ORDER OF THE PRESIDENT OF THE COURT
26 June 2003 *

In Joined Cases C-182/03 R and C-217/03 R,

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, assisted by P. Kelley, B. Van de Walle de Ghelcke and J. Wouters, avocats,

applicant in Case C-182/03 R,

and

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

applicant in Case C-217/03 R,

v

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

defendant,

* Language of the case: French.

APPLICATION for the suspension 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, or for interim measures,

THE PRESIDENT OF THE COURT

makes the following

Order

Procedure in Case C-182/03 R

1 By application lodged at the Court Registry on 25 April 2003, the Kingdom of Belgium brought an action under Article 230 EC for the partial annulment 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 ('the contested decision').

2 By separate document lodged at the Court Registry on the same day, that Member State applied, pursuant to Article 242 EC, for suspension of the operation, pending final judgment in the main action, of the second paragraph of Article 2 of the contested decision in so far as it provides 'nor be extended by the renewal of current authorisations' and of the last sentence of the third paragraph of Article 2.

3 After the Commission adopted an amendment to the contested decision, the Kingdom of Belgium, by documents lodged at the Court Registry on 9 May 2003, submitted a new plea, pursuant to Article 42(2) of the Rules of Procedure, in support of its application for annulment and of its application for suspension of operation.

4 In the light of the submission of that new plea, the Kingdom of Belgium, in connection with the application for suspension of operation, also requested, pursuant to the second subparagraph of Article 84(2) of the Rules of Procedure, that operation of the contested decision should be suspended immediately, even before the Commission submitted any observations.

5 The Commission submitted its written observations on the application for suspension of operation on 22 May 2003.

6 The parties submitted oral argument on 3 June 2003, at an interlocutory hearing held jointly with that in Case C-217/03 R.

Procedure in Case C-217/03 R

7 By application lodged at the Registry of the Court of First Instance on 28 April 2003, registered as Case T-140/03, Forum 187 ASBL ('Forum 187') brought an action under Article 230 EC for the annulment of the contested decision.

8 By separate document lodged at the Registry of the Court of First Instance on the same day, Forum 187 sought the suspension of the operation of the contested decision pending a final judgment in the main action and the adoption of any other interim measures considered necessary in the case. By the same document, it also requested, pursuant to Article 105(2) of the Rules of Procedure of the Court of First Instance, that operation of the decision be suspended immediately, even before the Commission submitted any observations.

9 The Commission submitted its written observations on the application for suspension of operation on 15 May 2003.

10 In the light of the connection with Case C-182/03, and after having heard the parties, the Court of First Instance (First Chamber, Extended Composition), by order of 16 May 2003, declined jurisdiction of Case T-140/03 in favour of the Court of Justice.

11 After the Court of First Instance declined jurisdiction, the application for annulment and the application for suspension of operation were registered at the Registry of the Court of Justice as Cases C-217/03 and C-217/03 R respectively.

12 By document lodged at the Registry of the Court of First Instance on 16 May 2003, subsequently forwarded to the Registry of the Court of Justice, Forum 187 made further submissions following the Commission's adoption of an amendment to the contested decision.

13 The parties submitted oral argument on 3 June 2003 at an interlocutory hearing held jointly with that in Case C-182/03 R.

Joinder

14 Given the connection between the applications for suspension of operation, it is appropriate, pursuant to Article 43 of the Rules of Procedure, to join them for the purposes of this order.

15 At the hearing, the parties in Case C-217/03 R expressed their consent for French to become the only language of the proceedings solely for the purpose of the order to be made on the application for suspension of operation.

Law and facts

Monitoring of existing aid and claims under Community law

16 Article 88(1) and (2), first subparagraph, EC provides:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing 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.'

17 Under Article 17(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1):

'Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.'

Belgian tax regime for coordination centres

18 The Belgian tax regime for coordination centres, which derogates from ordinary law, is governed by Royal Decree 187 of 30 December 1982 concerning the establishment of coordination centres (*Moniteur belge* of 13 January 1983), as supplemented and amended on several occasions.

19 To benefit from the regime a centre must first receive individual authorisation by royal decree. In order to obtain that authorisation, the centre must form part of a multinational group with capital and reserves of at least BEF 1 thousand million

and an annual group turnover of at least BEF 10 thousand million. Only certain preparatory, auxiliary or centralisation activities are authorised and undertakings in the financial sector are excluded from the regime. At the end of the first two years of their activity, centres must have in Belgium at least the equivalent of 10 full-time employees.

20 The authorisation granted to a centre is valid for 10 years and renewable for the same duration.

21 The tax regime for authorised coordination centres derogates from the ordinary tax regime in several respects.

22 First, a centre's taxable income is determined at a standard rate according to the 'cost-plus' method. It represents a percentage of the total operating expenses and costs.

23 Secondly, the centres are exempt from property tax on the buildings they use to carry on their professional activity.

24 Thirdly, the 0.5% registration fee is not payable on contributions made to a centre or on increases in its registered capital.

25 Fourthly, exemptions from the withholding tax on income from dividends, interest and royalties distributed by centres, with certain exceptions, and to income received by the centres on their cash deposits.

