

Official Journal

of the European Union

ISSN 1725-2555

L 282

Volume 46

30 October 2003

English edition

Legislation

Contents

I Acts whose publication is obligatory

.....

II Acts whose publication is not obligatory

Commission

2003/754/EC:

- ★ **Commission Decision of 26 June 2002 declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK))** ⁽¹⁾ (notified under document number C(2002) 2315) . 1

2003/755/EC:

- ★ **Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium** ⁽¹⁾ (notified under document number C(2003) 564) 25

⁽¹⁾ Text with EEA relevance.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 June 2002

declaring a merger to be compatible with the common market and the EEA Agreement

(Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK))

(notified under document number C(2002) 2315)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/754/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, as last amended by Regulation (EC) No 1310/97 ⁽²⁾, and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 30 November 2001 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

(1) On 24 January 2002 Franz Haniel & Cie GmbH (Haniel) and Cementbouw Handel & Industrie BV (Cementbouw) notified the Commission under Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation) of a concentration whereby in 1999 they acquired joint control, within the meaning of Article 3(1)(b) of the Merger Regulation, of Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten (CVK, Netherlands) and its member undertakings through an agreement and by purchasing equity interests of RAG AG (RAG, Germany).

(2) The Commission examined the notification and found that the notified proposal fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the EEA Agreement. It therefore decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation. After a thorough examination of the case, the Commission has now reached the conclusion that the notified merger proposal did create a dominant position which appreciably restricts competition in a substantial part

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 261, 30.10.2003.

⁽⁴⁾ OJ C 261, 30.10.2003.

of the common market. However, the commitments made by the parties remove the reservations about the merger from the competition standpoint.

I. PARTIES AND OPERATION

A. Parties

(3) Haniel is a diversified German holding company. In the building materials sector it is active in the manufacture and sale of wall-building materials such as sand-lime bricks, aerated concrete and ready-mixed concrete. Haniel's main centre of activities is Germany, but before the merger it was also active in the Netherlands through its stake in several sand-lime brickworks that are members of CVK. In 2002 it has also taken over the German undertaking Fels-Werke GmbH (Fels) and Ytong Holding AG (Ytong), which are both active, through subsidiaries, in the building materials sector in the Netherlands; however, Haniel has promised the Commission on certain conditions to sell Ytong's Dutch businesses⁽⁵⁾.

(4) Cementbouw is active in the building materials trade, construction markets, logistics and raw materials supply, ready-mixed concrete and the building materials industry in the Netherlands. Cementbouw is controlled by CVC Capital Partners Group Ltd (CVC), an investment trust with its registered office in the Canary Islands

(5) CVK sells sand-lime brick products in the Netherlands and controls the production of sand-lime bricks in its member plants. Its membership consists of all the sand-lime brickworks in the Netherlands. The following firms are members (the percentages show their respective stakes in CVK):

— Kalkzandsteenfabriek De Hazelaar BV (De Hazelaar)	[...]* %
— Kalkzandsteenindustrie Loevestein BV (Loevestein)	[...]* %

— Steenfabriek Boudewijn BV (Boudewijn)	[...]* %
— Kalkzandsteenfabriek Hoogdonk BV (Hoogdonk)	[...]* %
— Kalkzandsteenfabriek Rijsbergen BV (Rijsbergen)	[...]* %
— Kalkzandsteenfabriek Harderwijk BV (Harderwijk)	[...]* %
— Kalkzandsteenfabriek Roelfsema BV (Roelfsema)	[...]* %
— Kalkzandsteenfabriek Bergumermeer BV (Bergumermeer)	[...]* %
— Anker Kalkzandsteenfabriek BV (Anker)	[...]* %
— Vogelenzang Fabriek van Bouwmateria- len BV (Vogelenzang)	[...]* %
— Van Herwaarden Hillegom BV (Van Herwaarden)	[...]* %

(6) The shares in De Hazelaar, Loevestein, Boudewijn, Hoogdonk and Rijsbergen belong to Haniel. The shares in Harderwijk, Roelfsema and Bergumermeer belong to Cementbouw. Haniel and Cementbouw each own [...]* % of Anker, Vogelenzang and Van Herwaarden.

B. Background to and implementation of the merger of 9 August 1999

(7) CVK has been in existence since 1947 and started out as a joint sales organisation for its members, the Dutch sand-lime brick manufacturers. In 1989 it was changed into a cooperative, to improve cooperation among the manufacturers.

(8) The originally independent sand-lime brickworks were taken over in due course by various groups. Before the merger in question was completed, five of the eleven CVK members (De Hazelaar, Loevestein, Boudewijn, Hoogdonk and Rijsbergen) were subsidiaries of Haniel. Three sand-lime brickworks (Harderwijk, Roelfsema and Bergumermeer) were subsidiaries of Cementbouw, which at the time was still part of the Dutch group NBM Amstelland BV (NBM Amstelland)⁽⁶⁾. Two works (Anker and Vogelenzang) were subsidiaries of RAG. Haniel owned [...]* %, Cementbouw/NBM Amstelland [...]* % and RAG [...]* % of Van Herwaarden.

(*) Parts of this text have been omitted in order to ensure that no confidential information is disclosed; these are contained in square brackets and marked with an asterisk.

(5) See Commission Decisions of 21 February 2002 in Case COMP/M.2495 — Haniel/Fels and of 9 April 2002 in Case COMP/M.2568 — Haniel/Ytong.

(6) NBM Amstelland sold Cementbouw to CVC at the beginning of 2001.

(9) In 1998 the Dutch competition authority, Nederlandse Mededingingsautoriteit (NMa), was notified of a proposed merger whereby CVK would acquire control over its members, all eleven of whom were sand-lime brick manufacturers in the Netherlands. Control would be transferred after the conclusion of a pooling agreement (*poolingovereenkomst*). This notification came after the initiation of cartel proceedings against CVK by the public prosecutor, initially under the Dutch competition rules in force up to the end of 1997 and [...]*. The NMa authorised the notified merger by decision of 20 October 1998 (7). It took the view that the pooling agreement together with the corresponding changes to CVK's articles (*statuten*) ensured that the original business and organisational ties between the member companies and their owners would be broken in a way that ensured that CVK would acquire control over its members. Control of the member companies by their owners (Haniel, Cementbouw / NBM Amsteland, RAG) would also be ruled out by this means. In the NMa's opinion, the notified merger would not lead to the creation or strengthening of a dominant position on the Dutch market. [...]*

(10) Before the merger was carried out, RAG had decided to surrender its shares in the CVK member companies and sell them to Haniel and Cementbouw. By acquiring these shares, Haniel and Cementbouw would, through their stakes in CVK member companies, each have 50 % of CVK. After the 'Heads of Agreement' had been concluded on 5 March 1999, the parties informed the NMa of their intentions. The NMa told the parties that the proposed sale would not constitute a merger under Dutch law, if it were carried out after the pooling agreement had been concluded.

(11) CVK and its member companies concluded the pooling agreement on 9 August 1999. CVK's articles were also altered on that date, to reflect the provisions of the pooling agreement (*statutenwijziging*). On the same day, the agreement by which RAG sold its shares to Haniel and Cementbouw was signed and implemented. Also on 9 August 1999, a 'cooperation agreement' between Haniel and Cementbouw was concluded, setting out *inter alia* how both firms intended to use their influence over CVK. [Examples of individual provisions of the cooperation agreement]*.

II. MERGER

(12) Under Article 3(1)(b) of the Merger Regulation, a concentration shall be deemed to arise where one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

(13) In the present case, by virtue of the agreements concluded on 9 August 1999 (pooling agreement, alteration of the articles, cooperation agreement) and the acquisition of RAG's shares in Anker, Vogelenzang and Van Herwaarden by Haniel and Cementbouw, which was agreed and implemented on the same day, Haniel and Cementbouw acquired control over CVK, and at the same stroke the latter acquired control over its eleven member companies.

(14) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking, i.e. they have the power to block actions which determine the strategic commercial behaviour of an undertaking and are hence forced to reach a common understanding in determining the commercial policy of the joint venture. This is particularly the case where there are only two parent companies which share equally the voting rights in the joint venture (8).

(15) By buying RAG's shares, Haniel and Cementbouw acquired joint control of CVK. Their respective indirect stakes of 50 % in CVK enable Haniel and Cementbouw to exercise veto rights at the meeting of CVK members (*ledenvergadering*). These rights were created by the withdrawal of RAG, whose presence at the meeting would have made variable majorities possible and hence ruled out control of the meeting by the shareholders.

(16) The meeting of members decides who will sit on CVK's decision-making bodies. These are the managing board (*raad van bestuur*) and the supervisory board (*raad van commissarissen*). The articles and the pooling agreement impose restrictions on the meeting's choice, since no member of the managing board, and only a

(7) Case 124/CVK Kalkzandsteen.

(8) Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 5, recitals 19 and 20).

minority of the members of the supervisory board, may at the same time hold a position in the companies of the shareowners of the CVK members.

decisions of the Haniel group's management with regard to the merger in question show that, in Haniel's eyes at any rate, the pooling agreement would enable the parties jointly to control CVK⁽¹⁰⁾.

- (17) Choosing who sits on the decision-making bodies of a company is a basic strategic decision. A right to veto such a decision therefore gives its holder, for the purposes of the Merger Regulation, control over the company, in this case CVK, since the members of the decision-making bodies will not disregard the views of those who have the right to veto their decisions.
- (18) The acquisition of control of CVK from its members, through the conclusion of the pooling agreement, and the alterations to CVK's articles are also part of the merger and hence a subject of these proceedings. The pooling agreement provides that CVK's member companies will be managed in such a way that CVK is appointed as the institutional manager (*directeur*) of each member company — the shareholder(s) appoint(s) a further manager each — and has the power to instruct that company. The member companies' profits and losses are distributed among the shareholders in accordance with the latter's indirect shares in CVK, irrespective of the profits and losses made by the individual companies. Thus the individual member companies are brought together in an economic unit under the aegis of CVK, which consequently acts as a full-function enterprise for all sand-lime brick manufacturers on the market. All strategic decisions concerning CVK and its member companies are taken centrally by CVK's managing board.
- (19) Further light is shed on Haniel's and Cementbouw's acquisition of control of CVK by the cooperation agreement which they concluded in the context of the pooling agreement. This regulates various aspects of their cooperation within CVK (see paragraph 11). In addition, certain strategic decisions implemented by CVK's corporate management after the merger had been carried out — in particular the closure of three of the eleven sand-lime brickworks — were already being discussed in detail by Haniel and Cementbouw before the merger and thus, for the parties, plainly formed the basis for concluding the pooling agreement⁽⁹⁾. Collectively, the documents preparing the
- (20) Indirectly through CVK, therefore, Haniel and Cementbouw also acquired control of the member companies. The operations took place within a narrow time frame and closely resembled each other. The legal acts giving Haniel and Cementbouw control of CVK and those giving CVK control of the eleven sand-lime brick companies were performed on the same day (9 August 1999) and were recorded by the notary in a uniform document. Moreover, it was the parties' intention to link the two acquisitions of control, so that one did not take place without the other. The conclusion of the agreements, which were submitted to the NMa, was thus postponed until the conclusion of the negotiations on the transfer of RAG's shares. This came about because RAG had in the meantime expressed the wish to withdraw from CVK, as it was no longer willing to be part of the cooperative's proposed new corporate structure. Economically too, therefore, the two acquisitions of control should be regarded as a unit. Even if one wanted to see these events as two transactions separated in time by a 'logical second', they are dependent on each other in such a way that they should be regarded as a single merger.
- (21) Haniel, too, took this line in its comments on the statement of objections and in the hearing. Cementbouw, however, proposed that, should the departure of RAG be seen as an acquisition of joint control over CVK by Haniel and Cementbouw — which Cementbouw disputes — the Commission's responsibility could relate only to that acquisition. CVK's acquisition of control over its member companies, on the other hand, was legally a separate concentration. It cannot be concluded that because the pooling agreement and the transfer of the RAG shares to Haniel and Cementbouw were agreed on the same day they form a single event in a legal or business sense; it was merely that practical difficulties which had not been described in full had prevented the pooling agreement from being concluded immediately after the NMa's authorisation on 20 October 1999. CVK's acquisition of control of the member plants, however, was legalised by the NMa's legally enforceable decision of 20 October 1998, so that there was no

⁽⁹⁾ The planned closure of the Bergumermeer, Boudewijn and Vogelenzang works is mentioned in various internal documents of Haniel's as a basis for carrying out the CVK operation [details of the said documents]*.

⁽¹⁰⁾ [Reference to internal documents of Haniel]*.

way the Commission's investigation in the present proceeding could cover that event as well.

- (22) The Commission cannot share Cementbouw's view. All the agreements concluded on 9 August 1999 constitute a single economic event, as a result of which a joint sales organisation for 11 hitherto legally independent sand-lime brickworks belonging to a total of three different parent companies was changed into a full-function undertaking jointly controlled by Haniel and Cementbouw. Haniel confirmed more than once that for the parties involved in the transaction of 9 August 1999 (Haniel, Cementbouw and RAG) all these agreements were interdependent and formed an economically unified whole. When asked, Cementbouw could not give a convincing explanation why the transaction authorised by the NMa was postponed for more than nine months and only implemented when RAG withdrew. The Commission therefore assumes that RAG would not have been prepared to take part in implementing the pooling agreement as an indirect shareholder in CVK.
- (23) From a formal point of view, admittedly, RAG did conclude the pooling agreement before the sale of its shares to Haniel and Cementbouw was completed. From the fact that the same notary officially recorded the pooling agreement and the alteration of the articles immediately before the sale of the RAG shares at the same meeting, and drew up a single document for the purpose, it is clear however that RAG can be said to have been involved in the implementation of the CVK structure authorised by the NMa only from a superficially formalistic perspective. Such a purely formal perspective is not enough to decide the question whether one or more business acquisitions constitute a concentration that has to be vetted under the Merger Regulation. The provision in the second paragraph of Article 5(2) of the Merger Regulation, which is not directly relevant here, also shows that an economic perspective is appropriate in this case. It can therefore be assumed that the agreements concluded on 9 August 1999 form a single concentration, whereby CVK acquired control over its member undertakings, and at the same time Haniel and Cementbouw acquired control over CVK.
- (24) It follows that the merger authorised by the NMa on 20 October 1998 is different to that carried out by the parties on 9 August 1999. The NMa authorised a merger that would have led only to CVK's acquisition of control over its member companies, without the shareholders acquiring control of CVK. When the NMa took its decision, the shares of the CVK member companies were held by three shareholders (Haniel, Cementbouw and RAG), which would have resulted in variable majorities in the members' meeting and, hence, no one would have had control of CVK. Even if one treats the acquisition of the eleven sand-lime companies by CVK as an independent acquisition of control, it still did not have a Community dimension. The operation on which the NMa took a decision was thus a concentration which did not have to be notified to the Commission under the Merger Regulation.
- (25) Only after it had taken its decision was the NMa informed by the parties that RAG intended to sell its stake in the sand-lime companies to Haniel and Cementbouw in the manner described. The NMa confirmed in an informal letter to the parties that it would not regard the sale of the RAG shares as a merger from the standpoint of Dutch competition law, if the pooling agreement was concluded and the alterations to the articles were made before the shares were transferred. Basically, it took the view that, by transferring control of their companies to CVK, the shareholders would lose direct control over them but would not acquire any indirect control over CVK. This, so the NMa reasoned, was due to the restrictions on the composition of CVK's organs contained in the alterations to the articles. It is therefore applying a criterion for control which according to the Merger Regulation is not relevant in this form. At the time of the correspondence, the cooperation agreement between Haniel and Cementbouw had not been submitted to the NMa.
- (26) Opposing this approach, Haniel objected that the legislator had deliberately followed the Merger Regulation when formulating the concept of control in the Dutch Merger Act. In accordance with the Commission's practice, too, having the same persons sitting on the management boards of the undertakings concerned could lead to the acquisition of control.
- (27) It should be noted that the legislator's intention that the concept of control should be interpreted in a way which corresponds as closely as possible to Community law does not necessarily have to lead, in legal terms, to an identical interpretation. The Commission cannot influence the way the Dutch authority interprets the concept, but it is definitely not acceptable that in its interpretation of the concept in the Merger Regulation the Commission should have to follow the

national authority's municipal law interpretation in an earlier decision. In the present case, the NMa decided that the fact that members of a joint venture's management bodies do not simultaneously occupy posts in the parent companies was crucial to its conclusion that the joint venture was not controlled by the parent companies. As regards the application of Article 3(3) of the Merger Regulation, the Commission cannot share this view, for the reasons already explained. Even if, in accordance with the Commission's practice, the fact that the members of managing bodies are the same persons may, depending on the pattern of the case, be used, together with other elements, to establish control, the opposite conclusion should not be drawn from this, namely that where the persons are not the same there is no control, even if it exists when the other relevant criteria apply.

