the procedure laid down in Article 88(2) EC in respect of Belgian provisions concerning coordination centres,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: N.J. Forwood, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

Community provisions

1 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty ('the State aid procedure regulation') (OJ 1999 L 83, p. 1), which entered into force on 16 April 1999, contains *inter alia* the following definitions:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87](1) of the Treaty;

(b) "existing aid" shall mean:

...

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

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

...'

National provisions concerning the coordination centres

2 The Belgian legislation on coordination centres is found originally in Royal Decree No 187 of 30 December 1982 ('Royal Decree No 187'). That legislation is applicable to authorised coordination centres.

3 By way of derogation from the ordinary tax regime, the taxable income of authorised coordination centres is, in principle, assessed at a flat rate and corresponds to a percentage of the amount of certain costs of the coordination centre.

4 Where there are no objective criteria to determine the percentage of profits to be taken into account in order to determine the taxable income, it must, in principle, be set at 8%.

5 The profits of coordination centres are taxed at the standard rate of corporation tax.

6 Besides the flat rate determination of taxable income, authorised coordination centres are also exempt from property and withholding tax and registration fees.

7 Authorisation of a coordination centre is subject to certain conditions, including the requirement to be part of a multinational group with businesses in at least four countries, having own capital of BEF 1 billion and an annual consolidated turnover of BEF 10 billion. The authorisation is granted for 10 years and is renewable.

Background to the dispute

8 On 3 April 1984 the Belgian Government notified to the Commission a draft law amending the scheme provided for in Royal Decree No 187. On 2 May 1984 the Commission adopted a decision in which it stated that, in the light of the amendments proposed by the draft law, the tax regime applicable to the coordination centres did not contain any element of State aid for the purposes of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

9 As the amendments actually made to Royal Decree No 187 by the law of 27 December 1984 did not correspond to those proposed in the draft law notified to the Commission, the latter initiated the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) with regard to the tax regime provided for by Royal Decree No 187, as amended.

10 After the Commission had received from the Belgian Government the text of the law of 4 August 1986 further amending Royal Decree No 187, the Commission took the view that the regime no longer contained any aid element, terminated the procedure and communicated its decision to the Belgian Government by letter of 9 March 1987.

11 On 11 November 1998 the Commission adopted a notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3), in which it indicated its intention to examine or re-examine all tax regimes in force in the Member States.

12 By letter of 12 February 1999 the Commission requested the Belgian authorities to provide it with information regarding the coordination centres. The Kingdom of Belgium replied to that request by letter of 15 March 1999.

13 By letter of 17 July 2000 Commission officials informed the Belgian authorities that in the light of the notice on direct business taxation, the tax regime applicable to the coordination centres now seemed to constitute State aid within the meaning of Article 87(1) EC. They invited the Belgian authorities to submit their observations regarding that preliminary assessment.

14 By letter of 6 September 2000 the Kingdom of Belgian contested the validity of the letter of 17 July 2000 classifying the coordination centres regime as existing aid and operating aid. The Kingdom of Belgium requested the Commission, as a collegiate body, to consider the matter and to reach a preliminary conclusion before the initiation of the cooperation procedure provided for in Article 17 of the State aid procedure regulation.

15 On 11 July 2001 the Commission proposed to the Kingdom of Belgium appropriate measures within the meaning of Article 88(1) EC.

16 By letter of 19 September 2001 the Belgian authorities reformulated their comments on the classification as existing aid, the procedure adopted, and the content of the appropriate measures proposed, and informed the Commission that their comments constituted neither an agreement nor a refusal to adopt those measures. The Belgian authorities considered that the co-operation phase provided for in Article 17 of the State aid procedure regulation had been initiated only because of the decision adopted on 11 July 2001 by the College of Commissioners.

The contested decision

17 Failing express acceptance of the appropriate measures by the Belgian authorities within the period laid down, and in the light of the observations submitted by them in their letter of 19 September 2001, the Commission, by decision of 27 February 2002 ('the contested decision'), initiated the formal investigation procedure under Article 88(2) EC in regard to the coordination centres scheme.

18 After summarising the principal conditions which must be satisfied in order to benefit from the tax regime in question, the Commission states as follows in points 31 and 32 of the contested decision:

'It is true that in 1984 the Commission stated that the coordination centres regime did not contain any aid element. Nevertheless, the following analysis shows that the regime, as now applied, appears to satisfy all the necessary criteria for classification as aid. In view of that finding, the Commission is of the opinion that the tax regime is in the nature of an aid which, at the time of initiation of the appropriate State aid procedure, must be regarded as existing aid.