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

Council documents concerning harmful tax competition

27 As part of an overall review of harmful tax competition, the Council, on 1 December 1997, adopted a code of conduct for business taxation (OJ 1998 C 2, p. 2). In that context, the Member States committed themselves to eliminate gradually certain aspects of their fiscal measures considered harmful, while the Commission expressed its intention to examine or re-examine, in the light of the State aid rules, the tax regimes in force in the Member States.

28 The Belgian rules relating to the tax regime for coordination centres was among the national fiscal measures affected by those various initiatives.

The background to the contested decision

29 The tax regime for the coordination centres had been examined by the Commission when it was introduced. In particular, in decisions communicated

in the form of letters on 16 May 1984 and 9 March 1987 ('the decisions of 1984 and 1987'), the Commission had held, in essence, that such a regime, based on a system for a flat-rate assessment of the income of the coordination centres, did not contain an aid element.

30 After adopting, on 11 November 1998, a notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3), the Commission undertook a comprehensive review of the tax legislation of the Member States from the point of view of the State aid rules.

31 In the course of that review, the Commission asked the Belgian authorities, in February 1999, for certain information relating, in particular, to the regime for the coordination centres. The Belgian authorities replied in March 1999.

32 In July 2000, the Commission's departments informed the Belgian authorities that the regime appeared to constitute State aid. For the purpose of initiating the cooperation procedure, in accordance with Article 17(2) of Regulation No 659/1999, the Commission's departments invited the Belgian authorities to submit their observations within one month.

33 By letters sent in September and December 2000 and in September 2001, the Belgian authorities contended that it was the full Commission as a collegiate body, not its departments, which was empowered to rule on the matter and to initiate the cooperation procedure.

34 On 11 July 2001, the Commission adopted four proposals of appropriate measures, pursuant to Article 88(1) EC, concerning *inter alia* the regime for the coordination centres. It suggested that the Belgian authorities agree to make a certain number of changes to that regime, although it made the transitional provision that centres authorised before the date on which those measures were approved could continue to benefit from the former regime until 31 December 2005.

35 By letter of 19 September 2001, the Belgian authorities made a certain number of observations regarding the procedure followed and the substance of the matter.

36 Since the appropriate measures it had proposed were not approved, the Commission, by decision notified by letter of 27 February 2002 (OJ 2002 C 147, p. 2), initiated the formal investigation procedure in accordance with Article 19(2) of Regulation No 659/1999. In particular, it invited the Kingdom of Belgium to submit its observations and to provide any information relevant to an assessment of the measure in question. 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 regime at issue had legitimate expectations that provisional measures would be laid down.

37 After the initial one-month time-limit had been extended, the Belgian authorities sent their opinion to the Commission by letter of 12 April 2002.

38 By letter of 16 May 2002, the authorities notified a draft law designed to amend Royal Decree 187. The draft was registered by the Commission as new aid under reference N351/2002.

39 In July 2002, following several meetings, the Commission sent the Kingdom of Belgium a request for additional information regarding both the existing regime and the draft which had been notified. The Belgian authorities responded to the request by letter of 30 August 2002. Interested third parties also took part in the formal procedure to investigate the measure in question.

The contested decision

40 On 17 February 2003, the Commission adopted the contested decision, which was notified on the same day to the Kingdom of Belgium. After finding that the wording of Article 2 of the operative part of the decision could seem inconsistent with the conclusions drawn in points 122 and 123 of the reasons for the decision, the Commission decided, on 23 April 2003, to amend Article 2 by means of a corrigendum. That amendment was notified to the Member State on 25 April 2003.

41 In the contested decision, the Commission first of all gave its reasons for classifying the regime for coordination centres as existing aid and explained the legal basis for the procedure it followed. The decision states that Article 1(b) of Regulation No 659/1999 could serve as a legal basis in the present case and that, failing that, Articles 87 EC and 88 EC constituted the real legal basis for the Commission's action.

42 The Commission also pointed out in the contested decision that, if it were to be regarded as a withdrawal or amendment of the decisions of 1984 and 1987, the contested decision fulfils the conditions for the exercise of the Commission's right to withdraw or amend any unlawful favourable measure.

43 In the remainder of the contested decision, the Commission takes the view that the various measures which form the tax regime for coordination centres fulfil the conditions of Article 87(1) EC, but do not qualify for any of the derogations provided for in Article 87(2) and (3).

44 With regard to the legitimate expectations invoked by the coordination centres, the contested decision states in its grounds:

'(117) The Commission recognises that there is a legitimate expectation on the part of beneficiaries of the scheme. It is therefore right that the Commission should allow the centres that hold an approval on 31 December 2000 to continue to enjoy the benefits of the scheme until the end of their period of approval, if this was ongoing at the time of the present Decision, up to 31 December 2010 at the latest. This view is based on the following grounds.

(118) ... [the] agreements [approved by the tax administration] related only to the facts and not to the scheme being implemented. They cannot, therefore, give any legal guarantee that the scheme, as it stood on the date approval was granted, would be maintained for the next 10 years....

(119) ... Although approval gives no guarantee as to the continued existence of the advantageous nature of the scheme, the Commission admits that centres were established, investment made and commitments entered into in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the tax regime. The Commission has accordingly decided to allow a transitional period so that the cost-plus scheme for the present beneficiaries can be gradually phased out.

(120) 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 ten 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.'

45 According to the conclusions in points 121 to 123 of the grounds of the contested decision:

'(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.'

46 The first two articles of the operative part of the contested decision, as amended, provide:

'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 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.'