(28) Since the operation examined by the Commission in these proceedings is therefore different from that notified to the NMa in 1998, and authorised in the decision of 20 October 1998, the national authority's decision will not be rendered ineffective by a Commission decision in the present case. Both authorities have acted in accordance with their respective powers. The proposal notified to the NMa by the parties at that time had no Community dimension because, if the tests of the Merger Regulation are applied, the three indirect parent companies of CVK (Haniel, Cementbouw and RAG) had no joint control of CVK, on account of the variable majority, and were therefore not involved in the merger themselves. However, as a result of RAG's withdrawal, the operation carried out on 9 August 1999 was, by virtue of the Merger Regulation, the basis for the joint control of CVK and simultaneously its member companies by the remaining parent companies, Haniel and Cementbouw, and therefore has a Community dimension. The examination of the concentration under merger control law was thus a matter for the Commission.

(29) The parties and CVK dispute the Commission's jurisdiction on the grounds that in the present case the Commission is setting aside the legally enforceable decision of the NMa and attacking the duly acquired legal positions of CVK and its members. The NMa confirmed to CVK, in the correspondence conducted before the agreement of 9 August 1999 was concluded,

that RAG's withdrawal from CVK did not represent a merger that had to be vetted again, provided the CVK company structure on which the authorisation decision of 20 October 1998 was based was put into effect beforehand.

(30) This objection is not sustainable. As already explained, the parties to the merger proceeding brought before the NMa did not implement the proposal notified to the NMa, but instead carried out another merger through the agreement of 9 August 1999, which was not authorised by the NMa in that form. The NMa's confirmation in informal correspondence that a new notification was not necessary does not protect the merger from the application of the Merger Regulation or create a legitimate expectation in the parties or CVK, which would be unsoundly attacked by the present Commission decision. It is questionable whether the parties and CVK have met the requirements laid down by the NMa in the correspondence mentioned. As explained in paragraph 23, the CVK company infrastructure authorised by the NMa in its decision of 20 October 1998 before the sale of the RAG shares to Haniel and Cementbouw can at best be invoked in a superficially formalistic perspective. In any event, however, an informal written confirmation from a national authority cannot alter the division of jurisdiction in the Merger Regulation. Besides, since the national authority is not responsible for interpreting the Merger Regulation, that confirmation cannot give the undertakings involved a legitimate expectation that there is no duty to notify under the Merger Regulation. Nor did the NMa actually say this, for the relevant correspondence only mentions a possible duty to notify under Dutch law⁽¹¹⁾.

(31) Nor is the enforceability of the NMa decision altered by the fact that, on the question of control, the Commission's assessment differs from that made by the NMa. Different legal or factual assessments by different authorities, each acting in accordance with their own powers, cannot always be avoided, especially if those authorities act on a different legal basis (Merger Regulation/national competition law). The legal position of the undertakings affected by the

⁽¹¹⁾ See the letter from CVK's legal adviser to the NMa dated 13 April 1999 and the NMa's letter to the legal adviser dated 28 April 1999.

respective decisions is not compromised thereby, for each authority's decision has a binding effect only in respect of the underlying set of facts, which is different in each case.

V. COMPATIBILITY WITH THE COMMON MARKET

A. The relevant product markets

- (32) The enforceability of the NMa decision of 20 October 1998 cannot therefore prevent the Commission from exercising this jurisdiction. The transaction carried out on 9 August 1999 thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

- (33) The firms concerned achieve an aggregate world-wide turnover of over EUR 5 billion⁽¹²⁾ (Haniel EUR 18,7 billion, CVC EUR 18,8 billion, CVK EUR 0,2 billion). Both Haniel and CVC have a Community-wide turnover of over EUR 250 million (Haniel EUR 17,5 billion, CVC EUR [...] billion, CVK EUR [...] billion). Neither Haniel nor CVC achieves more than two thirds of its Community-wide turnover within one and the same Member State; this is only the case with CVK (Netherlands). Consequently, the notified concentration has a Community dimension.

IV. PROCEDURE

- (34) After examining the notification, the Commission established that the notified concentration fell within the scope of the Merger Regulation and raised serious doubts about its compatibility with the common market and the EEA Agreement. On 25 February 2002 it therefore decided to initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation.
- (35) On 25 April 2002 the Commission sent a statement of objections to Haniel, Cementbouw and CVK, on which Haniel commented on 11 May, and Cementbouw and CVK on 13 May 2002, in separate documents. At the request of the parties and CVK an oral hearing was held in Brussels on 16 May, in which a third undertaking, the builders' merchant Raab Kaarcher Baustoffen ('Raab Kaarcher'), also took part.

⁽¹²⁾ Turnover was calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Turnovers achieved before 1 January 1999 were calculated using the average ECU exchange rate and converted into euros in the ratio of 1:1.

- (36) The merger relates to the production and sale of wall-building materials. CVK produces and sells sand-lime bricks and sand-lime walling units. In addition to its activities in the construction materials market, Cementbouw produces and distributes ready-mixed concrete and precast concrete walling units. Aside from its participation in CVK, Haniel was not active in the Netherlands until recently, but, after the takeover of Fels, it is active in aerated concrete and gypsum products; the takeover of Ytong, however, is not, on account of the promise to sell Ytong's Dutch operations, a takeover of a building materials business that is relevant to the assessment of this merger. In addition to sand-lime, concrete, aerated concrete and gypsum products, clay bricks are also used in wall building, as are, to a limited extent, steel plates and wooden panels.

1. The products

- (37) Sand-lime bricks are masonry units prepared from lime and sand by adding water and then compressing and hardening them under steam pressure. The bricks are used exclusively for building walls. They are generally rendered, filled in with thin plaster or hidden from view by a facing wall. When sand-lime masonry is visible, it generally consists of facing bricks, which are produced only in small formats⁽¹³⁾. These form a separate market, which will not be discussed in detail here, as the parties produce such facing bricks only in small quantities. Besides sand-lime bricks, other, larger sand-lime walling units are used (usually measuring up to 900 × 625 × 300 mm in the Netherlands).
- (38) Aerated concrete is a building material made from sand, lime and cement, to which aluminium powder is added during the manufacturing process. The powder reacts with water to form a fine porous structure. Aerated concrete products (blocks and other units) are used mainly in the construction of buildings. They can be used for both load-bearing walls — particularly in the case of blocks and very dense units — and non-load-bearing walls.
- (39) Gypsum is a light wall-building material used only for non-load-bearing walls, as it has a very low load-bearing capacity. It is used in the form of gypsum plasterboards and planks.

⁽¹³⁾ Maximum size: 240 × 175 × 113 mm.

- (40) Concrete is another widely used wall-building material. Concrete walls can be made by pouring mixed concrete on site (*in-situ* concrete) or by using precast concrete walling units. A third form of concrete comes in small-format concrete blocks. Concrete walls are built almost only as load-bearing walls.
- (41) In-situ concrete can be cast either by the traditional method of using formworks specially made on site or by 'tunnel forming' (*tunnelgietsbouw* in Dutch) using prefabricated tunnel formworks, whereby walls and ceilings are cast in a single process.
- (42) Precast concrete walling units are produced in factories to precise specifications, then transported to the site and incorporated in the building for which they are intended. They generally constitute entire walls and are thus considerably larger than the sand-lime bricks or blocks predominantly used in masonry work, and require heavy equipment.
- (43) Brick — the classic masonry material — is manufactured from a mixture of clay and water by firing at temperatures of over 1 000 °C. However, the size of individual bricks is limited, as the firing process causes deformations such as shrinkage and warpage. Jointing is therefore necessary when working with these products, in order to offset these deformations.
- (44) Steel plates are used mainly in non-residential construction, and to a lesser extent in residential construction. For example, they are used to fill in wall space in load-bearing concrete or steel structures. In such cases the wall usually consists of two steel plates with insulating material between them (metal sandwich plates).
- (45) Wooden panels are employed in industrial and residential construction, mainly in the form of prefabricated walling units used to close off the building on the outside where there are no load-bearing walls. In the Netherlands wood is used for load-bearing walls only in exceptional cases.
- building materials depend to a not inconsiderable extent on national building practices and traditions, as well as on conditions in the construction industry, and can sometimes vary considerably therefore between certain EEA states. In its investigation, the Commission has focused on conditions in the Netherlands, since it is only in that Member State that the merger has an effect.
- (a) Market definition used by the notifying parties (wall-building materials)
- (47) The parties claim there is a single market in wall-building materials, given the existing conditions of competition, in particular the lack of any price difference based on use and the fact that they are invariably sold via the building materials trade. This market includes all products which are used in the construction of walls: clay bricks, concrete blocks, sand-lime bricks, aerated concrete blocks, precast concrete walling units, sand-lime walling units, aerated concrete units, masonry mortar, *in-situ* concrete, steel plates, gypsum plasterboards and planks, and wooden panels. The parties argue that, when a building is designed, there is generally a choice of various solutions for constructing the walls.
- (48) The parties state that the architect or project developer generally defines the requirements to be met as regards the building's load-bearing capacity, age-resistance, ease of maintenance, thermal insulation, fire protection and noise insulation. In some cases the architect also makes a selection of building materials in the building's specifications, but, according to the parties, these specifications leave ample room for alternative solutions. Building contractors have a free choice of building materials, provided that the specifications are met. In the project proposal they can opt for a specific building material or put forward several possible solutions.

2. Definition of the relevant market

- (46) In determining the extent of a relevant market, the Commission has to consider various product market definitions. In so doing, it has to be borne in mind that the use and exchangeability of various wall-
- (49) The parties do concede, however, that the various wall-building materials are not entirely interchangeable for every purpose. In view of the considerable differences in the demands made on building materials, depending on whether they are used for load-bearing or non-load-bearing walls, the parties consider that there is a case for dividing the market in wall-building materials into materials for load-bearing and for non-load-bearing walls.

(b) Previous Commission practice
(masonry/load-bearing masonry)

- (50) In its Decision on Preussag/Hebel⁽¹⁴⁾, the Commission looked at two alternative product market definitions, but without adopting any firm position. On the one hand it considered the possibility of a market for all materials that can be used to build walls by the 'brick on brick' method (masonry), including clay bricks, sand-lime bricks, aerated concrete blocks and pumice blocks. Its investigations at that time suggested that these products were interchangeable at the building planning stage. Within this market definition, the Commission also considered that a further distinction could be made between load-bearing and non-load-bearing walls (load-bearing masonry). It took no account of precast concrete walling units or *in-situ* concrete.

(c) Practice of the German Bundeskartellamt (masonry)

- (51) The Bundeskartellamt has consistently defined the relevant market in wall-building materials in a similar manner to that which the Commission initially envisaged in its Decision on Preussag/Hebel. In its decisions the Bundeskartellamt assumes the existence of a market in building materials for rising back-up masonry which takes in aerated concrete products, sand-lime products, bricks, pumice blocks and concrete blocks (masonry). The Bundeskartellamt does not distinguish between load-bearing and non-load-bearing walls. As far as the Bundeskartellamt is aware, the materials used in Germany for both types of wall are essentially the same.

(d) Practice of the NMa (building materials for load-bearing walls)

- (52) By contrast, the NMa draws a distinction between load-bearing and non-load-bearing walls because, to its knowledge, different materials are used for each type of wall in the Netherlands⁽¹⁵⁾. Because of this difference in uses, sand-lime, which is used for both types of wall, is in competition with different materials in each case. The NMa has included all wall-building

materials used for load-bearing walls in its definition of the market in wall-building materials for load-bearing materials. This covers not only the above-mentioned wall-building materials for masonry referred to in recital 51 (the 'brick on brick' method), but also precast concrete units and *in-situ* concrete. However, it should also be pointed out that, in a subsequent decision, the NMa opened up the possibility of a distinction between *in-situ* concrete and other wall-building materials⁽¹⁶⁾.

3. Assessment

- (53) On the basis of the information available to it and, in particular, the market investigation carried out by it in the case, the Commission, like the NMa, concludes — as in its Decisions of 21 February 2002 (Case COMP/M.2495 — Haniel/Fels) and 9 April 2002 (COMP/M.2568 Haniel/Ytong) — that there is a relevant product market in the Netherlands for building materials for load-bearing walls and a separate one for building materials for non-load-bearing walls. The former includes all building materials used for load-bearing walls, such as clay bricks, sand-lime, aerated concrete, concrete blocks, precast concrete wall units and, possibly, *in-situ* concrete. However, the result of the market investigation suggests that *in-situ* concrete, in particular that cast by tunnel forming, should be excluded; however, it is not necessary to settle this matter conclusively, since the question does not affect the assessment of the concentration. Likewise, the market for building materials for non-load-bearing walls covers all building materials used for non-load-bearing walls, such as sand-lime, aerated concrete, gypsum plasterboards and planks, steel sheets and wood.

- (54) All the building materials included by the parties in their proposed market definition are suitable for the building of walls and are actually used for this purpose. The Commission's market investigation in the Netherlands has shown, however, that not all of these materials are in competition with one another.

⁽¹⁴⁾ Case COMP/M.1866 — Preussag/Hebel, 29.3.2000; but compare the Decision of 21 February 2002 on Case COMP/M.2495 — Haniel/Fels and the Decision of 9 April 2002 on Case COMP/M.2568 — Haniel/Ytong.

⁽¹⁵⁾ NMa, Decision of 20 October 1998 in Case 124/CVK — Kalkzandsteen.

⁽¹⁶⁾ NMa, Decision of 29 February 2000 in Case 2427/NCD — Fernhout.