... Article 1(b)(v) of [the State aid procedure regulation] expressly envisages that a measure which did not constitute aid at the time when it was put into effect may become aid due to the evolution of the common market. In such a case [the regulation] indicates that it is an existing aid to which the procedure set out in Articles 17 to 19 of that regulation applies. The position is the same if the Commission, after having initially taken the view that a measure does not constitute aid, then changes its assessment and takes the view that it is in fact an aid within the meaning of Article 87 of the Treaty.'

Procedure and forms of order sought

19 By application lodged at the Registry of the Court on 13 September 2002, the applicant brought the present action.

20 By separate document lodged at the Registry of the Court on the same date, the applicant requested the Court to adjudicate under the expedited procedure in accordance with the second subparagraph of Article 76a(1) of the Rules of Procedure of the Court of First Instance.

21 After hearing the Commission, the Court (Second Chamber, Extended Composition) rejected that application by decision of 8 October 2002.

22 By separate document lodged at the Registry of the Court on 31 October 2002, the Commission raised an exception of inadmissibility under Article 114(1) of the Rules of Procedure. The applicant lodged its observations on that objection on 12 December 2002.

23 The Commission contends that the Court should:

— dismiss the application as manifestly inadmissible;

— order the applicant to pay the costs.

24 The applicant claims that the Court should:

— reject the objection of manifest inadmissibility;

— annul the contested decision;

— order the Commission to pay the costs.

Law

25 Under Article 114(1) of the Rules of Procedure, upon application by a party, the Court may rule on admissibility without dealing with the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings shall be oral. The Court considers that in the present case it is sufficiently informed by the documents before it, and that there is no need to open the oral procedure.

26 The Commission raises two pleas of inadmissibility. First, it submits that the contested decision is not a challengeable act. Second, it contests the applicant's locus standi. The first of those pleas should be examined.

Arguments of the parties

27 The Commission submits, first, that in the case of acts or decisions adopted in several stages, the case-law has held that only a measure which definitively lays down the position of the institution on the conclusion of the procedure may be challenged, and not a provisional measure which merely paves the way for the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10). In the present case the contested decision is merely a preparatory act adopted at a provisional stage of the procedure for examining existing aid pursuant to Article 88 EC and the State aid procedure regulation. It has no immediate legal effect and brings about no change in the legal position of the applicant or of its members. Only on the basis of the examination of the information and opinions obtained in the course of the formal examination procedure initiated by the contested decision can the Commission, where appropriate, adopt a decision which is capable of affecting the interests of beneficiaries of the scheme in issue.

28 The Commission submits, second, that according to the case-law a decision opening the procedure in respect of existing aid does not have immediate legal effects and thus is not a challengeable act (Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 17 to 22; Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraphs 25 to 28, and Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraph 61, '*Tirrenia*'). Only decisions opening the formal procedure in relation to a measure in the course of implementation and characterised as new aid are challengeable acts because of the suspensive effect provided for in the last sentence of Article 88(3) EC.

29 The Commission submits, third, that the action is premature and that, if it were upheld, any examination by the Commission of whether the scheme in question constituted aid and was compatible with the common market would be precluded, contrary to the scheme of the Treaty.

30 The applicant contends, first, that the contested decision has legal effects.

31 It observes that in adopting the contested decision the Commission necessarily reverses the 1984 and 1987 decisions in which it had taken the view that the scheme at issue did not contain any element of State aid. It states that it is indeed possible that the Commission's final decision may, unlike the contested decision, find that the coordination centres scheme does not contain any aid element. However, this is most improbable, particularly because the Commission has already proposed appropriate measures which shows that it regards the scheme as incompatible existing aid.

32 Consequently, the legal certainty created by the 1984 and 1987 decisions has been eliminated or, at least, the legal certainty of the applicant's members is less than before the initiation of the formal examination procedure (Case T-251/00 *Lagardère and Canal* + v *Commission* [2002] ECR II-4825, paragraph 111). Accordingly, the contested decision produces legal effects and is therefore a challengeable act.