The facts subsequent to the contested decision

47 The amendments to Royal Decree 187 which had been notified on 16 May 2002 by the Belgian authorities to the Commission were adopted by the Belgian Parliament on 24 December 2002 and published in the *Moniteur Belge* on 31 December 2002. Their entry into force has to be decided by Royal Decree.

48 On 23 April 2003, the Commission adopted a first decision in respect of the amendments to the regime for coordination centres notified by the Belgian authorities ('the decision of 23 April 2003'). It approved in part the regime which was the result of those amendments, but initiated a formal investigation procedure with regard to the retention of certain tax exemptions.

49 More specifically, it is apparent from that decision that the Commission agrees in principle to the use of the cost plus flat-rate method and to the way in which that method is now applied. On the other hand, the investigation procedure is initiated in respect of the apparent non-taxation of the 'exceptional' or 'gratuitous' advantages granted to the coordination centres and of the exemptions from withholding tax and registration duty on capital increases.

50 Furthermore, a fax sent by the Commission to the Registrar of the Court of Justice on 28 May 2003 shows that, by letter dated 26 May 2003, the Kingdom of Belgium notified the Commission, pursuant to Article 88(3) EC, of the fact that it intended to grant, until 31 December 2005, the benefit of certain tax measures to undertakings which were subject to the regime for coordination centres on 31 December 2000 and whose authorisations expire between the 17 February 2003 and 31 December 2005.

51 The Kingdom of Belgium also asked the Council, by letter of the same day, for those measures to be declared compatible with the common market in accordance with the third subparagraph of Article 88(2) EC.

52 At its meeting of 3 June 2003, the Ecofin Council gave its approval in principle to that request and asked the Committee of Permanent Representatives to take any measures necessary to enable the Council to adopt the planned decision as soon as possible, and in any event before the end of June 2003.

Arguments of the parties

Concerning the admissibility of the application in Case C-217/03 R

53 Forum 187 considers that its main application is admissible. First, it may bring an action in its own name since it played an active role in the administrative procedure and since the contested decision adversely affects its *raison d'être*.

Secondly, it has standing to bring proceedings on behalf of its members, who are themselves directly and individually concerned by the decision.

54 In its written observations, the Commission claims, on the contrary, that the main action is manifestly inadmissible, which means that the application for suspension of operation is inadmissible. Forum 187 is not directly and individually concerned by the contested decision.

55 An association whose role is to promote the collective interests of a category of persons is not individually affected by a measure affecting the general interests of that category. Furthermore, the mere fact that it participated in the administrative procedure is not enough to constitute *locus standi*. Forum 187 has no particular standing with regard to the Belgian authorities, nor can its *raison d'ëtre* be affected by the contested decision. As for its members, they are not entitled to challenge a decision concerning a general aid scheme, so Forum 187 cannot replace them.

Prima facie *case*

56 The subject-matter of the main actions brought by the Kingdom of Belgium and by Forum 187 is not exactly the same. Whereas Forum 187 seeks the annulment of the whole of the contested decision, the Member State's action seeks the annulment of the decision only in so far as it does not authorise it to grant, even temporarily, renewal of authorisation to coordination centres which benefited from the regime at issue as at 31 December 2000.

57 The grounds put forward by the Kingdom of Belgium and Forum 187 to establish a *prima facie* case for their actions therefore differ; it is therefore appropriate to present them separately.

Prima facie case in Case C-182/03 R

58 In order to establish a *prima facie* case, the Kingdom of Belgium puts forward four pleas, to which it adds a new plea submitted by separate document.

59 It maintains, by the first plea, that the Commission, by not granting a reasonable period to the Kingdom of Belgium and to the coordination centres whose individual authorisations expire in the months following notification of the contested decision, infringed Article 88(2) EC and the principles of legal certainty, protection of legitimate expectations and proportionality. The lack of a reasonable period prevents the Kingdom of Belgium from completing the relevant legislative procedure, takes no account of the procedure relating to the amendments to the regime notified by the Kingdom of Belgium, is contrary to Article 88(2) EC which, as is apparent from the judgment in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 12, as a rule grants the Member State a period within which to comply with the amendment to existing State aid, and causes it considerable harm. As for coordination centres whose authorisations are close to expiry, the premature end of the regime in question means, specifically, the immediate cessation of their activities with serious financial consequences, since they needed a minimum of 18 months to prepare for such a change.

60 By its second plea, the Kingdom of Belgium claims that the coordination centres had acquired legitimate expectations that their authorisations could be renewed. Those legitimate expectations arose, first, from the Council's documents relating to harmful taxation measures, from which it is apparent that centres whose

authorisations expire before 2005 could continue to benefit from the current regime until that date, whether or not by renewal of the authorisation. Secondly, it is clear from the Belgian legislation and from the preparatory documents, that the regime for the coordination centres is permanent, which means that a centre has a right to renewal of its authorisation provided that it fulfils the objective conditions laid down by Royal Decree 187.

61 The third plea alleges infringement of the principle of equality. Centres whose authorisations expire in the months following notification of the contested decision are the only ones not granted a reasonable period, and that difference in treatment is not justified.

62 By its fourth plea, the Kingdom of Belgium complains that the contested decision states insufficient grounds so far as concerns the reasons which led the Commission, after acknowledging the need for a reasonable transitional period, to prohibit indiscriminately any renewal of authorisations after the date of notification of the decision.