(a) Properties of the various wall-building materials

- (55) Each of the abovementioned wall-building materials has specific properties that are taken into account in the selection of a specific wall-building material for a specific building project.
- (56) Sand-lime products are a cheap building material which, though they cannot achieve the size of aerated concrete precast products, nevertheless, with dimensions of up to 900 × 625 × 300 mm, are larger than traditional bricks. Furthermore, sand-lime products, like aerated concrete, have a smooth surface that does not have to be evened out by jointing. The walling units can be glued together. In addition, sand-lime products can be cut to shape at the factory in accordance with the building plans, so that walling units forming the gable or window openings can be pre-prepared. All these factors mean that less time and less expenditure on wage costs are needed than in the case of, for example, ordinary bricks. At the same time, sand-lime units do not require large-scale investment in heavy cranes, as in the case of precast concrete wall units, or casting moulds, as in the case of *in-situ* concrete. In the Netherlands, because of their excellent load-bearing properties, sand-lime is used for load-bearing walls and, to a lesser extent, also for non-load-bearing walls. In the Netherlands, it is estimated that some [60-80]* % of sand-lime is used in load-bearing walls. When it is used in non-load-bearing walls, sand-lime has the disadvantage of being relatively heavy (about twice as heavy as aerated concrete). However, the material does have good sound-insulating properties and is suitable in particular for high, non-load-bearing walls, such as those often required in non-residential construction. Sand-lime is the traditional and most popular wall-building material in the Netherlands.
- (57) Precast concrete walling units do not require masonry work as they are already the size of the wall to be produced. Concrete as a product can be produced from relatively simple raw materials. However, fairly large-scale resources such as cranes must be used in erecting such walls, and this in its turn involves some investment costs. They are therefore used mainly for relatively large-scale projects. Precast concrete walling units are used mainly in industrial construction (in Dutch, *utiliteitsbouw*, abbreviated to *u-bouw*), and less in housing construction (in Dutch, *woningbouw*, the abbreviated form of which is *w-bouw*). However, their use in medium-sized projects involving 10 or more units, can also save costs, as the wall is produced at the factory and erection at the building site requires relatively little labour and takes relatively little time. The bigger the project, the lower the costs for the precast wall.
- (58) In-situ concrete requires the largest amount of on-site investment in its use, particularly *in-situ* concrete used

in tunnel forming. The manufacture and use of the frameworks required for repeated casting in the tunnel forming method are so costly that this method is economically viable only if there is a minimum of 30 to 50 residential units (over about 15 residential units according to other sources) and only if those units are identical in shape and size⁽¹⁷⁾. There is therefore little flexibility as to shape and size in construction using *in-situ* concrete in the tunnel forming method. However, flexibility is an important criterion in the Netherlands, even in the case of fairly large projects, so as to avoid uniformity. The tunnel forming method is not, therefore, an appropriate technique for relatively small building projects or projects which do not include rectangular shapes or repetitive use of the material. *In-situ* concrete is also used in the construction of both individual houses and high-rises, the load-bearing capacity of which is ensured by means of a cast concrete skeleton to which non-load-bearing wall-building materials are attached.

- (59) Aerated concrete is an expensive wall-building material. It is produced from high-grade, expensive basic materials with high energy costs. Large sections must be reinforced with steel, which further increases the price, since reinforced sections entail significant costs in the manufacture of the reinforcing elements. In contrast to steel reinforcement in the case of ordinary concrete, the steel used for reinforcement here has to be coated in order to protect against corrosion. The constructional properties of aerated concrete are somewhat more limited than those of sand-lime, but it is possible to use it to build up to two storeys with load-bearing walls. Aerated concrete does, however, have excellent thermal insulation properties. In Germany, some 80 % of the aerated concrete products used in wall building are used for load-bearing walls, while only 20 % are used in non-load-bearing walls. In the Netherlands, however, the ratio is the reverse: some 80 to 85 % of aerated concrete is used in non-load-bearing walls.
- (60) Gypsum is a light material. Because of this property, it is very well suited to non-load-bearing walls. The load-bearing demands placed on floors are small, and space is saved. Because of its lack of load-bearing capacity, gypsum is used only for non-load-bearing walls.
- (61) Bricks are relatively small wall building units, and because of their uneven surface they are usually jointed, although there are apparently also ways of

⁽¹⁷⁾ The construction industry association VOB claims that the tunnel method can be a viable option where there are more than about 15 residential units. However, this depends on local circumstances, and in particular on the design of the houses and the degree of variation. Most market participants questioned regard the tunnel method as economically viable only where more than 30 to 50 residential units are involved.

gluing them together. Their use thus entails relatively high labour costs and is relatively time-consuming, and this makes bricks unsuitable for industrial construction methods.

(b) Distinction between wall-building materials for load-bearing walls and for non-load-bearing walls

(62) The market investigation showed that the decision as to which building material to use for a specific project is influenced both by the client and the architect and by the building contractor. Exactly how much influence on the choice of wall-building material is exercised by each of these three groups of persons varies from case to case.

(63) The client's precise preferences regarding, for example, aesthetics and building costs are factors here, as are the architect's specifications. Criteria which are of relevance in the selection of the various wall-building materials are quality, constructional properties, flexibility of use, appearance, the purchase price of the material and the costs involved in using it. The special requirements of the building project must be taken into account in this respect, as must the use to which the building is to be put, the necessary load-bearing capacity, resistance to ageing, fire protection, sound insulating properties, other technical capabilities, timetable and the overall costs of the project. The building contractor's main criteria, in so far as he has any options regarding the choice of wall-building materials, are costs and building speed. These in turn are influenced by his experience with specific building materials and the resources and facilities (e.g. cranes) available to him. As far as the cost factor is concerned, it must be borne in mind that the cost of materials is always just one part of the overall costs of erecting a wall.

(64) In its market investigation, therefore, the Commission surveyed all these decision-makers to determine the basis of their conduct in selecting wall-building materials. Similarly, the manufacturers of the various building materials were asked to provide information. In the Netherlands, the survey showed that, in selecting building materials, a fundamental distinction was made between the choice of building materials for load-bearing walls and building materials for non-load-bearing walls.

(65) The difference between load-bearing and non-load-bearing walls, as the terms suggest, is the load-bearing function of the relevant wall-building material. Load-bearing walls ensure the stability of a building. The relevant walls are often external walls. However, internal walls too may perform a load-bearing function.

Such walls must be distinguished from walls which do not have any function in supporting the building, but merely divide up the space or fill gaps inside a load-bearing framework (external or internal walls). Building materials used in load-bearing walls must meet certain requirements as to resistance to pressure, load-bearing capacity and stiffness. Building materials used in non-load-bearing walls, by contrast, must meet other, possibly contrary requirements. Lighter, non-load-bearing walls, for example, have the advantage of making fewer demands on the load-bearing capacity of the ceilings. Thin non-load-bearing walls for their part save space.

(66) These varying requirements in respect of load-bearing and non-load-bearing walls result, in the Netherlands, in different building materials being selected for these different purposes. In the Netherlands, the main material used in load-bearing walls is sand-lime. Sand-lime is used in [50 to 60]* % of all load-bearing walls. Concrete is the next largest building materials category. *In-situ* concrete is used in [10 to 15]* % of all load-bearing walls. At least two-fifths of this building material is used in tunnel forming⁽¹⁸⁾. A total of [5 to 10]* % is accounted for by load-bearing walls made from precast concrete wall units. Aerated concrete and bricks, accounting for proportions of [0 to 2]* % and [2 to 5]* % respectively, play a very minor role.

(67) In the case of non-load-bearing walls, by contrast, gypsum products are the main materials used. They account for [40 to 50]* % of the materials used in non-load-bearing walls. Next comes aerated concrete with [15 to 20]* %, followed by sand-lime with [15 to 20]* %.

(68) This demand-side pattern is typical of the Netherlands and differs fundamentally from that in other countries, such as Germany. In Germany, the proportions in the use of aerated concrete for load-bearing and non-load-bearing walls are just the reverse of those in the Netherlands. Whereas in Germany 80 % of all aerated concrete products are used to construct load-bearing walls, in the Netherlands 85 to 90 % of all aerated concrete products are used in non-load-bearing walls. In Germany, concrete plays a minor role in load-bearing walls in residential construction, while bricks and other masonry units feature prominently. In Belgium, by contrast, concrete blocks appear to be much more widespread than in the Netherlands and, together with bricks, to be the most common wall-building material. The use of *in-situ* concrete in tunnel forming is much less widespread in Germany and Belgium than in the Netherlands.

⁽¹⁸⁾ According to the information provided by the parties, *in-situ* concrete accounts for [30 to 40]* % of the materials used in tunnel forming; the market investigation suggested that the proportion might be even higher than that.

- (69) The reasons for these differences in demand-side behaviour stem, firstly, from differences in building traditions and aesthetic approaches and, secondly, from the advanced industrialised building methods used in the Netherlands.
- (70) In the Netherlands, building and construction activity is based on large-scale projects even in the residential sector. Less than 20 % of all new residential building relates to individual house building. In Germany, by contrast, the figure is more than 90 %. In the Netherlands, large areas are released by the government for building purposes, and on such areas the building and construction industry erects as much as several thousand residential units (e.g. what are known as *VINEX locaties*). In building projects on this scale, building materials that require high investment but involve lower wage costs, such as *in-situ* concrete using the tunnel forming method, are profitable. Consequently, bricks, which are labour-intensive at the building site (small size and need for jointing) and hence entail higher wage costs and are more time-consuming, are used to only a minor extent.
- (71) Sand-lime is the traditional building material in the Netherlands, since it is very cheap to produce and can be used with great flexibility, speed and on favourable cost terms in the building process (large units, cut to the required shape in the factory, no jointing necessary).
- (72) Aerated concrete, which is very widely used in Germany in load-bearing walls because of its good thermal-insulating properties, is, despite this advantage, not so widely used in the Netherlands because of its substantially higher price compared to sand-lime. In Germany, 30 cm-thick aerated concrete units are used for load-bearing walls. These have then only to be plastered and painted to produce a complete wall that meets high thermal-insulation requirements. There are no costs for facing masonry and additional insulation. In the Netherlands, by contrast, smooth, plastered external walls are not customary. The preference there is for facades which give the impression of brickwork. This is done by means of brickwork facing in front of the load-bearing wall and the insulation between wall and facing. This means that the cost advantage of aerated concrete, which does not need insulation and facing, is forfeited and hence that aerated concrete is a much more expensive building material than sand-lime. Consequently, aerated concrete is used only occasionally in the Netherlands for load-bearing walls in residential construction.
- (73) However, since aerated concrete costs about the same as gypsum walls, is relatively light, but affords better thermal insulation, aerated concrete products are used in the Netherlands for non-load-bearing walls. Sand-lime is also used here. This is because it has very good sound-insulating properties which may, in some cases, offset its disadvantages as a heavy building material. In addition, because of its constructional properties, it is particularly suitable for high, non-load-bearing walls, such as are required primarily in non-residential construction.
- (74) There is therefore only limited competition in the Netherlands between, on the one hand, products used in load-bearing walls and, on the other, those used in non-load-bearing walls. This prompts the Commission to draw a distinction in the Netherlands between a relevant product market in load-bearing walls and one in non-load-bearing walls. This is despite the fact that some wall-building materials that are suitable for load-bearing walls may also be used in non-load-bearing walls and vice versa. This applies in particular to sand-lime, which is the only wall-building material which is used to any significant extent equally in load-bearing and non-load-bearing walls. Firms which make products suitable for both types of wall are, in the market in load-bearing walls, in competition with a largely different set of competitors and faced with different competitive conditions from those applying in the market in non-load-bearing walls.
- (75) In setting its prices for products used in load-bearing walls, CVK, as the only sand-lime brick producer in the Netherlands, is not restricted by prices charged on the market in products intended for non-load-bearing walls. The Commission's market investigation shows that CVK is often aware of the specific use of its products⁽¹⁹⁾. Firstly, in many cases, the company knows the place where its products will be used, since it is itself often responsible for delivering them to a particular building site. Secondly, as regards the delivery of sand-lime walling units, that make up half its turnover, CVK has access to the architect's plans. In addition, Haniel has indicated that the thickness of a substantial portion of sand-lime products means that they can be used in load-bearing or non-load-bearing walls. This information was confirmed by Raab Karcher during the hearing. In view of the comments of the parties and CVK on the statement of objections and the discussion of this question at the hearing, the Commission therefore takes the view that CVK is in a position to differentiate its prices according to the perceived competitive situation. In this respect, implicit price differentiation between large and small building projects through bulk discounts and uniform transport prices is possible. CVK has said that it grants builders' merchants project- and contractor-specific discounts.
- ⁽¹⁹⁾ In particular for elements cut for a specific use or for specific deliveries; see paragraph 56.

(76) Even if CVK cannot differentiate the prices of sand-lime brick products for load-bearing walls from those for non-load-bearing walls, it is to be assumed that it tailors its pricing strategy primarily to the requirements of the market in load-bearing walls, since it sells [60 to 80]* % of its products on that market.

(c) Inclusion of *in-situ* concrete in the market in wall-building materials for load-bearing walls

(77) The results of the market investigation raise the question of whether and to what extent *in-situ* concrete is also to be included in the market in wall-building materials for load-bearing walls. This applies in particular to *in-situ* concrete used in tunnel forming. As already explained in recital 58, this technique involves high fixed investment costs which become worthwhile when only a certain number of units are to be built. According to various sources, this number is in the region of 30 to 50 residential units or, if they are of identical shape and size, as few as approximately 15 residential units. This means that this method is not an option, not only in the case of small projects, but also in the case of large projects in which, for aesthetic and social reasons, a repetitive building style is to be avoided. Irrespective of the exact number of residential units required to make tunnel forming economically viable, it can be concluded that sand-lime is not exposed to competition from *in-situ* concrete in relatively small-scale projects⁽²⁰⁾.

(78) Furthermore, tunnel forming allows not only walls but also, as part of the same process, ceilings to be produced. For these reasons, a decision to opt for tunnel forming is not so much a price decision as a decision in favour of a particular system. For instance, if a builder working on a construction project wanted to switch from sand-lime products to *in-situ* concrete as part of the tunnel forming, this would result in not only a change in the wall construction materials, but also in a change in the materials used to make the floor and ceiling. This means that a changeover to tunnel forming would result in a change in the overall construction plan. That is why *in-situ* concrete used in tunnel forming would be a rather unusual option for those builders who currently use sand-lime products for their projects.

(79) In their comments on the statement of objections and in the hearing, the parties and CVK confirmed and consolidated their view that *in-situ* concrete in all forms must be regarded as the relevant product market.

(80) However, the question of whether *in-situ* concrete, and in particular *in-situ* concrete used in tunnel forming, should be viewed as belonging to the market in wall-building materials for load-bearing walls can, however, be left open, as it has no impact on the outcome of the negotiation. Although the parties deemed it appropriate to define the relevant product market, which includes all kinds of *in-situ* concrete, the planned merger has placed CVK in a dominant position on the Dutch market.

4. Conclusion concerning the relevant product markets

(81) In view of the above, the Commission considers that, for the purposes of assessing the notified concentration, a distinction has to be made in the Netherlands between a market in building materials for load-bearing walls and a market in building materials for non-load bearing walls. As far as the market in building materials for load-bearing walls is concerned, the question of whether *in-situ* concrete, in particular that used in tunnel forming, is to be included in this market, may be left open, as it does not affect the assessment of the concentration.

B. The relevant geographic market

(82) The parties define the relevant geographic market with regard to the Netherlands as national. Although a few firms involved in the building materials trade tend to operate on a regional basis, they argue, transport costs in the Netherlands are not of such significance that building materials cannot be supplied throughout the entire territory of the Netherlands. Wall building materials are transported by lorry, usually from the production site direct to the building site.

(83) The investigations have confirmed that the Dutch market is indeed national. The market investigation has shown that the prices charged for most wall building materials are calculated free at production site for delivery throughout the Netherlands, even though transport costs represent a not insignificant cost factor. CVK, as the only producer of sand-lime, can, moreover, supply any building site in the Netherlands direct from the nearest sand-lime works.

(84) Although imports of wall building materials from Belgium and Germany do apparently take place in the border regions of the Netherlands, these are marginal and do not justify incorporating parts of Belgium and Germany into the relevant geographic market. The market investigation has revealed the existence of

⁽²⁰⁾ It should be noted in this context that in many cases CVK knows the site where its products are to be used, (see recital 75).

barriers to market entry based, in particular, on building and industrial safety regulations. For example, bricks laid manually may not weigh more than 18 kg in the Netherlands which is not the case in other Member States. On the other hand, building standards in Germany mean that walls of comparable wall thickness must be stronger and, given the extra materials that requires, are more expensive than in the Netherlands. All the important undertakings that operate on the Dutch market in wall-building materials are also established in the Netherlands. Belgian and German producers operating in the Netherlands also do so via Dutch subsidiaries.

- (85) The Commission therefore takes the view that, for the purposes of this Decision, the relevant geographic market should be defined as a national market covering the entire territory of the Netherlands.