33 It submits, next, that the contested decision creates legal effects through its diminution of the legitimate expectations of the Kingdom of Belgium, and of the economic operators concerned, that the scheme at issue is compatible with Community law. In the light of Article 10 EC, under which the Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, there is legal uncertainty as to whether the Belgian authorities may continue to apply the scheme, and issue new authorisations, until the Commission has adopted its final decision. Specifically, the applicant submits that the Belgian authorities cannot ignore the precise findings (however provisional) by the Commission in the contested decision with regard to the

rules for the scheme in question. There is also legal doubt as to whether an undertaking may legitimately expect to receive the benefits of the scheme until the adoption of a final decision. The applicant queries whether a new coordination centre can expect to receive an authorisation for 10 years the day before the Commission adopts a final negative decision.

34 The applicant submits, second, that by virtue of the principle that each person is entitled to effective judicial protection (Case C-50/00 P *Unión de Pequenos Agricultores* v *Council* [2002] ECR I-6677, paragraph 39), the contested decision should be subject to judicial review.

35 In that regard it submits, first, that, unlike competition decisions, a final decision in State aid matters is addressed to the Member State concerned and not directly to the economic operators. In those circumstances, that Member State may, for political reasons, decide not to bring an action for annulment of a final negative decision and decide to comply with it, even though it does not agree with the underlying analysis. It observes that in the present case the Kingdom of Belgium proposed an amendment to the scheme in question following the contested decision and even before the adoption of the Commission's final decision. Moreover, the Belgian Government is refusing to grant new authorisations and is indicating, upon the renewal of existing authorisations, that the 10-year period of validity may be curtailed on account of developments at Community level. In those circumstances, even a successful action brought by the recipients of the aid to contest the final negative decision regarding the coordination centres scheme would not ensure adequate legal protection, as it would not restore that scheme.

36 It observes, next, that the case-law accepts that there is a right of action before the courts against most decisions initiating the formal examination procedure under Article 88(2) EC (*Tirrenia*, and Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa and Others* v *Commission* [2002] ECR

II-4217). It asserts more specifically that the latter judgment establishes a right of action before the courts against a decision to initiate a formal examination procedure that classifies a measure as new aid where the Member State concerned and the economic operators affected took the view that the measure in question was an existing aid or did not fall within the scope of Article 87(1) EC. In the light of that case-law, a decision to initiate the formal examination procedure in a case of existing aid — in particular where that decision confirms, in regard to third parties, a change in the legal scope of a measure — should, equally, be an act subject to judicial review. In the present case, that is precisely the situation of the Belgian authorities and of the economic operators concerned, who, relying on the 1984 and 1987 decisions, took the view that the scheme in question did not constitute aid. The contested decision should therefore be subject to judicial review.

37 Finally, the applicant submits that following the contested decision it became clear to its members that they would have to put in place alternative arrangements to finance their coordination centres by the time the procedure under Article 88(2) EC was complete. Having regard to the time required in order to implement such alternative arrangements, its members are forced to act at the stage of the contested decision in order to anticipate and minimise the consequences of a final negative decision.

38 The applicant concludes from the foregoing that the contested decision must be regarded as a challengeable act.

Findings of the Court

39 It must be noted, first, that it is settled case-law that any measure whose legal effects are binding on, and capable of affecting the interests of, the applicant by

bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action under Article 230 EC for a declaration that it is void (*IBM* v *Commission*, paragraph 9; and Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 21).

40 In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, in principle an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (*IBM* v *Commission*, paragraph 10; Case T-64/89 *Automec* v *Commission* [1992] ECR II-367, paragraph 42).

41 However, in matters of State aid, provisional measures which have independent legal effects in relation to the final decision for which they are a preparatory step constitute challengeable acts (*Tirrenia*, paragraph 57; Case T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 82).

42 In the present case, the contested decision is a provisional measure intended to pave the way for the Commission's final decision on the coordination centres scheme. Accordingly, that decision, adopted in the area of State aid, constitutes a challengeable act only if, notwithstanding its provisional nature, it has independent legal effects.

43 In that regard, first, unlike decisions initiating the formal examination procedure in regard to measures which have been provisionally classified as new aid, the contested decision, which classifies the coordination centres scheme as a scheme of existing aid, does not have any independent legal effects deriving from the

suspension of measures provided for in the last sentence of Article 88(3) EC in regard to new aid (*Tirrenia*, paragraph 59; *Government of Gibraltar* v *Commission*, paragraphs 84 and 85, *Territorio Histórico de Guipúzcoa and Others* v *Commission*, paragraph 38).