63 According to the new plea, the corrigendum made to the contested decision made the interpretation to be given to the decision extremely uncertain.

64 In its written observations, the Commission declares that it is prepared to consider, *prima facie*, that the main action is not manifestly unfounded, but in any case makes observations on the five pleas raised by the Kingdom of Belgium.

65 With regard to the first plea, the Commission claims that the Member State could immediately bring into force the new regime which was authorised mainly by the decision of 23 April 2003; accordingly, no specific period was needed. It also maintains that the Belgian authorities are not required, under national law, to grant renewal of an authorisation. As for the transitional period which should have been granted to the coordination centres, it started in 1997 since, from that date, they received many 'signals' heralding a challenge to the current regime.

66 With regard to the legitimate expectations arising out of the Council's documents, the Commission points out that the documents were provisional in nature. Furthermore, it maintains that a different interpretation may be made of the Council documents referred to by the Belgian authorities from that made of them by those authorities. It also disputes the alleged permanence of the regime for coordination centres.

67 The Commission also denies the allegation of discrimination made in the third plea. It maintains, in particular, that all the coordination centres whose authorisations were valid on the date of the contested decision will be able to benefit from an authorisation of at least 10 years, including centres whose authorisations expire in the months following the date of the decision. It also points out that it has a duty to protect undistorted competition within the common market.

68 Replying to the fourth plea, which alleges insufficient grounds the Commission points out that, just as it does not have to give specific reasons for ordering recovery of incompatible aid, so it is not required to give specific reasons for carrying out its duty, under Article 88(1) EC, constantly to review existing aid schemes.

69 In reply to the Kingdom of Belgium's new plea, the Commission claims that the contested decision, as amended, allows coordination centres whose authorisations were renewed between 1 January 2001 and 17 February 2003 to retain the benefit of the effects of the regime in question. There is no uncertainty as to the scope of that decision and, in any event, the Belgian authorities were properly informed in sufficient time of the Commission's intentions. The Commission therefore raises the question whether that new plea is admissible and maintains that it is also manifestly unfounded.

Prima facie case in Case C-217/03 R

70 Forum 187 raises four pleas to establish a *prima facie* case for its application.

71 It maintains, by the first plea, that the contested decision has no legal basis and infringes the principle of legal certainty. In view of the positions adopted by the Commission 15 years previously, the decision cannot be based on Article 1(b)(v) of Regulation No 659/1999, since it makes no reference to any development in the common market, nor on Articles 87 EC and 88 EC. Nor, in view of the time elapsed, can it reflect the Commission's right to rectify its mistakes. In those circumstances, the principle of legal certainty, connected with observance of the inviolability of previous decisions, was infringed.

72 By its second plea, Forum 187 claims that the analysis made in the contested decision, according to which the tax regime for coordination centres falls within the scope of Article 87(1) EC, contains several errors. The reasoning is too cursory, owing to the overall nature of the analysis carried out. The decision does not distinguish correctly between competition between national tax regimes and competition between undertakings. It undermines the sovereignty of the Member

States with respect to taxation. In practice, a large number of centres gain no financial advantage from the regime in question. The regime does not involve any loss of tax revenue for the Belgian State, because, if it did not exist, most of the centres would not have been established in Belgium. It creates no restriction on competition because it is open to all multinationals, which alone need a centre to supply cross-border services within a group, nor does it have any effect on trade between Member States. Furthermore, the Commission incorrectly reversed the burden of proof to the detriment of the Belgian authorities.

73 The third plea alleges infringement of the legitimate expectations which the Commission had created for the coordination centres. First, according to Forum 187, it is not certain that centres which were authorised before 31 December 2000 but whose authorisation was renewed or amended between that date and the date of the contested decision have a transitional period. Secondly, no transitional period is provided for centres whose authorisations expire after the date of the decision. In view of the fact that the closing and transfer of a centre may take up to two years, the Commission was wrong to focus exclusively on the legal term of the authorisation without taking into account the practical and operational difficulties resulting from its decision.

74 The fourth and final plea criticises the contested decision for stating insufficient grounds, in particular as to the reasons which led the Commission to reverse its decisions of 1984 and 1987 and as to the justification for the transitional period granted.

75 In response to the first plea, the Commission maintains that the contested decision is based on Article 88 EC. Since a reference to Regulation No 659/1999 is considered necessary, the Commission invokes Article 1(b)(ii) of that regulation, which includes in the definition of 'existing aid' any aid previously

approved by the Commission or the Council. In the present case, the decisions of 1984 and 1987 do not preclude an action by the Commission, if the tax regime concerned does indeed have to be regarded as aid and provided that the action does not infringe the legitimate expectations of the interested parties.

76 The Commission also refutes each of the arguments raised by Forum 187 in connection with its second plea. An aid scheme may be evaluated on the basis of its general characteristics. The Commission rightly took into account all the effects of the regime concerned on competition. The contested decision is neither a covert harmonisation nor a challenge to the sovereignty of the Member States, but merely an application of the rules of the Treaty. The individual situation of certain undertakings is irrelevant to the overall assessment of the regime at issue. The fact that, owing to its effects, the regime acquires tax revenue for the Belgian State can in no way rule out the existence of aid. The selectivity of the regime is specifically due to the fact that its application is restricted to multinationals obtaining services within a group. Furthermore, the Commission did not reverse the burden of proof.