C. Competitive assessment

- (86) The Commission has reached the conclusion that the merger in this case, i.e. the acquisition of control by CVK over its members and by Haniel and Cementbouw over CVK, has led to the emergence of a dominant position by CVK and its controlling parent companies Haniel and Cementbouw on the market in wall-building materials for load-bearing walls in the Netherlands.
- (87) In the following, there will first be a description of the dominant position as it stands today followed by an account of the extent to which it has arisen as a result of the merger.

1. Dominant position of the parties

(a) Principles

- (88) The Court of Justice of the European Communities has defined a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. Such a position does not preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an

appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

- (89) The existence of a dominant position may derive from several factors which, taken separately, are not necessarily decisive, but among which the existence of very large market shares is highly important. Important evidence of the existence of a dominant position is, moreover, the relationship between the market shares of the undertakings involved in the concentration and their competitors, especially those of the next largest ⁽²¹⁾.

(b) Market structure

- (90) In 2000, the total quantitative volume of the Dutch market in wall-building materials was [...] m³. In value terms, it had a volume of some EUR [...]*. The market in wall-building materials for load-bearing walls had a volume of [...] m³ and was worth EUR [...]*. If *in-situ* concrete is excluded from the load-bearing walls market, the latter's volume shrinks to [...] m³ and EUR [...]*. If only *in-situ* concrete by the tunnel forming method is excluded, the market volume is [...] m³ and EUR [...]* ⁽²²⁾.
- (91) Below are the market shares (by volume) of the parties and of their main competitors including all wall-building materials for load-bearing walls and, alternatively, excluding *in-situ* concrete and *in-situ* concrete cast by the tunnel-forming method ⁽²³⁾:

⁽²¹⁾ Case 85/76 Hoffmann-La Roche v Commission (1979) ECR 461, paragraph 39; see also Case T-102/96 Gencor v Commission (1999) ECR II-753, paragraphs 201 and 202.

⁽²²⁾ Assuming that [20 to 40]* % of the *in-situ* concrete used in the Netherlands is cast using the tunnel-forming method; see footnote 18.

⁽²³⁾ The calculation is based on estimates made by the parties on the shares of the various building materials in the consumption of wall-building materials as a whole and broken down between load-bearing and non-load-bearing walls. In as much as wall-building materials are used in load-bearing and non-load-bearing walls (e.g. sand-lime bricks, aerated concrete), only that part of such building materials which is estimated to be used in load-bearing walls was taken into account. On the basis of its market investigation, the Commission considers these estimates to be basically accurate; however, precise statistical data are not available.

(in %)

Company	Building material	Market share		
		Load-bearing wall building materials, including <i>in-situ</i> concrete	Load-bearing wall building materials, excluding <i>in-situ</i> concrete used in tunnel forming	Load-bearing wall building materials, excluding <i>in-situ</i> concrete
CVK (Haniel/Cementbouw)	Sand-lime products	[50-60]*	[50-60]*	[60-70]*
Cementbouw	Precast concrete walling units <i>In-situ</i> concrete	[2-5]*	[2-5]*	[2-5]*
Haniel (Fels)	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
CVK + Cementbouw + Haniel		[60-70]*	[60-70]*	[60-70]*
Mebin	<i>In-situ</i> concrete	[2-5]*	[2-5]*	0,0
NCD	<i>In-situ</i> concrete	[0-2]*	[0-2]*	0,0
Wienerberger	Clay bricks	[0-2]*	[0-2]*	[0-2]*
Hanson (Pioneer)	Clay bricks <i>In-situ</i> concrete	[0-2]*	[0-2]*	[0-2]*
Oudenallen	Precast concrete walling units	[0-2]*	[0-2]*	[0-2]*
Ytong	Aerated concrete	[0-2]*	[0-2]*	[0-2]*
CRH	Clay bricks	[0-2]*	[0-2]*	[0-2]*

(92) According to the Commission's findings, CVK alone has a share of more than [50 to 60]* % of the market in wall-building materials for load-bearing walls. The second-largest market player is Cementbouw, which, together with Haniel, has acquired control of CVK as a result of the merger, with a market share of almost [2 to 5]* %. Cementbouw owes its market position to its activities in the area of precast concrete walling units and *in-situ* concrete. Apart from through CVK, Haniel is active on the Dutch market only through the activities of Fels. The parties' joint market share is therefore almost [60 to 70]* %. The next-largest competitor is the ready-mixed concrete manufacturer Mebin, with a market share of around [2 to 5]* %. Other competitors have market shares of less than 2 %. The market share of CVK is therefore more than [10 to 15]* times bigger than that of its leading competitor.

(93) If *in-situ* concrete were not to be included in the market in wall-building materials for load-bearing walls, the market share of CVK alone would be [60 to 70]* % as CVK does not supply *in-situ* concrete. Including Cementbouw's market share, the parties would hold a combined market share of around [60 to 70]* %. The largest independent competitor, Mebin, would then not be active in the relevant product market. This would

leave only a limited number of much smaller competitors whose market shares do not exceed 2 %, or indeed much less in some cases.

(94) If only *in-situ* concrete cast by the tunnel-forming method is excluded from the market definition, CVK's market share would be [50 to 60]* %. Including Cementbouw's market share, the parties would hold a market share of around [60 to 70]* %.

(95) The market positions of the parties and their competitors have — as the parties themselves state — hardly changed in recent years.

(c) Role of the various wall-building materials

(96) None of CVK's competitors in the Netherlands is active in the sand-lime brick sector. CVK is the only producer and supplier of this building material in the Netherlands. Sand-lime is, however, for the reasons given above, the traditional and most popular wall-building material in that country. Moreover, they are the only wall building material to be used to a significant extent in both load-bearing and non-load-bearing walls.

(97) *In-situ* concrete cannot be regarded as a material for which CVK is subject to considerable competitive press-

ure. On the one hand, *in-situ* concrete accounts for only [10 to 15]* % of the market in wall-building materials, of which some [0 to 2]* % is attributable to Cementbouw. According to data from the industry association VOB, the share of *in-situ* concrete seems to have remained stable. According to some on the market, it has even declined slightly. Those questioned put this down to a trend towards small and more diversified construction projects. On the other hand, the competitive pressure on the market depends not only on the market position of one product but also on the market position of the competitors which supply that product. As indicated above, competitors on the market in wall-building materials are dispersed. The largest producer of *in-situ* concrete, Mebin, has a share on the overall market for wall-building materials for load-bearing walls of only [2 to 5]* %, while that of other competitors is less than 2 %. By contrast, the parties have a market share of [60 to 70]* %, with that of CVK alone standing at [50 to 60]* %.

- (98) However, an important factor for the market position of competitors is which products they offer. This is particularly true in this case because the market in question is a differentiated product market on which a range of products compete with each other to varying extents for the same uses. In each case, it depends on the characteristics of the product and the specific situation whether a given product directly competes with another product, and — as explained in connection with the definition of the product market — it is consequently doubtful whether or not *in-situ* concrete should be included in the relevant market. In such a market, the ability to supply a specific product which is perhaps particularly appreciated by certain consumers or for certain uses may be important to a given firm's market position. Consequently, CVK's market position is strengthened over and above its market share by the fact that it is the sole manufacturer of sand-lime products in the Netherlands.

(d) Barriers to market entry

- (99) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that there are substantial barriers to market entry. CVK controls all the sand-lime brickworks in the Netherlands and hence the production of by far the most important wall-building material in the relevant product market. The Commission's market investigation has shown that it would be possible for manufacturers of other wall-building materials to undertake the manufacture of sand-lime brick products only at great expense in terms of time and investment. The same is also true of other

wall-building materials such as aerated concrete. The production processes and hence the production plants are different for each wall-building material.

- (100) While Haniel has put the investment costs for a sand-lime brickworks at only some EUR [...]*. The setting-up of a ready-mix concrete plant costs, according to Haniel, EUR [...]*; Cementbouw has estimated these investment costs to be much higher. Moreover, the competitors questioned in connection with the investigation of the market have all stated that they would have considerable difficulties in expanding their existing capacities or launching production of another wall-building material. One competitor indicated that the establishment of a new sand-lime brickworks would require an investment of EUR [...]*, that the necessary official authorisation would be difficult to obtain, and that building the works alone would take two years. In contrast to the parties' view that the market entry barriers are low, the Commission accordingly assumes that no competitive pressure is exerted by possible market entries such as to control CVK's room for manoeuvre on the relevant market. Consequently, there have been only a few market entrants in recent times, and these were all limited to the concrete sector.
- (101) There are also considerable excess capacities for sand-lime products, a fact which makes market entry an unattractive prospect, even now that CVK has closed three of its original eleven sand-lime brickworks. Moreover, CVK's remaining production facilities are evenly dispersed across the Netherlands, and it is therefore able to supply any customer from a local brickworks. The Commission's market investigation has shown that this factor also strengthens CVK's market position.

(e) Buyer power

- (102) Notwithstanding the parties' and CVK's comments on the statement of objections and the discussion during the hearing, the Commission takes the view that the customers of CVK have no buyer power. No one customer buys a substantial part of CVK's output. Although the five largest building materials traders (the largest of which has a sales share of [20 to 30]* %) account for [60 to 80]* % of CVK's sales, this does not give the largest buyer any power since there are enough other traders on the market. Moreover, some of these traders are buying associations (*inkoopcombinaties*). What is important is the fact that the dealers are dependent on dealing in CVK's products. Sand-lime is the most

important building material in the Netherlands. The next most important is concrete. However, this does not constitute an alternative for traders because neither *in-situ* concrete nor, to any appreciable extent, precast concrete walling units are marketed via them. Consequently, no other building material can replace sand-lime products for traders. This was confirmed by Raab Karcher during the hearing. It may be true that — as Haniel argued — the building materials trader risks losing the building project to concrete if his sand-lime brick offer is not cheap enough. However, this only means that the trader with his sand-lime brick offer — and indirectly also CVK — is in competition with concrete suppliers, not that the trader is in a position to exert buyer power on CVK.

- (103) Moreover, CVK has considerable influence on determining the prices charged to building firms. Although materials traders bear the financial risk of sale, it is building firms and not traders that decide which materials to use. As already explained in detail, CVK is generally well informed about the identity of users and the use to which its products are put. For example, bricks are supplied direct by the works situated closest to the construction project. According to CVK, discounts are granted to dealers, whereby they might be bound to supply certain construction firms or projects. Moreover, construction firms are widely dispersed and not in a position to exert buyer power themselves. Similarly, the demand component of the large Dutch building groups such as Bam Groep, Koninklijke Volker Wessels Stevin, Heijmans, Ballast Nedam and HBG is too small individually to exert any buyer power such as could offset CVK's dominance on the supply side.

(f) Influence of competition on the adjacent market

- (104) CVK's operational scope on the market in wall-building materials for load-bearing walls is not limited either by the conditions of competition on the adjacent market in wall-building materials for non-load-bearing walls, on which its market position is weaker. The Commission's comment in the statement of objections that CVK is aware, when setting prices, of whether its products will be used for load-bearing or non-load-bearing walls and gears its prices primarily to the conditions of

competition on the load-bearing-walls market, which for it is more important, was not refuted by the parties and CVK. Reference should be made to the comments in recitals 75 and 76 in this respect.

(g) Integration with Cementbouw

- (105) CVK's dominant position on the Dutch market in wall-building materials for load-bearing walls is also characterised by its structural links to its controlling parent company Cementbouw.
- (106) Cementbouw operates on the relevant market by supplying *in-situ* concrete and precast concrete walling units. In the area of precast concrete walling units, Cementbouw has a strong position in particular with regard to smaller units, which are principally used in residential construction, i.e. products which are readily substitutable for sand-lime products. Together, CVK and Cementbouw thus offer three or, (depending on the market definition), two of the most important wall-building materials for load-bearing walls. CVK/Cementbouw therefore have a considerably wider operational scope than competing suppliers of wall-building materials on a differentiated product market such as the one in question, since no other supplier is in the position of covering their customers' needs as comprehensively.
- (107) Cementbouw is also active on the downstream building materials trading market. Its building materials trading division is one of the largest wholesalers of building materials in the Netherlands, with a strong market position above all in the west, north and east of the country⁽²⁴⁾. Some building materials dealers have indicated that those dealers belonging to Cementbouw receive preferential treatment from CVK. Both of these factors contribute to CVK-Cementbouw's considerably wider operational scope as compared to its competitors.

- (108) Cementbouw objected that the structural link between CVK and Cementbouw could not be taken into account in the competitive assessment, because CVK was not controlled by Cementbouw and both undertakings had in the past been in competition with one another. However, for the reasons set out in Section II of this Decision, the Commission starts from the assumption that Cementbouw controls CVK on a joint basis with

⁽²⁴⁾ See, for example, the 2000 Annual Report of NBM Amstelland (at that time Cementbouw's parent company).

Haniel. In assessing the effects of the merger, therefore, it cannot be assumed that Cementbouw and CVK operate independently of one another on the market as competitors.

(h) Result

- (109) The parties' market position can be summarised as follows: CVK has by far the largest market share with more than [50 to 60]* %. To this should be added Cementbouw's market share of almost [2 to 5]* %, with the result that the parties have a combined market share of almost [50 to 60]* %. The remaining market volume is fragmented and divided among competitors with market shares of just a few percent. CVK, moreover, is the only Dutch supplier of the most important building material in the Netherlands. The market power available to the parties is not offset by buyer power on the other side of the market. It should also be borne in mind that Cementbouw is active with other important building materials on the relevant market itself and on the downstream market of building materials trading. The combination of all these factors gives the parties a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

2. *Emergence of a dominant position as a result of the merger*

- (110) On the basis of its investigations, the Commission takes the view that the parties' dominant position, as described above, arose as a result of the merger on 9 August 1999 of all of the Dutch manufacturers of sand-lime products into a full-function company, CVK, jointly controlled by Haniel and Cementbouw.

- (111) Before this merger, the sand-lime brick works making up CVK were legally and economically independent of each other. Only the marketing of their products was centralised within the joint marketing organisation that was CVK. Neither the sand-lime brick manufacturers controlled by Haniel nor those controlled by Cementbouw or RAG achieved individual shares on the market in wall-building materials for load-bearing walls which led to the conclusion that there was a dominant position. According to estimates by Haniel, the market share of the Haniel works and the Cementbouw works

on the market in wall-building materials for load-bearing walls was some [20 to 30]* % each, while that of the RAG works was some [5 to 10]* %⁽²⁵⁾.

- (112) The fact that the sand-lime brickworks belonging to CVK were already linked to each other by a joint marketing organisation before the merger does not justify the view that these firms already held a dominant position via CVK and that the merger did therefore not significantly alter the market structure. Indeed, the conversion of a joint marketing organisation into a full-function company constitutes a structural change to market conditions which might lead to the emergence of a dominant position. This occurred in this case, since the merger permanently brings the 11 Dutch sand-lime brick manufacturers under the single management of CVK.

- (113) While the joint marketing organisation which existed before the operation standardised only one — albeit important — aspect of the competitive conduct of the CVK works, namely the marketing of their products, all links in the value-added chain (research and development, purchasing, logistics, production, marketing, etc.) are now centralised within CVK, and all related strategic decisions determining the conduct and success of the firm in the competitive process are adopted uniformly by CVK's management.

- (114) Moreover, the structural change to market conditions brought about by the creation of a full-function company is generally more permanent than the formation of a joint marketing organisation. While it is relatively easy for the members of a joint marketing organisation to withdraw from such an organisation and again operate independently without the need for extensive restructuring, it is possible in the case of a full-function company that the various functions of previously separate firms are integrated in such a way that it is either very difficult or indeed no longer possible

⁽²⁵⁾ According to figures presented to the supervisory board of Franz Haniel & Cie GmbH on 12 March 1999, the market shares of the Haniel works and the Cementbouw works in the Netherlands before the merger each stood at [40 to 50]* %, with that of the RAG works at [15 to 20]* %. Assuming that CVK's share of the relevant market was [50 to 60]* %, Haniel and Cementbouw would each have had a market share of [20 to 30]* % and RAG [5 to 10]* %.

for the company to be split up and the original situation to be restored ⁽²⁶⁾.