44 Second, the classification of the coordination centres scheme as a scheme of existing aid in the contested decision does not imply that the Commission has decided to revoke its 1984 and 1987 decisions. That classification is provisional in nature. Thus, Article 7(2) of the State aid procedure regulation provides that the Commission may close the formal examination procedure by a decision which finds that, unlike the classification adopted at the outset of that procedure, the measure in question does not constitute aid.

45 That preliminary classification of the scheme in question as existing aid cannot, despite the applicant's contention (see paragraph 31 above), cease to be provisional because it is made following a proposal of appropriate measures addressed to the Member State concerned. Even if such a proposal implies that, on the basis of the observations submitted by the Member State, the Commission has reached the conclusion that the scheme in question constitutes incompatible existing aid, that conclusion is itself provisional. It cannot be ruled out that ultimately, in the light of the information submitted by interested persons in the course of the formal examination procedure initiated by the contested decision, the Commission may reach a different conclusion from that which it reached when proposing appropriate measures and may consider that the scheme in question does not in fact contain any aid element.

46 As the contested decision cannot be regarded as a repeal of the 1984 and 1987 decisions, it cannot, contrary to the applicant's submission (see paragraph 32 above), impair the legal certainty which the applicant attributes to those decisions.

47 Third, contrary to the applicant's submission (see paragraph 33 above), the alleged diminution of the legitimate expectation of the Kingdom of Belgium, on which the applicant may not in any event rely, and that of the applicant's members as a result of the contested decision does not constitute a legal effect which brings about a distinct change in the legal position of the applicant, of its members or even of the Kingdom of Belgium. By the contested decision, the Commission informs the Kingdom of Belgium and the economic operators concerned that the coordination centres scheme is being examined as to its compatibility with the common market and that it is possible that at the end of the examination procedure that scheme may be regarded as a scheme of incompatible existing aid. The alleged diminution of the legitimate expectation on which the applicant relies is a mere consequence of the fact of such a warning and not a legal consequence which the contested decision is intended to produce (see by analogy *IBM* v *Commission*, paragraph 19).

48 Moreover, inasmuch as the applicant is alleging, in reality, that the legal effect of the contested decision is to prohibit the Member State from continuing to implement the coordination centres scheme, it suffices to note that, according to well-established case-law, a scheme of existing aid may continue to be implemented until such time as the Commission finds that it is incompatible with the common market (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 20, and *Tirrenia*, paragraph 61). Moreover, as has already been pointed out (see paragraph 43 above), the suspension of measures provided for in the last sentence of Article 88(3) EC does not apply in the present case. Consequently, the Court must reject the argument that, in the light of Article 10 EC, there is henceforth legal doubt as to the Belgian authorities' power to implement the coordination centres scheme after the contested decision and even before the Commission has adopted a final decision.

49 It follows from the foregoing that the contested decision does not produce any legal effect. Consequently, it does not constitute a challengeable act.

50 Besides, contrary to the applicant's submission (see paragraph 34 above), it does not follow from the principle that every person is entitled to effective judicial

protection of rights guaranteed by Community law that the contested decision must be capable of review by the Court. It suffices to note that this principle does not apply where, as in the present case, the contested decision is without legal effect. If it has no legal effect, the contested decision is not capable of infringing any rights guaranteed by Community law. Moreover, the Community Courts have consistently and expressly stated that decisions to initiate the formal examination procedure may be brought before the Court for review only in so far as they have independent legal effects (*Tirrenia*, paragraphs 55 and 57; *Government of Gibraltar* v *Commission*, paragraph 80 et seq, and *Territorio Histórico de Guipúzcoa and Others* v *Commission*, paragraph 37). The approach adopted in those cases cannot therefore be extended to decisions to initiate the formal examination procedure which, as in the present case, do not produce any legal effect.

51 Lastly, the applicant's allegation that its members need a significant period of time in order to implement alternative financial arrangements cannot, of itself, justify the need to permit judicial review of the contested decision.

52 The first plea of inadmissibility must therefore be upheld. Consequently, the action must be held inadmissible and it is not necessary to examine the Commission's second plea of inadmissibility.

Costs

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition),

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the applicant to pay the costs.**

Luxembourg, 2 June 2003.

H. Jung
Registrar

N.J. Forwood
President