77 As regards the third plea, alleging infringement of the legitimate expectations of the beneficiaries of the regime in question, the Commission considers that the contested decision contains adequate transitional provisions.

78 In reply to the fourth plea, the Commission maintains that the decision states sufficient grounds.

Urgency and balancing of interests

79 The Kingdom of Belgium and Forum 187 draw attention, in particular, to the damage arising from the fact that it was impossible to renew the standing of coordination centres whose current authorisations will expire after the date of notification of the contested decision but before judgment is given in the main action. They maintain that the consequence of the application of that decision would be that those centres in Belgium would have to cease activities immediately.

80 According to the Kingdom of Belgium, the imposition of a withholding tax on all the whole flow of funds from the coordination centres would result in a disproportionate cash advance since the total amount of the withholding tax is significantly higher than the total amount of corporation tax; it would also lead to dual taxation. The centres would therefore be compelled to interrupt their activities and to relocate abroad, from where they would not subsequently return, owing to the long-term investments made. About 10 centres are involved.

81 That damage would occur before the outcome of the main action and even before the Kingdom of Belgium was able to adapt its legislation and to offer, with the agreement of the Commission, a new regime giving centres a framework within which to pursue their activities in Belgium and therefore to avoid such harmful consequences. The partial approval of the regime notified by the Belgian authorities by no means settles certain essential points concerning *inter alia* the withholding tax on income from moveable assets.

82 The Kingdom of Belgium argues that it would suffer three kinds of harm as a result of this phenomenon of relocation. First, there would be the loss of up to 450 jobs, which could not be redressed owing to the current financial crisis and the very specific skills of the staff concerned. Secondly, the coordination centres sector, the importance of which for Belgium is well established, would be

weakened and Belgium's reputation adversely affected. The lack of an adequate transitional period thus affects the long-term establishment strategy of the centres. Thirdly, that development would deprive the Belgian State of a significant source of tax revenue and social security contributions, both directly and indirectly.

83 Forum 187 points out the commercial difficulties which would be suffered by the centres whose authorisations expire before a ruling is given in the main action. Their activities, like those of their group, would be seriously disrupted if they were required to close without being granted an adequate transitional period for reorganising their affairs. The sudden removal of a coordination centre would oblige the multinational to make radical changes to its *modus operandi*, at great expense and with a very harmful impact on its financial activities. It would also make it difficult to transfer existing contracts to other entities within the group. Also, those consequences would be irreversible. There are 8 applications for renewal of authorisation already pending and 28 further applications are still to be made.

84 Forum 187 also mentions the position of centres whose authorisations were renewed or amended between 1 January 2001 and 17 February 2003. If the contested decision meant, for them, the immediate end of the regime in question, that would generate legal uncertainty, which in itself constitutes serious and irreparable harm, and considerable commercial damage. However, Forum 187 withdrew that argument following the Commission's adoption of an amendment to the decision.

85 The Kingdom of Belgium and Forum 187 maintain that the balance of interests weighs in favour of granting the suspension of operation. They both stress that the Commission allowed the regime for coordination centres for 20 years and granted a transitional period until 2010, so that the Community interest in opposing suspension of operation is slight. The Kingdom of Belgium points out in

particular that the granting of a sufficient and appropriate transitional period is in the Community interest and that the interest pursued by the Commission through the immediate prohibition of what it had authorised for 20 years cannot take precedence over the interest of the Member State and its centres in avoiding serious and irreparable harm. Forum 187 stresses the specific harm which would result for its members from such a prohibition and compares it with the slight distortion of competition caused by the regime in question.

86 For its part, the Commission considers that, as regards both the coordination centres and the Kingdom of Belgium, the condition of urgency is not satisfied.

87 With regard to the harm alleged by that Member State, the Commission states, first, that it cannot invoke the harm incurred by the coordination centres, because they do not constitute a whole sector of the Belgian economy and, in the present case, only about 10 centres are involved.

88 The Commission also maintains that the harm invoked is not the result of the immediate application of the contested decision, since this by no means prevents centres continuing in Belgium. Possible cessations of activity or relocations would be the result of the individual decisions of the centres concerned, which would take many factors, not only fiscal factors, into account.

89 Furthermore, the new tax regime for coordination centres was essentially authorised on 23 April 2003 and its entry into force can be decided without any additional time-limit. The regime does not require any major adjustment to the centres' accounting systems. The Commission maintains that the fact that it

opened the investigation procedure in respect of certain aspects of the regime, in particular the exemption from the withholding tax, does not really constitute a restriction on centres. It points out in that respect, first, that the withholding tax is not payable on the whole of the flow of funds between a coordination centre and the companies in the group but only on the periodic interest payment made by the centre to those companies and, secondly, that there are many exemptions from the tax in ordinary tax law.

90 With regard to the extent of the harm alleged, the Commission first disputes that the damage allegedly caused to the 10 coordination centres concerned by the immediate implementation of the contested decision can be validly established without any reference at all to the individual position of each of them. It also considers that that possible harm is purely financial and by no means jeopardises the very existence of the centres. Furthermore, since the centres form part of large international groups, they have the financial means necessary to meet additional costs. As regards alleged contractual undertakings and long-term investment, the Commission points out that the Kingdom of Belgium's application contains no specific information. Finally, since 1997 the centres have received many signals, so that they could have anticipated the decision finally adopted.