(115) It should also be remembered that only as a result of the merger Cementbouw's activities on the relevant market and the downstream market of building materials trading inure to CVK as a whole.

(116) Finally, the view that the merger led to the emergence of a dominant position on the part of CVK on the Dutch market in wall-building materials for load-bearing walls is confirmed by some of the market developments uncovered by the Commission in its market investigation and by CVK's competitive conduct since the merger.

(117) While the price level for sand-lime had previously risen at a relative moderate rate ([0 to 5]* % in 1999 and again in 2000), CVK increased its prices by [5 to 10]* % in 2001 and [5 to 10]* % in 2002. According to the information at the Commission's disposal, demand for wall-building materials actually declined in the same period, and the price of other products, especially bricks, fell or remained unchanged. A large number of customers have indicated that CVK imposes its prices unilaterally and is not prepared to negotiate. Raab Karcher also stated at the hearing that before 1999 despite the existence of the CVK marketing organisation individual price negotiations with individual sand-lime brick works had in individual cases been quite possible. Since the conversion of CVK into a full-function undertaking, however, the works which were members of CVK had refused individual talks with customers and referred them to the CVK central office in Hilversum.

(118) In response to its existing surplus capacities, CVK has closed three of its eleven sand-lime brick works (Bergumermeer and Vogelenzang in 2001, Boudewijn in 2002) with a combined production capacity of [...] bwf ⁽²⁷⁾. This corresponds to some [15 to 20]* % of the total capacity of all CVK works.

(119) CVK is also said to have unilaterally imposed transport charges and conditions. Customers are said to have been required to purchase the glue required to construct sand-

lime brick walls also from CVK, which CVK in turn obtains from Cementbouw, because CVK refuses to abide by the guarantee if the glue of other manufacturers is used. Building material dealers and other market players have indicated that they have increasingly been passed over or marginalised by CVK and, as a result of unilateral price increases, have been required to accept reduced margins.

(120) Some of those questioned have stated that it has been made more difficult or impossible to import from Germany. On the one hand, the Dutch customers of German sand-lime brick works owned by Haniel and situated close to the border have been refused supplies. On the other, some of those questioned expressed the fear that CVK would no longer supply them with certain types of sand-lime brick elements not available in Germany if they obtained sand-lime bricks and units from Germany. This was also stated by Raab Karcher at the hearing. Raab Karcher also stated that a German sand-lime brickworks belonging to the Haniel group had recently increased its supply price by 55 %; Raab Karcher sees this as an attempt to direct demand back to CVK.

(121) CVK's conduct is described by many market players as monopolistic. Some have stated that competition has declined. Others have pointed to vertical links with Cementbouw's activities in the building materials trade.

(122) All of these factors suggest that CVK's conversion to a full-function company has put it in a position to behave, to a much greater extent, independently of its competitors and customers than had previously been possible for the joint marketing organisation. Whereas, before the merger, price competition between sand-lime brick manufacturers was essentially ruled out by the cartel, while those manufacturers nevertheless defined their business strategy independently, CVK is now able, as a result of the single management of the entire Dutch sand-lime brick industry, to focus all of the competition parameters (product development and diversification, capacity adjustment, production quantities, prices, etc.) centrally on profit maximisation for the overall company and thereby fully exploit the advantage of its unique position on the market vis-à-vis its competitors and customers.

(123) The parties and CVK are of the opinion that the merger has not had any impact on the market. CVK had existed as a marketing organisation since 1947 and was thus of longer duration than many full-function joint ventures. CVK had also, prior to 1999, from the point of view of demand-side firms, been operating as an integrated supplier on the market. The member works had not had any distribution structures of their own, so that, even

⁽²⁶⁾ In this case, for example, it was decided after conclusion of the pooling agreement to close three of the eleven existing sand-lime brick works (Bergumermeer, Boudewijn and Vogelenzang) with the consequence that, were CVK to be broken up, three of its eleven members would no longer have their own business operations.

⁽²⁷⁾ Abbreviation for *basiswaaforma*t (basic wall format), the standard unit of size for wall-building materials.

before the present merger, exit would not have been a straightforward matter. The changes in the competitive behaviour of the parties which are described by customers in the Commission's market investigation and which point to the development of market power are partly repudiated by the parties and partly attributed to other reasons. For example, the price increases for sand-lime are attributed to higher costs and are said to be in line with the general trend of prices. The 55 % price increase imposed by a German Haniel sand-lime brick-works and complained of by Raab Karcher at the hearing is said to involve a factory in the new German *Länder* which, prior to its takeover by Haniel, had sold surplus production in the Netherlands at below cost price.

(124) Even taking account of the comments of the parties and of CVK, the Commission maintains its view that the merger has brought about a structural change in market conditions. A joint marketing organisation cannot be equated in its effect on competition with an integrated full-function undertaking under single control even if it has existed for many years and even if the exit of individual members makes certain adjustments necessary, such as the establishment of their own distribution structures. Otherwise, mergers between previously independent undertakings which, before the merger, had formed a distribution organisation could be covered by the material criterion of merger control (creation or strengthening of a dominant position) only in exceptional cases. Furthermore, the information provided by Raab Karcher at the hearing indicates that even so solid a marketing organisation which had lasted so long as CVK was not in a position to deprive its members entirely of the scope for their own competitive action. Even if CVK had, with the price increases charged since 1999, been partly or entirely passing on cost increases to its customers, this indicates, in view of the existing surplus capacities, falling demand and stagnating or decreasing prices for competing wall-building materials, that CVK is to a substantial extent able to act independently of its competitors and customers. An undertaking fully exposed to competition is, under such circumstances, in general not able to pass on cost increases in full to its customers.

(125) Furthermore, it is by no means certain that, without the merger, CVK would still exist today in the form in which it had existed until 1999. [more detailed explanation of this statement in view of the fact that cartel proceedings

against CVK were in progress before the pooling agreement was notified at the NMa]* It must therefore be assumed that the present dominant position of the parties was created as a result of the merger.

C. Conclusion

(126) The Commission has therefore reached the conclusion that the merger has led to the emergence of a dominant position on the part of CVK on the market in wall-building materials for load-bearing walls in the Netherlands, as a result of which effective competition within the common market or a substantial part thereof is significantly obstructed.

VI. COMMITMENT SUBMITTED BY HANIEL AND CEMENTBOUW

(127) In order to remove the Commission's misgivings in relation to the market in wall-building materials for load-bearing walls in the Netherlands, Haniel and Cementbouw initially submitted a draft commitment which essentially provided that Haniel and Cementbouw would end the cooperation agreement and would sell the holdings they had acquired in 1999 from RAG in the firms Anker, Vogelenzang and Van Herwaarden to an independent purchaser. The pooling agreement and the change in CVK's articles were to be maintained; the purchaser of the shares to be sold would have to undertake to participate in the pooling agreement and the current CVK structure.

(128) After the Commission had pointed out to the parties that, in its view, this draft commitment was not sufficient to resolve the competitive problem identified by the Commission, Haniel and Cementbouw submitted the commitment described below, the full text of which is set out in the Annex to this Decision.

(129) Haniel and Cementbouw undertake:

- (a) within [...] of the adoption of the Commission Decision, to revoke the pooling agreement, to undo the amendment to CVK's articles and to dissolve CVK;
- (b) to revoke the cooperation agreement with immediate effect;
- (c) simultaneously with the ending of the pooling agreement, to end the joint control of the firms Anker and Van Herwaarden [description of how this is to be achieved]*;

(d) insofar as the firm Vogelenzang, which at present has no business activity, were to resume its production, Haniel and Cementbouw undertake to end joint control of this undertaking in the same way as provided for in respect of Anker and Van Herwaarden.

(130) Haniel and Cementbouw also undertake [commitment concerning CVK's internal organisation]*.

(131) The commitment also contains rules on the appointment of a trustee, whose task it is to supervise compliance with the commitment by the parties.

VII. COMPETITIVE ASSESSMENT OF THE NOTIFIED MERGER IN THE LIGHT OF THE COMMITMENT SUBMITTED BY HANIEL AND CEMENTBOUW

(132) The commitments submitted by the parties initially in draft form are, in the Commission's view, not sufficient to dispel the competitive doubts as regards the Dutch market in wall-building materials for load-bearing walls. The draft commitments remove only the joint control of Haniel and Cementbouw over CVK, without at the same time removing CVK's dominant position created by the merger. The draft commitments are based on the assumption, which as explained in Section II of this Decision is incorrect, that only the acquisition of joint control by Haniel and Cementbouw over CVK was subject to examination by the Commission in these proceedings, while the simultaneously completed acquisition of control by CVK over its member undertakings was, because of the decision taken by the NMa on 20 October 1998, not subject to the Commission's jurisdiction.

(133) The final commitments described in recitals 129 to 131 are, by contrast, in the Commission's view sufficient to resolve in an appropriate manner the abovementioned competitive misgivings.

(134) As a result of these commitments, the effects of the merger as described in Section II are undone. Through the revocation of the pooling agreement and the cooperation agreement, CVK's control over its member undertakings is removed. This means that the undertakings wholly owned by Haniel, i.e. De Hazelaar, Loevestein, Hoogdonk, Rijsbergen and Boudewijn, and the undertakings wholly owned by Cementbouw, i.e. Harderwijk, Roelfsema and Bergumermeer, once again come under the sole control of their respective shareholders. The simultaneously restored joint control of the three joint ventures Anker, Van Herwaarden and Vogelenzang is removed by the following measures: in each instance, one of the two parties, i.e. Haniel or Cementbouw, will take over sole control of one of the two undertakings, Anker and Van Herwaarden.

(135) [Means by which Haniel or Cementbouw will acquire sole control of Anker and Van Herwaarden]*.

(136) [Analysis of specific means by which Haniel or Cementbouw will acquire sole control of Anker and Van Herwaarden]*.

(137) The firm Vogelenzang does not at present have any business activity. The parties intend to sell the assets of this undertaking to a third party and to share the proceeds of the sale in proportion to their holdings. If, however, the business activity of Vogelenzang were to be resumed under the present shareholders Haniel and Cementbouw, one of the two parties will take over sole control of this undertaking in the same way as is provided for in the case of the firms Anker and Van Herwaarden.

(138) The parties have also undertaken to dissolve CVK. [Description of the parties' motives in making this commitment and the steps needed to put it into effect]*.

(139) This means that, once the commitment has been fully complied with, CVK will cease to exist in its present form as a joint venture jointly controlled by Haniel and Cementbouw in which the entire Dutch sand-lime brick industry is combined under uniform direction. In place of the present CVK, there will be two competing suppliers of sand-lime brick to which the sand-lime brickworks solely owned or owned on the basis of a majority holding by Haniel and Cementbouw belong and which are integrated into the respective groups of Haniel and Cementbouw.

(140) Even taking account of their respective continued supply of products on the relevant market in wall-building materials for load-bearing walls, it is not to be expected that Haniel or Cementbouw can individually or jointly retain a dominant position. Cementbouw is an undertaking which has long been operating on the Dutch market with ready-mixed concrete and precast concrete balling elements and which moreover is vertically integrated into the wholesale stage. Haniel, by contrast, has, in the building materials sector, hitherto operated mainly on the German market and entered the Dutch market only in the 1990s through the acquisition of various sand-lime brickworks belonging to CVK. With the recent acquisition of the aerated concrete manufacturer Fels, Haniel has added an essential product to its product

range on the Dutch wall-building materials market. This suggests that the two parties have differing interests on the Dutch market which (also in view of the geographical distribution of the works belonging to Haniel and to Cementbouw after the separation) rule out any risk of coordination following the ending of the distribution organisation that existed before the merger. This also applies because, given the small geographical size of the Dutch market, the location of a works does not significantly affect transport costs.

(141) [Analysis from the point of view of competition of specific means by which the commitment is to be put into effect]*.

(142) [Analysis from the point of view of competition of specific means by which the commitment is to be put into effect]*.

(143) The period of [...] allowed the parties for compliance with the commitment appears necessary, by way of exception, in view of the unusual circumstances of this case. In order to dissolve the existing, centrally integrated full-function undertaking CVK and, in its place, to establish two mutually independent sand-lime brick undertakings, the parties must be enabled to cope with all the organisational measures, including the associated labour-management and labour-law requirements described in paragraph 138. [More detailed explanation of this statement]*. Thus, the present case, in which the merger being examined by the Commission was effected almost three years ago and has resulted in the creation of a new, integrated undertaking, whose dissolution is the subject of the commitment given by the parties, differs from the conventional case of a commitment to sell an already existing undertaking which can operate on a stand-alone basis⁽²⁸⁾.

(144) The Commission has therefore come to the conclusion that, taking account of the commitment given by Haniel and Cementbouw, the notified merger will not give the parties a dominant position on the market in wall-building materials for load-bearing walls in the Netherlands.

⁽²⁸⁾ See paragraph 14 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/ 98 (OJ C 68, 2.3.2001, p. 3).

VIII. CONDITIONS AND OBLIGATIONS

(145) The first sentence of the second paragraph of Article 8(2) of the Merger Regulation states that the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

(146) Measures that effect a structural change to the market will be imposed in the form of 'conditions'; implementing steps necessary to achieve this result will take the form of 'obligations'. If a condition is not fulfilled, the Commission decision declaring the concentration compatible with the common market is null and void. Where the undertakings concerned commit a breach of an obligation, Article 8(5)(b) of the Merger Regulation empowers the Commission to revoke a clearance decision; Article 14(2)(a) and Article 15(2)(a) of the Merger Regulation empower it to impose fines or periodic penalties on the parties⁽²⁹⁾.

(147) In accordance with this basic distinction, the Commission decision should be made subject to the condition of full compliance with those commitments given by Haniel and Cementbouw that relate to the dissolution of CVK in its present form and the formation of two mutually independent sand-lime brick suppliers⁽³⁰⁾. These commitments serve to offset the identified creation of a dominant position by the parties on the Dutch market in wall-bearing materials for load-bearing walls and hence to maintain competition on that market. All the remaining parts of the commitment, in particular the details regarding the trustee to be appointed by Haniel and Cementbouw, should be made the subject of obligations, since they are merely intended to ensure the implementation of the above-mentioned conditions.

IX. ADDRESSEES OF THIS DECISION

(148) This Decision — like the statement of objections which preceded it — is addressed not only to the notifying parties, but also to the CVK joint venture jointly controlled by the parties. Exceptionally, the particular circumstances of this case militate in favour of including

⁽²⁹⁾ See paragraph 14 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/ 98 (OJ C 68, 2.3.2001, p. 3, recital 12).

⁽³⁰⁾ Points 27, 28, 32 to 35 and 40 of the Annex.

CVK in the addressees of the Decision. Although CVK is, via its parent companies, indirectly an addressee already, it is not merely the target undertaking in this case. Rather, it is the instrument by which the merger took place, and CVK's direct involvement is also necessary for the commitment given by Haniel and Cementbouw to be fulfilled. CVK is a party to the pooling agreement, and the specified measures involve an amendment to CVK's articles.

X. CONCLUSION

(149) For these reasons, provided the commitments entered into by Haniel and Cementbouw are fully complied with, it can be accepted that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Subject to full compliance with the commitments set out in the Annex, therefore, the concentration should be declared compatible with the common market and the EEA Agreement pursuant to Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration by which Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV have, within the meaning of Article 3(1)(b) of the Merger Regulation, acquired joint control of the undertaking Coöperatieve Verkoop- en Produktievereniging van Kalkzandsteenproducenten and its member undertakings is hereby declared compatible with the common market and the EEA Agreement.

Article 2

Article 1 shall apply subject to the condition that the commitments entered into by Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV and set out in points 27, 28, 32 to 35 and 40 of the Annex are complied with in full.

Article 3

The obligation is attached to this Decision that the other commitments entered into by Franz Haniel & Cie. GmbH and Cementbouw Handel & Industrie BV and set out in the Annex must be complied with in full.

Article 4

This Decision is addressed to:

Franz Haniel & Cie. GmbH
Franz-Haniel-Platz 1
D-47119 Duisburg

Cementbouw Handel & Industrie BV
Bennebroekerdijk 244
2142 LE Cruquius
The Netherlands

Coöperatieve Verkoop- en Produktievereniging van Kalkzand-
steenproducenten
Utrechtseweg 38
1213 TV Hilversum
The Netherlands

Brussels, 26 June 2002.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

The full wording of the conditions and obligations referred to in Articles 2 and 3, in the original German, can be consulted on the following Commission website:

http://europa.eu.int/comm/competition/mergers/cases/decisions/m2650_de.pdf

COMMISSION DECISION**of 17 February 2003****on the aid scheme implemented by Belgium for coordination centres established in Belgium***(notified under document number C(2003) 564)***(Only the French and Dutch texts are authentic)****(Text with EEA relevance)**

(2003/755/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on the interested parties to give their views pursuant to the abovementioned provisions⁽¹⁾, and having regard to their comments,

Whereas:

also notes the progress that has already been made towards this goal of eliminating harmful tax competition, and in particular the steps taken by the Member States to abolish the measures identified by the code of conduct group as harmful, or at least to remove the harmful aspects of such measures.

- (2) For further details of the procedural steps that preceded the Commission's decision of 27 February 2002 to initiate the formal investigation procedure, the Commission would refer to the letter it sent to Belgium on this occasion (letter initiating the procedure)⁽⁴⁾.

I. PROCEDURE

- (1) In 1997 the Council (Ecofin) approved a code of conduct for business taxation⁽²⁾ to tackle harmful tax competition and set up an ad hoc group to examine the tax measures to which the code of conduct applies. Following the undertaking in the code of conduct, the Commission issued a Notice in 1998 on the application of the state aid rules to measures relating to direct business taxation⁽³⁾, in which it affirmed its commitment to the strict application of the rules according to the principle of equality of treatment. Against this background, the Commission, acting in accordance with the state aid rules, began its examination of the measures identified by the code of conduct group as harmful. The Commission would stress here the parallels between the work of the code of conduct group and the Community's policy on state aid, both of which are aimed at eliminating those measures that distort or threaten to distort competition in the common market. The Commission

- (3) To recapitulate: Royal Decree No 187 of 30 December 1982 provides for a tax scheme for approved coordination centres that derogates from ordinary tax law. On 2 May 1984 the Commission decided that it did not object to Royal Decree No 187 in the form it would take after amendment by the bill submitted to it by the Belgian Government on 3 April 1984. The Belgian Government was notified of this decision. However, the amendments actually introduced by the Belgian Government did not correspond to the bill submitted to the Commission. The Commission consequently initiated a formal investigation procedure on 12 December 1985. Following amendments proposed by the Belgian Government and enacted on 4 August 1986, the Commission informed Belgium on 9 March 1987 that it had closed the procedure in the light of the amendments made by Belgium in order to make the aid scheme compatible with Article 92 of the EC Treaty (now Article 87).

⁽¹⁾ OJ C 147, 20.6.2002, p. 2.

⁽²⁾ OJ C 2, 6.1.1998, p. 2.

⁽³⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁴⁾ See footnote 1.

- (4) On 1 December 1997 the Council adopted a Code of conduct for business taxation and asked the Commission to examine or re-examine the tax measures in force in the Member States. On 11 November 1998 the Commission issued a Notice on the application of the State aid rules to measures relating to direct business taxation (the Notice).
- (5) Having sent a request for information to the Belgian authorities on 12 February 1999, the Commission announced on 17 July 2000 that the scheme probably now had to be considered as state aid. It then initiated the cooperation procedure applicable to existing aid schemes under Article 17(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁵⁾, by calling on the Belgian authorities to submit their comments. The Belgian authorities criticised the procedure and demanded that the cooperation stage be launched by the Members of the Commission, acting as a body, rather than by the Commission departments. The Commission contested this approach.
- (6) On 11 July 2001 the Commission wrote to Belgium ⁽⁶⁾ proposing appropriate measures to make the scheme compatible with the rules on State aid. The Belgian authorities sent their comments in a letter of 19 September 2001, informing the Commission that these comments were not to be construed either as an acceptance or as a rejection of the proposed measures.
- (7) In the absence of an explicit acceptance of the measures within the specified time limit, and in the light of the comments made by the Belgian authorities in their letter of 19 September, the Commission decided on 27 February 2002 to initiate the procedure referred to in Article 88(2) of the EC Treaty, in accordance with Article 19(2) of Regulation (EC) No 659/1999. The Commission informed Belgium of this decision by letter of 1 March 2002 ⁽⁷⁾.
- (8) The original one-month deadline having been extended ⁽⁸⁾, the Belgian authorities notified the Commission of their position by letter of 12 April 2002, stating that these were not comments within the meaning of Article 88(2) of the EC Treaty but arguments within the meaning of Article 19(2) of Regulation (EC) No 659/1999 relating to the measures proposed by the Commission.
- (9) By letter of 16 May 2002 Belgium communicated the text of a preliminary draft bill amending Royal Decree No 187. The amendments made to the Royal Decree by this text are the subject of a separate procedure ⁽⁹⁾.
- (10) After meetings with the Belgian authorities on 26 June and 3 July 2002, the Commission asked Belgium for further information about both the scheme currently in force and the draft new scheme that had been notified ⁽¹⁰⁾. After an extension of the original deadline the Belgian authorities replied by letter of 30 August 2002.
- (11) The Commission's decision to initiate the procedure was published in the Official Journal of the European Communities ⁽¹¹⁾. The Commission asked the interested parties to make known their views on the measure in question. The Commission received comments on the subject from 90 interested parties, which it then forwarded to Belgium by letters of 24 September and 8 November 2002 ⁽¹²⁾. Belgium responded by letters of 16 October and 16 December 2002.

II. DESCRIPTION OF THE MEASURES INVESTIGATED

- (12) The tax scheme for coordination centres is based on Royal Decree No 187 of 30 December 1982. The Royal Decree was supplemented by the Law of 11 April 1983, the Royal Decree of 20 December 1984 and the Law of 28 December 1992, and has also been repeatedly amended ⁽¹³⁾. The scheme has applied in its present form since 1 January 1993. A general explanation by the tax administration is contained in Circular CIRH.421/439.244 of 29 November 1993.

⁽⁵⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁶⁾ Letter SG(2001) D/289723.

⁽⁷⁾ See footnote 1.

⁽⁸⁾ Request of 27 March 2002 (A/32428).

⁽⁹⁾ The scheme notified is registered under number N351/2002.

⁽¹⁰⁾ Letter COMP D/53779 of 18 July 2002.

⁽¹¹⁾ See footnote 1.

⁽¹²⁾ Letters COMP D/55338 and D/56352.

⁽¹³⁾ Law of 27 December 1984, Law of 4 August 1986, Royal Decree of 3 November 1986, Law of 28 December 1990, Law of 23 October 1991 and Law of 4 April 1995.

- (13) A coordination centre qualifies for the scheme if it has been individually approved by Royal Decree. In order to qualify for approval a coordination centre must, under Royal Decree No 187, be part of a group with a multinational character⁽¹⁴⁾ and have capital and reserves of at least BEF 1 billion and an annual consolidated turnover of at least BEF 10 billion. Only certain types of preparatory, ancillary or centralisation work are allowed⁽¹⁵⁾, and firms in the financial sector (credit, banking, insurance) do not qualify. Finally, coordination centres must employ at least the equivalent of 10 full-time staff in Belgium by the end of their first two years in business.
- (14) The approval of the coordination centre is valid for 10 taxable periods from the taxable period in which the application for approval is made. Since the adoption of the Law of 23 October 1991 the approval may be renewed under the same conditions as those that applied to the original approval.
- (15) Royal Decree No 187 derogates from the ordinary tax system by providing for the taxable income of approved coordination centres to be assessed at a flat rate that corresponds to a percentage of expenditure and operating costs (the 'cost plus' method). The calculation is based on all the centre's costs excluding staff costs, financial charges and corporation tax. The profit margin must in principle be calculated case by case, 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 the costs plus a percentage for profits, the same percentage can be used for the profit margin, provided this is not abnormal. In the absence of any objective criteria for determining the percentage of profits to be taken into account the rate is set at 8 %.
- (16) The coordination centre's taxable profits may not, however, be less than the total of the expenditure or charges that are not deductible as business costs ('non-deductible expenditure') and the exceptional or gratuitous advantages extended to the centre by members of the group ('alternative tax base').
- (17) The profits of coordination centres are taxed at the standard rate of corporation tax.
- (18) Under the Law of 11 April 1983 coordination centres are exempt from property tax (*onroerende voorheffing/précompte immobilier*) on buildings they use for business purposes. The law also exempts them from registration duty (*registratierecht/droit d'enregistrement*) of 0,50 % on contributions and capital increases. Lastly, dividends, interest and royalties paid by coordination centres are exempt from withholding tax (*roerende voorheffing/précompte mobilier*) under the Law of 11 April 1983, except, in the case of interest, if the recipient is subject to tax on natural persons or tax on legal persons.
- (19) As a result of the amendments introduced by the Royal Decree of 20 December 1984, Article 110(6) of the Royal Decree implementing the 1992 Income Tax Code states that income received by the coordination centres from their cash deposits is also exempt from withholding tax.
- (20) The exemption from withholding tax was accompanied by a notional withholding tax on the payments made by the centres. The tax is notional in the sense that the recipients of the income paid by the centres receive the full amount, without deduction of a tax, but are entitled to offset the notional amount of tax against their final tax bill. According to the Belgian authorities the notional withholding tax is no longer applied to the interest paid by the centres, on the basis of agreements concluded since 24 July 1991, or to dividend payments with effect from the same date or to royalties paid or assigned since 1 January 1986.
- (21) The Law of 28 December 1992 introduced an annual tax on coordination centres with effect from 1 January 1993, amounting to EUR 10 000 (BEF 400 000) per
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- (14) Multinational character is determined on the basis of the following criteria: establishment (subsidiaries in at least four countries), turnover achieved abroad and capital invested abroad. The requirement that the multinational group must pursue activities in at least four countries was introduced by the Law of 4 August 1986.
- (15) Advertising, supplying and collecting information, insurance and reinsurance, scientific research, contacts with national and international authorities, centralisation of activities in the area of accounts, administration and data processing, centralisation of financial transactions and hedging of risks associated with exchange rate fluctuations, as well as all ancillary or preparatory work for the companies in the group.

full-time member of staff employed by a coordination centre, up to a maximum of EUR 100 000 (BEF 4 000 000) per centre.

- (22) According to the Belgian authorities the scheme applies to around 250 approved centres and financial flows of billions of euros.

III. REASONS FOR INSTITUTING THE FORMAL PROCEDURE

- (23) The Commission took the view that the coordination centres probably enjoyed a specific advantage because the cost-plus method was applied only to them. Given that significant costs — financial charges and staff costs — were excluded from the calculation of the tax base, and the profit margin was generally set at 8 %, regardless of the nature of the work performed, it seemed unlikely that the taxable income calculated in this way would be comparable to what would have been obtained using the normal method that applies under ordinary tax law and is based on the difference between assets and liabilities. This method did not, therefore, appear to comply with the guidelines laid down by the Organisation for Economic Cooperation and Development (OECD) in its reports on the cost-plus method.

The Commission also held that the coordination centres and the groups to which they belonged probably received a specific advantage in that the exemptions from property tax, withholding tax and registration duty on capital injections went beyond the exemptions to which all firms were entitled on the basis of the ordinary tax system.

Finally, the Commission held that these specific advantages did not appear to be justified by the nature or structure of the Belgian tax system and could lead to competition being distorted and trade between the Member States being adversely affected. The measures in questions should therefore probably be regarded as aid within the meaning of Article 87(1) of the EC Treaty. Moreover, given that the exceptions provided for in Article 87(2) and (3) of the EC Treaty did not apply, the Commission concluded at this stage that such an aid measure was probably incompatible with the common market.

IV. COMMENTS OF THE BELGIAN AUTHORITIES AND INTERESTED PARTIES

- (24) Despite the objections by the Belgian authorities ⁽¹⁶⁾, the Commission does regard the remarks they made in their letter of 12 April 2002 as comments within the meaning of Article 88(2) of the EC Treaty.
- (25) Three associations or federations submitted comments on behalf of the firms they represent. They were the *Verbond van Belgische Ondernemingen* (VBO) (Federation of Enterprises in Belgium), the American Chamber of Commerce (AmCham) and Forum 187, the federation of coordination centres, distribution centres, service centres and call centres located in Belgium. Forum 187's comments, like those of the Belgian Government, are intended to highlight irregularities in the procedure followed by the Commission and to refute the allegation that the scheme involves aid incompatible with the common market. Its arguments also seek to show that the withdrawal of the favourable decisions of 1984 and 1987 contravenes the fundamental principles of Community law, founded on legal certainty and legitimate expectation.
- (26) Apart from these three associations, 87 centres or groups which have such centres sent comments to the Commission individually. The centres generally describe their own situation as regards date of approval, staff complement and investment and then endorse Forum 187's comments. The list of the 53 interested parties that did not ask to remain anonymous in order to conceal their identity from the Belgian state appears in the annexe to this decision.

IV.1. Procedure

- (27) The Belgian authorities stand by their refusal to accept the legal base invoked by the Commission for classifying the scheme as existing aid and their view that the chosen procedure was not then complied with. Forum 187, which represents the approved centres, denies the existence of any legal base and accordingly calls on the Commission to abandon its action. The following arguments are put forward in support of these views.

⁽¹⁶⁾ See recital (8).

(28) Firstly, the Commission cannot legitimately invoke Article 1(b)(v) of Regulation (EC) No 659/1999 as the legal base for its action because this requires the Commission to produce evidence that the scheme did not constitute aid when it entered into force but subsequently became aid because of the evolution of the common market. The Commission, however, has not proved that such an evolution took place. No other provision of Regulation (EC) No 659/1999 allows the procedure for existing aid schemes to be applied in the event of the Commission, having initially thought that a particular measure did not constitute aid, changing its mind and stating that the scheme does, after all, constitute aid within the meaning of Article 87 of the EC Treaty. The Commission cannot, therefore, apply the Procedure regarding existing aid schemes in Chapter V of the said Regulation.

(29) Secondly, only under strict conditions may the Commission withdraw or amend an unlawful favourable decision with retroactive effect. It must, for example, allow a reasonable length of time and must first produce evidence of the unlawfulness of the decision in question. Moreover, it must respect the legitimate expectation of the interested parties. Under the procedure followed by the Commission these conditions have not been met, with the result that there is no legal base for withdrawing the scheme.

(30) Thirdly, having itself chosen the procedure relating to existing aid schemes, the Commission is not complying with it. Because of the legal and economic importance of classifying a scheme as aid, such a value judgment is not the responsibility of the Commission departments but of the Members of the Commission acting as a body. The cooperation phase was therefore not properly launched by the letter of 17 July 2000 from the services of the Competition Directorate-General. Only the decision of the Members of the Commission of 11 July 2001⁽¹⁷⁾ can initiate this stage, with the result that in this case a step in the procedure relating to existing aid schemes was omitted. The Commission did not, therefore, initiate the procedure in a valid way. For this reason Belgium states that its letter of 12 April 2002 contains arguments relating to the appropriate measures proposed rather than comments on the initiation of the procedure.

IV.2. Aid character of the scheme

(31) Both the Belgian authorities and the interested parties that submitted comments argue that the scheme for the coordination centres satisfies none of the four criteria for classifying a measure as State aid.

IV.2.1. Economic advantage

(32) In the first place certain interested parties point out that the advantages arising from coordination centres are the result of economies of scale that can be attributed to the centralisation of certain horizontal activities within the group, and that their decision to set up a centre in Belgium was not influenced by tax measures that were perceived as more favourable. In this connection they refer to the existence of alternative locations with more attractive tax regimes.