91 The Commission infers that, since there is no serious and irreparable harm to the centres concerned, there is also no harm to the Kingdom of Belgium. Furthermore, even if some 10 centres ceased their activities or relocated, that would not have a significant impact on the Belgian economy. In any event, the Belgian authorities are in a position to prevent any harm by immediately implementing the new regime for coordination centres.

92 As regards the harm invoked by Forum 187, the Commission points out that centres whose authorisations were renewed or amended between 1 January 2001 and 17 February 2003 may continue to benefit from their authorisations.

93 In respect of the other centres, the Commission makes observations which are in essence identical to those expressed in paragraphs 88 to 90 of this order.

94 For the purposes of weighing the various interests in the balance, the Commission refers to its interest in the measures being implemented, even if they are the subject of an action, and in its action to protect undistorted competition not being hindered. It also invokes the interest of third party competitors who are badly affected by the existing situation. The fact that the Belgian regime was regarded as a harmful tax measure in the Council's documents shows that there is a Community interest in seeing it abolished or amended. It also points out that the contested decision does not involve measures to recover aid, so that the Community interest ought, without any doubt, to take precedence over that of the coordination centres concerned.

Findings

95 Under Articles 242 EC and 243 EC, the Court may, if it considers that circumstances so require, order suspension of operation of the contested measure or lay down the appropriate interim measures in the cases before it.

96 Article 83(2) of the Rules of Procedure requires any application for such measures to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

97 According to settled case-law, the judge hearing an application for interim relief may order suspension of operation or other interim measures if it is established that such an order is justified, *prima facie*, in fact and in law (*fumus boni juris*) and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. (Case C-110/97 R *Netherlands* v *Council* [1997] ECR I-1795, paragraph 24). If appropriate, the judge hearing the application for interim measures also weighs up the interests involved.

Admissibility of the application in Case C-217/03 R

98 It has consistently been held that, in principle, the issue of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures, so as not to prejudge the substance of the case. However, where the contention is that the main action is manifestly inadmissible, it is for the judge hearing the application for interim measures to establish whether there is a *prima facie* case for finding that there is a certain probability that the main application is admissible (Joined Cases C-239/96 R and C-240/96 R *United Kingdom* v *Commission* [1996] ECR I-4475, paragraph 37).

99 Such an examination of the admissibility of the action is bound to be cursory because the proceedings for interim relief are by nature urgent. However, the decision of the judge hearing an application for interim measures does not prejudge the ruling which the Court of Justice will be required to give in the main action.

100 The Commission claims that the main action in Case C-217/03 is manifestly inadmissible. Forum 187 is not individually concerned by the contested decision, either by reason of its own interests or because it protects the collective interests of undertakings which are themselves individually concerned by the decision.

101 As regards Forum 187's reference to the protection of its own interests, it is clear from the case-law of the Court of Justice that, although the defence of general and collective interests of a category of persons is not sufficient to establish the admissibility of an action for annulment brought by an association, an association responsible for defending the collective interests of undertakings is nevertheless able to bring such an action against a final decision of the Commission concerning State aid if it can prove an interest of its own in bringing the action, in particular because its position as a negotiator has been affected by the measure of which the annulment is sought (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 20 to 24, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 29 and 30).

102 In the present case, in order to establish an interest of its own in bringing the action, Forum 187 asserts, not only that it actively participated in the procedure to investigate the measure in question, but also that it represents all the coordination centres and that its very *raison d'être* is affected by the contested decision.

103 Even though the Commission has responded to these arguments by pointing out that the contested decision did not involve the elimination or expulsion from Belgium of the members of Forum 187, the fact remains that the specific circumstances invoked by that association require an assessment of the actual scope of the decision and of its foreseeable consequences on the fate of the association, and also raise the question whether an association whose *raison d'être* is affected by a decision may, on that basis, claim an interest of its own in seeking its annulment.

104 As regards the reference by Forum 187 to the defence of the interests of its members, who are individually concerned by the contested decision, it should be pointed out that, in the present case, although the decision relates to a general aid scheme, a fact which supports the conclusion that an action brought by an

undertaking benefiting from such a scheme would be inadmissible, it also contains transitional provisions which directly affect the fate of limited categories of operators, namely coordination centres which already had authorisation of the date of notification of the contested decision and whose authorisations are renewable or will expire prematurely on 31 December 2010.

105 The admissibility of an action brought by those operators and, consequently, of an action brought by the association representing them cannot be decided at the stage of interim proceedings.

106 It must be stated that, in the case of an undertaking which has received unlawful aid, the recovery of which has been ordered by the Commission, the Court has accepted that an action brought by that undertaking against the Commission's unfavourable decision is admissible, even though the decision concerned a State aid scheme (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraphs 31 to 35).

107 Therefore, even though the circumstances of the present case appear to be different, the Court's case-law concerning these questions of admissibility does not seem sufficiently established to entail the conclusion, in the present proceedings, that Forum 187's action is manifestly inadmissible inasmuch as it seeks to protect the interests of its members.

108 In view of the foregoing, the application for suspension of operation submitted by Forum 187 cannot be dismissed as manifestly inadmissible.