(33) In addition, Forum 187, like the Belgian State, puts forward arguments relating to all of the individual measures which were the subject of the procedure initiated by the Commission on 27 February 2002.

IV.2.1.1. Exemption from property tax

(34) Firstly, the Commission has not shown that the tax entails financial charges that are normally borne by companies themselves. On the contrary, Belgian law provides for numerous exemptions from property tax, for example for companies based in employment areas or areas undergoing industrial restructuring and for innovative companies. Several regional decrees and ordinances grant exemption from such taxes to promote economic growth or restructuring. Given that the majority of companies based in Belgium consequently benefit from some form of exemption from property tax, this is not an advantage granted specifically to the coordination centres.

(35) Secondly, only those centres that own the buildings which they use can benefit from the tax advantage arising from the exemption from property tax. According to Forum 187, no more than 5 % of the centres are in this situation.

⁽¹⁷⁾ Proposal for appropriate measures.

IV.2.1.2. Exemption from capital duty

- (36) Firstly, Belgium likewise denies that capital duty entails financial charges that are normally borne by companies themselves. In support of this claim it points out that Belgian law provides for other exemptions from capital duty, such as those extended to companies based in employment areas and those connected with the award of certain subsidies to promote investment and employment in Belgium. The majority of capital injections in Belgium consequently benefit from some form of exemption, so this is not an advantage granted specifically to the coordination centres.
- (37) Secondly, Article 7(1) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital⁽¹⁸⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, states that exemptions that predate 1 July 1984 will be maintained. The exemption provided for in Article 29 of the Law of 11 April 1983 dates from before this date. As regards the possible application of Article 9 of the Directive, it should be noted that because many other Member States do not levy capital duty this exemption does not distort competition conditions in the common market. As a result, neither Article 102 of the EC Treaty (now Article 97), that provides for consultation of the Commission, nor Article 9 of the Directive, that refers to the provision of the Treaty, is applicable in this case. The conditions laid down in the Directive for granting and maintaining this exemption were in any case fulfilled.

IV.2.1.3. Exemption from withholding tax

- (38) Firstly, the application of withholding tax may not be regarded as a firm rule of the ordinary Belgian tax system: there are so many exceptions that the majority of financial flows are unaffected by this rule. In support of this assertion, the Belgian authorities list numerous exemptions from the withholding tax on dividends and interest, some of which they claim are closely related to the exemptions granted to coordination centres, in the sense that it is always income paid to non-residents that benefits from the exemption. According to Forum 187,

any Belgian firm can avoid the deduction of withholding tax as a 'professional investor'⁽¹⁹⁾. Coordination centres are professional investors and thus automatically exempt from withholding tax. In addition, the vast majority of interest payments to non-residents are usually exempt from withholding tax. The scheme is thus presented as a simplification on the grounds that the centres only carry out transactions within the group. The Belgian authorities had earlier cited the Commission's support for the abolition of all forms of deduction at source. They accuse the Commission of being inconsistent in objecting in this case to an exemption from deductions at source.

- (39) Secondly, contrary to what the Commission asserts, the exemption from withholding tax does not allow those receiving income from movable property the opportunity to pay the tax later. To compensate for the fact that no tax is deducted at source they have to make higher payments in advance (in the form of advances against the tax to be levied later).
- (40) Thirdly, it is wrong to assert that exemption from withholding tax automatically leads to a complete absence of taxation if the withholding tax constitutes the definitive tax. Belgium has avoided this by stipulating that the exemption only applies if the recipient of the interest payments is known and is not subject to tax on natural or legal persons, the only taxpayers for whom withholding tax is a definitive tax.
- (41) Fourthly, in the case of the exemption from withholding tax on interest on deposits received by the coordination centres, the Commission has a mistaken perception of the Belgian system, which grants this exemption to all companies in their role as 'professional investors'. Coordination centres are not, therefore, given preferential treatment compared to other companies.

IV.2.1.4. Notional withholding tax

- (42) The notional withholding tax was reduced to zero in 1991, with the result that the Commission's concern about this measure is misplaced.

⁽¹⁸⁾ OJ L 249, 3.10.1969, p. 25.

⁽¹⁹⁾ Article 105(3) of RD/ITC92 refers to 'professional investors' and three other categories of taxpayers that are eligible for exemption from withholding tax, i.e. 'financial institutions', 'semi-public organisations in the field of social security' and 'non-resident savers'.

IV.2.1.5. Flat-rate income assessment (cost-plus)

(43) Firstly, the cost-plus method is strongly advocated by OECD for determining the transfer prices for services within a group. The exclusion of certain costs and expenditure from the basis for assessment is compatible with OECD guidelines, which state that it is not always necessary to add a profit margin in order for the price to satisfy competition requirements ('at arm's length'). Moreover, when determining transfer prices, the Belgian administration must base itself on the OECD reports ⁽²⁰⁾. In addition, according to the OECD principles, expenditure made in a particular country via an entity that is not a permanent establishment or subsidiary is normally deductible for the entities for which the expenditure was made. In that case there is no intermediation margin.

(44) Thirdly, the use of a single rate of 8 % is justified because this is the rate that was applied even before the introduction of the scheme for coordination centres for determining the taxable income of Belgian establishments of foreign companies. Another argument used is that the Belgian administration also applies flat-rate percentages for the profit margin of certain categories of the self-employed. The Commission's criticism of the use of a flat-rate percentage ignores the reality of the situation, which is that this has been administrative practice since 1964 and is an integral part of the Belgian tax system.

(45) Fourthly, the scheme is disadvantageous compared to the ordinary tax system if the centre's operating results show a loss. In that case the centres have to pay both tax on a notional flat-rate income obtained by applying the cost-plus method and the flat-rate tax of EUR 10 000 per employee ⁽²¹⁾, whereas they would not have been liable for any tax under the normal method. Moreover, any understatement of the tax to be paid by a centre in Belgium would automatically be offset at the level of the parent company of the multinational group when it paid tax on its worldwide income. Examples are cited of parent companies in the United States, Finland

and Germany. Consequently, Forum 187 argues that no advantage is obtained at the level of the group.

- (46) Fifthly, no advantage is gained from excluding staff costs, because this is offset by the flat-rate levy on the first 10 employees. This personnel tax is equivalent to 8 % of an amount comparable to the amount of the staff costs excluded from the calculation. The exclusion of financial costs is justified because if they were subject to tax the result would be a level of taxation that exceeded the income that the centre receives as its intermediation margin.
- (47) Sixthly, the alternative basis of assessment described in recital 16 is not a theoretical basis but often serves as the actual tax base.

IV.2.2. Use of state resources

- (48) No state resources are involved in implementing the scheme for coordination centres. Indeed, the introduction of the scheme has attracted centres to Belgium and thus contributed to Belgian State resources.
- (49) Moreover, the majority of companies established in Belgium benefit from one or other exemption from withholding tax, property tax and capital duty. The Belgian state is not, therefore, renouncing any extra tax revenue.

IV.2.3. Distortion of competition and adverse effect on trade between the Member States

- (50) Firstly, the arguments put forward in support of the Commission's decision to initiate the procedure are superficial and theoretical. No concrete evidence is provided that competition has been distorted and trade adversely affected. Citing a judgment of the Court of Justice of the European Communities ⁽²²⁾, Belgium considers the failure to provide adequate reasons as sufficient grounds for annulment.
- (51) Secondly, it is wrong to ignore the tax systems of the other Member States. The Commission's position that the scheme in question should be examined solely in the context of the ordinary tax legislation currently applicable in Belgium is unacceptable. For example, the exemptions from property tax, withholding tax and

⁽²⁰⁾ See No 26/48 of the *Commentaar van het Wetboek van de Inkomstenbelastingen 1992* (commentary on the Income Tax Code) (Com.ITC).

⁽²¹⁾ See recital (21).

⁽²²⁾ Joined cases C-15/98, *Italian Republic v Commission* and C-105/99 *Sardegna Lines v Commission* [2000] ECR I-8855.

capital duty cannot have an adverse effect on trade between the Member States because taxes of this sort are not found in some — if not all — other Member States. Nor is it apparent from the Commission's analysis of the cost-plus method used in Belgium in what way this method is more advantageous than the methods applied in other Member States to constructions comparable to coordination centres. The advantages extended to the coordination centres exist in many other countries too, and the Commission has thus been unable to demonstrate that competition and trade between the Member States have been adversely affected. The Commission should have produced hard evidence of such adverse effects.

(52) Thirdly, the Commission asserts on purely theoretical grounds that the presence of Belgian coordination centres within multinational groups adversely affects competition and trade. In so doing it ignores the economic reality that the general tendency to concentrate service provision within a group in coordination-centre-type entities is justified by the reduction in costs achieved through economies of scale. According to Forum 187, all multinationals have a unit responsible for centralising activities such as cash-flow management, financing, accounts and personnel management for the companies within the group. All of these multinationals are free to set up a centre in Belgium or elsewhere. There is therefore no question of competition being distorted.

(53) Fourthly, it is argued that even if the centres were in a privileged financial situation, competition on the financial market would not be affected because the financial institutions determine the conditions they offer on the basis of an independent analysis of the situation of a group, without taking into account the existence of a coordination centre and the advantages that might arise from any special tax schemes. Moreover, the banks base themselves on the reference rates (LIBOR, EURIBOR, etc.) on which the centres have absolutely no influence.

IV.2.4. *Selectivity/specificity of the measure*

(54) Firstly, the Commission has not demonstrated that any discretionary power can be exercised in granting the advantages of the scheme. On the contrary, the administration applies clear rules in a strictly uniform

manner. For example, the fact that approved centres are not allowed to engage in insurance or reinsurance activities is solely due to insurance legislation, which does not permit insurance companies to undertake other activities, and not to any margin of discretion exercised by the tax administration.

(55) Secondly, the Belgian Government believes that the Commission wrongly lays the burden of proof at its door by requiring it to show that the measure is justified by the nature or structure of the Belgian tax system. The Commission is basing itself here on the Notice. But a notice cannot impose a new obligation on Member States. The onus is on the Commission to demonstrate that the scheme cannot be justified by the structure of the Belgian tax system.

Justification on the grounds of the nature or structure of the system

(56) Firstly, it is inherent in the nature of a tax system to set limits on and conditions for the advantages and disadvantages it offers. Contrary to the Commission's claim, the Belgian system is based on the principle that companies, as 'professional investors', are exempt, and not on the principle of systematic deduction of tax at source (see recital 38). Withholding tax is principally intended as a tax on natural and legal persons who are then released from an obligation: they are no longer required to declare the income from movable property that has been subject to withholding tax, because this constitutes the definitive tax on the income in question. The presentation of the regulations that apply here in the form of a principle followed by numerous exceptions reflects the desire of the legislator to include these regulations in a section of the 1992 Income Tax Code which is common to the four types of tax that are levied⁽²³⁾. According to Forum 187, it is inherent in the nature of a tax system to establish principles and to provide for exceptions to them. These exceptions will necessarily benefit some companies more than others. That does not mean that all of these exemptions have to be regarded as state aid within the meaning of Article 87(1) of the EC Treaty. It is therefore inappropriate to apply the provisions of that article to all of them.

⁽²³⁾ Tax on the income of resident natural persons, resident legal persons, domestic companies and non-residents (subdivided according to whether the taxpayer is a natural person or a company).

(57) Secondly, the Belgian authorities use a numerical example to demonstrate that companies in general — and coordination centres in particular — should be exempt from withholding tax because they carry out a very large number of financial transactions every year. Without the exemption, the total amount of withholding tax deducted would exceed the amount of tax due over the whole year, with the result that the Belgian state would be compelled to repay large sums to all companies in the country. This applies *a fortiori* to the coordination centres because of their activities in connection with the centralisation of cash flow management (cash pooling).

(58) Thirdly, the exemption of the centres is justified because of the risk of double taxation associated with withholding tax. Although excess withholding tax collected on domestic transactions can be repaid, States rarely take account of withholding taxes levied abroad. Moreover, even though some States allow withholding tax levied abroad to be offset against the taxes they levy, no State goes so far as to repay withholding tax it has levied that is in excess of the final tax liability.

(59) Fourthly, the selectivity denounced by the Commission is justified because the measure is solely intended for companies that perform tasks normally carried out by a head office. In this connection it is pointed out that this selectivity is roughly the same as that in the tax regime prescribed by Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States⁽²⁴⁾, as amended by the Act of Accession of Austria, Finland and Sweden, (or by the proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States)⁽²⁵⁾. Finally, the general nature of the exemption introduced in 1983 for income paid out by the centres was justified at the time because these centres were intended to promote new and unfamiliar forms of financial transaction. It was not clear at that point whether the various exemptions provided would actually apply to these new financial flows.

IV.3. Compatibility with the common market

(60) The Belgian Government takes the view that if the scheme does qualify as aid it is compatible with the

common market under Article 87(3)(c) of the EC Treaty, because it was introduced to promote investment and employment in Belgium. In support of this it cites the Report to the King that preceded Royal Decree No 187.

(61) The Commission questioned whether the exemption from capital duty was compatible with the Community provisions on the subject. Belgium asserts that all the conditions and formalities required by Directive 69/335/EEC were complied with and confirms that the application of this exemption is consequently compatible with Article 7 of the Directive, which states that exemptions predating 1 July 1984 must be maintained. The exemption provided for in Article 29 of the Law of 11 April 1983 dates from before that date.

IV.4. Legitimate expectation

(62) Firstly, the advantage of the scheme was granted in good faith and entirely lawfully to the approved centres. The centres may therefore invoke the principle of legitimate expectation in order to benefit fully from the 10-year approval that currently applies. This legitimate expectation is based on the Commission decisions of 1984 and 1987 authorising the scheme and the answer to a Parliamentary question given by the Member of the Commission responsible for competition in 1990⁽²⁶⁾, confirming that the Commission had no objections to the scheme in the light of the rules on State aid in force at the time.

(63) Secondly, the Commission's abrupt withdrawal of its favourable decisions of 1984 and 1987 violates certain fundamental principles of Community law, in particular the principles of legal certainty and legitimate expectation. Thus Forum 187, citing European case law, stresses that there is a presumption of legality as regards the Commission decisions, and the Commission must state and explain its reasons for deciding that earlier

⁽²⁴⁾ OJ L 225, 20.8.1990, p. 6.

⁽²⁵⁾ OJ C 123, 22.4.1998, p. 9.

⁽²⁶⁾ Answer given on 12 July 1990 to Written Question No 1735/90 from Mr G. de Vries to the Commission (OJ C 63, 11.3.1991, p. 37).

decisions were unlawful (*Papiers Peints*⁽²⁷⁾). It must do so within a reasonable time (*Alpha Steel*⁽²⁸⁾). The addressee of a decision must be able to ascertain what obligations the decision imposes upon him (*Gondrand*⁽²⁹⁾ and *Opel Austria*⁽³⁰⁾). The Commission was criticised for differences in interpretation between a decision of 1999 and five previous decisions concerning the same company (*Kvaerner Warnow*⁽³¹⁾). If the addressee of a decision fails to appeal within two months the decision can no longer be contested, and the same applies to the Commission because it declared that the scheme did not constitute State aid. Finally, the Commission, having approved a scheme, may not investigate each of the separate measures approved under this scheme (*Italgrani*⁽³²⁾).

- (64) Thirdly, if the Commission were to ban the scheme, the centres — or the groups to which they belong — would suffer significant losses if they were not able to take advantage of the remaining period of their current approval. These losses would result in particular from the need to transfer the centres' activities from Belgium to a foreign country and to break the long-term contracts with the staff, financial institutions⁽³³⁾ or owners of the buildings they rent. As a result of the centre's obtaining approval, or having its approval renewed, important investments have been made by the group in order to organise the centre's activities and adapt the structure of the group⁽³⁴⁾, with a view to centralising the activities involved. The groups in question decided to set up their centres in Belgium or to invest there in the legitimate expectation that the scheme did not qualify as state aid within the meaning of Article 87 of the EC Treaty and that they would be able to take advantage of the scheme for the full term of their approval, and even beyond it, i.e. with a view to remaining operational in the long term.