The subject-matter of the applications for suspension of operation

109 When questioned on this point at the hearing, the applicant in Case C-217/03 R confirmed that, in the light of the amendment made to the contested decision, its application for suspension of operation, in spite of its broader wording, was essentially identical to the application submitted in Case C-182/03 R.

Scope of the transitional regime established by the contested decision

110 In the first place, in view of the adoption of an amendment to the contested decision and the different opinions expressed in this regard by the parties in the written procedure, it is necessary to specify the exact scope of the transitional regime laid down by the decision.

111 In that regard, when questioned at the hearing, the parties agreed, for the purpose of these proceedings, to refer to the contested decision as amended and as interpreted by the Commission in its written observations (see paragraph 69 of this order).

112 In those circumstances, for the purpose of these proceedings, the contested decision is to be interpreted as meaning that all coordination centres which had authorisation as at the date of notification of the decision may continue to benefit from it until their individual authorisations expire and until 31 December 2010 at the latest.

113 In the light of the foregoing, there is no need to take into consideration individually either the Kingdom of Belgium's new plea, set out in paragraph 63 of this order, or the arguments presented by Forum 187, as summarised in paragraph 84 of this order, concerning the centres whose authorisations were renewed or amended during the period between 1 January 2001 and the date of notification of the contested decision.

Prima facie *case*

114 For the purposes of assessing the applications for suspension of operation, it is appropriate, first, to examine in particular the pleas relating to the lack of appropriate transitional measures in the contested decision; this will make it possible subsequently to put the harm claimed by the Kingdom of Belgium and Forum 187 into better perspective. The question of whether the transitional measures laid down by the decision are appropriate lies at the heart of these proceedings. First, the very aim of the applications for suspension of operation is to obtain a more favourable transitional regime. Secondly, the claim of urgency is based on the consequences of the allegedly inappropriate nature of the transitional measures contained in the decision.

115 The criticisms made by the Kingdom of Belgium and Forum 187 against the transitional provisions in the contested decision refer to Article 88(2) EC and to the principles of legal certainty, of protection of the legitimate expectations held by the Member State and by the coordination centres, and of proportionality and equality.

116 It is not for the President of the Court, when assessing whether there is a *prima facie* case, to give a final ruling on those various pleas. Subject to that reservation, it must nevertheless be stated that they seem reasonable.

117 In order to assess the scope of the contested decision, it is necessary first to bear in mind the context in which it is set. The grant of suspension of the operation of a measure cannot disregard the legal framework of which it is part.

118 None of the parties has disputed that, since the Commission had previously held that the tax regime for coordination centres did not contain aid falling within the scope of Article 87(1) EC, the regime could continue to be implemented as long as the Commission had not found it to be incompatible with the common market (see by analogy, with regard to an existing aid scheme, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 20, and Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraph 61).

119 It also appears, on first analysis, that neither the proposal of appropriate measures sent to the Kingdom of Belgium by the Commission nor the subsequent initiation, by the decision of 27 February 2002, of the formal investigation procedure, had any independent legal effect against that Member State or the coordination centres. In particular, the classification as existing aid and the doubts relating to the compatibility of that aid with the common market, as expressed in that decision, were provisional in nature and did not mean that the Commission had decided to reverse the decisions of 1984 and 1987. Indeed, in the light of information submitted by the interested parties in connection with the formal investigation procedure, the Commission might conceivably have reached a different conclusion and considered, in the end, that the regime for coordination centres does not constitute aid or contains only aid elements compatible with the Treaty. It should be pointed out in that regard that it was on those grounds that, by order of 2 June 2003 in Case T-276/02 *Forum 187* v *Commission* [2003] ECR II-2075, the Court dismissed as inadmissible the action for annulment brought by Forum 187 against the decision of 27 February 2002.

120 The Kingdom of Belgium and Forum 187 could not therefore necessarily expect the Commission to adopt a decision with the content of the contested decision.

121 Similarly, they could not know in advance the date on which the Commission would take its decision.

122 It is on the basis of these factors that it is necessary to consider briefly, in the light of the pleas raised by the Kingdom of Belgium and Forum 187, whether the transitional provisions contained in the contested decision are appropriate.

123 With regard to the Member State, it seems *prima facie* that the obligations to act or not to act which stem from the operative part of the contested decision are imposed on the State from the date of notification of the decision, without any specific time-limit for preparing itself. Furthermore, the Kingdom of Belgium is authorised to grant a transitional period only for authorisations which are underway and can no longer grant renewal of an authorisation.

124 The possibility remains, at the present stage, that that lack of a time-limit does not render the contested decision unlawful, since the decision was part of the review, carried out pursuant to Article 88(1) and (2) EC, of a regime which had hitherto been approved by the Commission.

125 It is true that the Commission claims that, in view of the partly positive attitude which it adopted in the decision of 23 April 2003, the Kingdom of Belgium could immediately implement a new tax regime for coordination centres.

126 However, although that argument may have a certain significance with respect to the assessment of urgency, it appears, on first examination, less persuasive when

it comes to assessing whether there is a *prima facie* case, since the validity of the contested decision must be assessed as on the date of its adoption.

127 As regards the coordination centres, it is also impossible automatically to rule out the possibility that they had certain legitimate expectations that, if the Commission's decision were unfavourable, transitional measures would be adopted to cover, for a reasonable period, all the centres, whatever the expiry date of their authorisations.

128 In conclusion, it is apparent from all these factors that it is impossible to reject at this stage, without prejudicing the assessments to be made during the examination of the main action, the claims of the Kingdom of Belgium and Forum 187 that the Commission should have granted the Member State a period within which to comply with the contested decision and the coordination centres whose authorisations expired in the near future a period within which to reorganise themselves.

129 It is therefore necessary to examine the conditions for granting the requested suspension.

Urgency and balancing of interests

130 In assessing the urgency of the measures sought, it must be determined whether they are necessary in order to avoid serious damage which could not be made good even if the main action were successful.

131 In that regard, it appears that the almost immediate interruption of the tax regime for coordination centres for one category of such centres, namely those whose authorisations expire in the short term, may have consequences which are serious and largely irreversible.

132 That harm is not limited to the accumulation of the possible adverse financial consequences which the contested decision would have for coordination centres whose authorisations expire in the months following notification of the decision.

133 Indeed, by seeking to bring an end to the implementation of a regime which has applied for many years without waiting for an overall and final assessment of the merits of the regime designed to succeed it, the contested decision creates a situation of harmful legal uncertainty both for the Kingdom of Belgium and for the groups to which the coordination centres concerned belong.

134 However, that Member State has a certain interest, *inter alia* for the reasons stated in paragraph 82 of this order, in being able to supply economic operators with a legal and fiscal environment as far as possible free from uncertainty.

135 Similarly, for certain coordination centres, a legislative vacuum in their specific tax regime, between the expiry of the current regime and the entry into force of the new regime, seems likely to cause significant problems.

136 The Commission nevertheless maintains that the Kingdom of Belgium is able to avoid the damage alleged by implementing a new regime in accordance with the contested decision and with the decision of 23 April 2003.

137 However, it does not seem possible, at the interim stage, to assess to what extent the Kingdom of Belgium is, in fact, able to establish urgently a new regime which does not infringe either of those decisions.

138 By the contested decision, the Commission required the Member State to withdraw the regime for coordination centres or 'to amend it in such a way as to make it compatible with the common market', without, however, giving any specific guidance as to the nature of the amendments necessary for that purpose. That lack of guidance seems to confirm the difficulty of the task facing the Member State concerned.

139 Moreover, the detailed rules of that hypothetical tax regime which could come into force immediately, without waiting for the end of the formal investigation procedure, are not clear from the decision of 23 April 2003. Thus, although the Commission accepted the principle of a flat-rate method of assessing the taxable income of the coordination centres, it provisionally made it unlawful not to add to the taxable basis obtained by that method the exceptional or gratuitous advantages granted to centres by the members of the group to which they belong.

140 Furthermore, the Kingdom of Belgium stated at the hearing, in response to the Commission's observations, that a partial entry into force of the new tax regime could not be achieved by the rapid means of the adoption of a royal decree but required amendments of a legislative nature.

141 The risk of harm reparable only with difficulty following the implementation of the contested decision must therefore be regarded as adequately established.

142 In those circumstances, the President of the Court must weigh up the risks associated with each possible result. In practical terms, that means examining whether or not the interest of the Kingdom of Belgium and Forum 187 in obtaining part suspension of the operation of the contested decision outweighs the interest in its immediate application. When carrying out that examination, he must determine whether the possible annulment of the decision by the Court giving judgment in the main action would make it possible to reverse the situation that would be brought about by its immediate implementation and, conversely, to what extent suspension would be such as to prevent the objectives pursued by the contested decision in the event of the main application being dismissed (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 50, and Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 89).

143 In that regard, it must be stated that, apart from the general interest in the application of measures of Community institutions, the Commission has by no means explained the extent of the harm which would be caused to the internal market if the gradual abolition by 31 December 2010 of the current tax regime for coordination centres did not include an immediate application of the disputed ban on the renewal of authorisations.

144 On the contrary, by dwelling on the fact that the number of coordination centres concerned was small, the Commission rather showed that the requested suspension would not have a significant economic effect. Furthermore, it

acknowledged at the hearing that it had not received complaints from competitors which might have demonstrated, by comparing the respective developments of the undertakings concerned, the specific effects of distortion of competition which would be caused if suspension were granted.

145 On the other hand, as is apparent from the foregoing arguments, the consequences for the Kingdom of Belgium and Forum 187 if suspension is not granted do not seem either hypothetical or lacking in seriousness.

146 Furthermore, in the present case, it seems conclusive that, if the suspension sought is not granted, a decision on the main issue in favour of those parties would be, in any event as regards the transitional regime of the contested decision, largely ineffective, since any financial measures which might be taken do not appear suitable for retroactively restoring the stability of the legislation applicable to coordination centres.

147 It is also necessary to take account of the fact that the Kingdom of Belgium acted diligently in order to prevent the occurrence of the alleged damage. The Member State in fact notified the Commission, in May 2002, of amendments to the existing regime, in order to respond to the concerns expressed by the Commission in its proposal of appropriate measures.

148 Therefore, suspension of the operation of the contested decision should be ordered inasmuch as it prohibits the Kingdom of Belgium from renewing coordination centre authorisations effective at the date of notification of the decision. It must be specified that the effects of renewals made pursuant to this order shall not extend beyond the day on which judgment is given in the main action.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

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.

3. Costs are reserved.

Luxembourg, 26 June 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President