⁽²⁷⁾ Case 73/74 *Papiers peints v Commission* [1975] ECR 1491, paragraph 31.

⁽²⁸⁾ Case 14/81 *Alpha Steel v Commission* [1982] ECR 749.

⁽²⁹⁾ Case 169/80 *Gondrand v Commission* [1981] ECR 1931, paragraph 17.

⁽³⁰⁾ Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 124.

⁽³¹⁾ Joined cases T-227/99 and T-134/00 *Kvaerner Warnow Werft v Commission* [2002] ECR II-1205.

⁽³²⁾ Case C-47/91 *Italy v Commission* [1994] ECR I-4635, paragraph 24.

⁽³³⁾ Banks, leasing companies, etc.

⁽³⁴⁾ Costs of computer network, software, financial circuits, etc.

- (65) For these reasons Forum 187 believes that the Commission cannot go back on its earlier decisions of 1984 and 1987 and should stop the procedure initiated on 27 February 2002. The associations and centres that expressed their views separately demand acknowledgement of the faith that they legitimately placed in the legality of the approval granted by the Belgian Government and in the maintenance of the effects of the scheme until the end of the current approval period. The last approvals to be renewed will expire on 31 December 2010.

- (66) Certain centres are also demanding the renewal of their approval for a further 10-year term once the present term has expired.

V. REMARK BY THE BELGIAN AUTHORITIES ON THE COMMENTS OF THE INTERESTED PARTIES

- (67) Belgium notes that the many comments submitted are indicative of a positive attitude to the scheme. The scale of the investments made by the interested parties shows the extent of their trust in the legal status of coordination centres and the Belgian and EU decisions relating to them. The Belgian authorities also note that none of the parties from the business world involved have expressed any negative views on the scheme, which, in their view, confirms that it does not involve any distortion of competition.

VI. EVALUATION OF MEASURES

VI.1. Procedure

- (68) Belgium and Forum 187 have criticisms of the fact that the measure was classed as existing aid, of the legal basis which the Commission chose for taking action, and of the procedure it has followed.

- (69) According to the Commission, the immediate legal basis is Regulation (EC) No 659/1999. Its underlying legal basis is provided by Articles 87 and 88 of the EC Treaty, which underpin all State aid-related Commission measures. Article 87 lays down the criteria for aid and its compatibility with the common market. They are objective criteria and the Commission has no room for manoeuvre as regards their evaluation. If it can show that an aid measure meets all the criteria laid down in Article 87, it can prove that it is aid, even if a previous

decision states the contrary. Regulation (EC) No 659/1999 confirms this approach in that it defines 'aid' as 'any measure fulfilling all the criteria laid down in Article 87(1) of the Treaty'. As the matter at stake is aid within the meaning of Article 87(1) of the EC Treaty, Article 88 applies and it must be established whether or not the measure concerned can be classed as existing aid. Regulation (EC) No 659/1999 uses the term 'new aid' in such cases.

(70) Article 88(1) of the EC Treaty provides for a more favourable procedure for existing aid schemes, allowing additional opportunities for interested parties to express their views. It is only if these proposals are rejected that the formal inquiry procedure, which is directly applicable to new or unlawful aid, can be applied to existing aid. Article 1(b) of Regulation (EC) No 659/1999 covers a variety of situations relating to 'existing aid'. 'Approved aid' is classed as existing aid, irrespective of whether it was expressly approved as aid compatible with the common market or as a non-aid measure, or was tacitly approved because the Commission had no objections. As indicated in point 32 of the letter initiating the procedure, this provision does cover cases in which the Commission, after initially taking the view that a given measure did not constitute aid, has changed its mind and now takes the view that the measure is aid within the meaning of Article 87 of the Treaty. This category includes aid that is classed as existing aid, because it can be shown that it was not aid at the time of entry into force, but was classed as aid at a later stage as a result of developments in the common market, although the Member State concerned had not modified it in any way. The Commission has consequently drawn the following conclusions.

(71) Firstly, if Article 1(b) of Regulation (EC) No 659/1999 were not applicable in this case, as Belgium and Forum 187 have tried to show, this would not imply that the Commission has no legal basis for pursuing its inquiry. On the contrary, since the Commission notes that the scheme covering the centres has all the characteristics of an aid scheme (see VI.2, Aid character), it should take measures to abolish or alter aid that is incompatible with the common market, in accordance with Article 88 (1) or (2) of the EC Treaty. If the aid concerned could not be shown to be existing aid, the Commission should have concluded that it was 'new aid', that the more favourable procedure for 'existing aid'

was not applicable and that the formal investigation procedure must be launched immediately. However, such an approach would have been unjustified, in view of the situation resulting from the 1984 decision. The Commission therefore confirms its judgment that the scheme for coordination centres constitutes existing aid because it was approved in 1984.

(72) Secondly, the Commission again confirms its right to withdraw or amend an unlawful favourable decision (see recital 29). As indicated in point 33 of the letter initiating the procedure, the Commission can decide to withdraw a decision provided that certain conditions laid down in case law⁽³⁵⁾ are met. The Commission takes the view that if its decision were to be regarded as a withdrawal of or an amendment to the earlier decisions of 1984 and 1987, these conditions would be met. In more general terms, the procedure followed guarantees legal certainty and respect for the legitimate expectations of the beneficiaries, provided that the procedure is clearly established and does not jeopardise the actual application of Community law. As the procedure used for existing aid rules out the possibility of recovering aid granted in the past, this decision cannot be made retroactive. Since the procedure has implications for the future only, and since the legitimate expectations of the persons affected are respected, the Commission cannot, therefore, accept the argument that the deadline within which it would be reasonable to withdraw or amend the unlawful decision has passed.

(73) Thirdly, as regards compliance with the procedure for existing aid, the Commission can only reiterate point 34 of the letter initiating the procedure: 'The Commission notes that the letter⁽³⁶⁾ of 17 July 2000 did not constitute a formal and final position, but rather the initial step in a lengthy procedure. It did serve its purpose, as it enabled the Belgian authorities to present their observations before the Commission proposed appropriate measures. Finally, the request for information and the invitation to submit comments, as mentioned in Article 17 of the Regulation laying down

⁽³⁵⁾ Notably Cases C-248/89 and C-365/89 *Cargill v Commission* [1991] ECR I-2987 and I-2045, and Case C-90/95 *P de Compte v Parliament* [1997] ECR I-1999.

⁽³⁶⁾ Letter D/53864 from the Commission, launching the phase of cooperation with Belgium.

the procedures, are of the same type as other previous steps for which the Regulation provides in another context (such as requests for information and injunctions pursuant to Articles 5 and 10, requests for observations in accordance with Article 11), which, in accordance with established practices to which the Member States have no objections, are carried out by Commission departments. This is why the letter in question did not have to be approved by the Members of the Commission acting as a body'.

VI.2. Aid character

- (74) Following the formal investigation procedure and taking account of the arguments adduced in connection with the decision to launch the procedure, the Commission takes the view that the doubts voiced at the beginning of the procedure cannot be set aside, for the following reasons.

VI.2.1. Economic advantage

- (75) The Commission confirms that the various exemptions from property tax, withholding tax and capital duty, the imposition of a notional withholding tax and the flat-rate used to establish the centres' taxable income, as set out in this Decision, result in economic advantages within the meaning of Article 87(1) of the EC Treaty to the centres and the groups to which they belong.

VI.2.1.1. Exemption from property tax

- (76) Firstly, the rule applicable to income from immovable property is that property tax is levied on owners or persons enjoying the usufruct of a property, irrespective of whether they are natural persons, companies or other legal persons, or Belgian or foreign residents. The property tax is thus a tax on all companies owning immovable property in Belgium⁽³⁷⁾. The exceptions referred to — companies based in employment areas, innovative companies, and firms in restructuring areas — do not by any means represent all or even most of the companies based in Belgium, and it is therefore an exaggeration to claim that the majority of Belgian firms benefit from some type of exemption from the property tax. Moreover, the simple fact that there are other — numerous — derogations does not in itself constitute sufficient justification for exemption. Any advantage

must be measured against the applicable rules on state aid, depending on the conditions and circumstances under which it was granted. The exemptions referred to may be classed as not constituting aid, or as aid compatible with the common market, or they may be classed as aid implemented unlawfully in Belgium which is not compatible with the common market. The Commission wishes to place particular emphasis on the substance of its Decision SG(83) D/12, addressed to Belgium on 3 January 1983 in connection with the scheme for companies based in employment areas. The Decision states that the Commission has established that the exemption from corporation tax, property tax and registration duty falls under the general prohibition on aid enshrined in Article 92(1) of the EC Treaty before the aid in question is declared to be compatible with the common market. Reference is also made to this principle in another decision addressed to Belgium⁽³⁸⁾, SG(2000) D/108799.

- (77) Secondly, the limited number of persons/organisations which benefit from this exemption from property tax does not show that these centres do not derive any benefit from the measure.

VI.2.1.2. Exemption from capital duty

- (78) The rule in Belgium⁽³⁹⁾ is that contributions to capital are subject to tax. Capital duty is therefore normally payable by all capital companies within the meaning of Article 3 of Directive 69/335/EEC which make contributions in Belgium in accordance with Article 4 of the Directive. As with property tax, the exceptions referred to do not represent the majority of the firms that are subject to taxation in principle, and it is thus an exaggeration to claim that most Belgian companies benefit from some type of exemption from capital duty. Finally, the argument cited at the end of recital 76 is applicable in this context too, *mutatis mutandis*, as justification for rejecting comparison with other exemptions, particularly those granted to companies based in employment areas.

⁽³⁷⁾ This means 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.

⁽³⁸⁾ N226/2000 — Regional aid scheme under the law of 30 December 1970.

⁽³⁹⁾ See Articles 115 ff. of the Code on Registration, Mortgages and Court Fees.

(79) Finally, the reference to the opinions expressed by the Council or Commission in favour of the abolition of capital duty appears at the very least paradoxical, given that payment of capital duty is the rule in Belgium. Granting an exemption to the centres is at best a step in that direction, but if it involves discrimination the centres will enjoy advantages not available to other companies based on Belgian territory. Moreover, Directive 69/335/EEC does not provide for the abolition of capital duty, but regulates its harmonisation and allows for keeping national exceptions within a very stringent framework, indicated in Article 9. The exemption in question does not comply with that framework.

VI.2.1.3. Exemption from withholding tax

(80) As with property tax and capital duty, the Commission confirms that exemption from withholding tax constitutes an economic advantage enjoyed by the centres and the groups to which they belong. It confirms, notably, that the withholding tax deducted under the conditions provided for under Belgian ordinary law is a tax to which most firms are subject. Where the general exemption for income paid by the centre extends beyond the exemptions provided for by ordinary law, it constitutes an economic advantage to the centres and the groups to which they belong. The advantage derived from this exemption lies in the deferred payment of final taxes, the mitigation of final tax or even the non-taxation of the income from movable property in question. The arguments cited by Belgium and Forum 187 cannot be accepted, for the following reasons.

(81) Firstly, as argued above, the existence of exemptions to which certain firms can have recourse cannot be justified by the fact that other exemptions exist. In this context it matters little that there are more companies with an exemption than firms obliged to pay or deduct withholding tax. Given that there are differences in the application of withholding tax and that these exemptions confer on the beneficiaries an advantage not enjoyed by non-beneficiaries, these differences are potentially caught by Article 87 of the EC Treaty, and it is necessary to determine whether the advantage conferred does in fact constitute aid; if it does, its compatibility with the common market should be assessed.

(82) Moreover, it is far from true to say that the greater part of the income paid by companies based in Belgium is subject to an exemption under ordinary law. Belgian law confers few general exemptions from withholding tax that are linked with the status of the party paying the income. Where it does confer such exemptions, the situation of the liable parties concerned⁽⁴⁰⁾ is not comparable with that of the centres. Moreover, such exemptions must be established by law, not by Royal Decree. After all, Section 266 of the Belgian 1992 Income Tax Code restricts the Crown's right to refrain from levying withholding tax to the income of parties whose identity can be established. This restriction emphasises the special nature of general exemptions under Belgian law.

(83) Most of the exemptions set out in the Royal Decree implementing the 1992 Income Tax Code are granted subject to stringent conditions. This applies particularly to the exemptions conferred on professional investors, who/which are by no means covered by a general exemption comparable with the one granted to the centres and the companies of the groups to which they belong. For instance, the types of income listed below are covered by an exemption in the case of the centres, but not for firms subject to ordinary law:

- income paid to a foreign company based outside the European Union in a country with which Belgium has not concluded an agreement on the avoidance of double taxation,
- income paid to a company based in Belgium or elsewhere in the European Union and which does meet the criteria laid down in Directive 90/435/EEC,
- income paid to a company based in one of the many countries with which Belgium has concluded an agreement providing for taxation at source, even if such taxation is limited.

(84) The exemptions applying to non-residents are subject to stringent conditions and are confined to the income of savers not resident in Belgium. This comparison is not, therefore, relevant in the context of an analysis of state aid relating to tax concessions granted to firms rather than savers.

⁽⁴⁰⁾ The Belgian state, social insurance institutions, financial institutions (banks, insurance companies, etc), investment funds and companies, the stock exchange.

(85) Secondly, the argument relating to advance payments of tax is not relevant in all cases, notably those described above, in which the party receiving the income is an entity not based in Belgium, which pays no tax in Belgium and is not, therefore, subject to any penalties because no advance payments have been made. In cases where the party receiving the income does pay tax in Belgium, it does enjoy an economic advantage, as withholding tax is not levied, because advance payments are made voluntarily and at particular times, in accordance with a calendar chosen by the company, depending on its estimated taxable revenue. Where necessary, loss-making companies or companies with a low taxable income are obliged to wait until the advance payments made have been refunded.

(86) Thirdly, under ordinary law the withholding tax is the final Belgian tax on both the income paid to savers (natural persons) or associations subject to taxation on income accruing to legal persons and on income paid to foreign companies which are unable to have this income offset or refunded in the country of destination. In this case, the general exemption granted for income paid by the centres is beneficial to the companies of the group based abroad, as the withholding tax is normally a final tax for them.

(87) Fourthly, it is not true to claim that income from the deposits of all companies in their capacity as 'professional investor' is exempt from withholding tax. If this had been the case, there would have been no need to apply Article 110 of the Royal Decree implementing the 1992 Income Tax Code so as to ensure that the centres, which are also 'professional investors', can benefit by the exemption applied to this income.

VI.2.1.4. Notional withholding tax

(88) The Commission thus confirms that assigning a notional withholding tax does constitute an advantage. The fact that the percentage was reduced to zero in 1991 does not necessarily mean that interest received from long-term loans concluded prior to 1991 cannot still benefit from a

notional withholding tax. Moreover, the fact that this measure exists as a scheme represents a potential risk to competition and trade between the Member States. Although the percentage has been reduced to zero, the measure has not been abolished as a matter of principle and the percentage could be adjusted by ordinary Royal Decree.

VI.2.1.5. Flat-rate income assessment (cost plus)

(89) Firstly, although it is not always necessary, according to the OECD guidelines, to allow for a profit margin in order for a price to comply with competition conditions, such exceptions apply to occasional costs borne by an associated company, to which they are passed on. They do not under any circumstances apply to costs borne by the coordination centres on a regular basis in connection with the activities for which they were established. For instance, the centres' staff costs and the financial costs incurred in connection with cash management or financing activities are essential costs which make a major contribution to enabling the centres to earn revenue. There is thus no justification for excluding them from the cost-plus-basis, in the light of the OECD criteria for establishing transfer prices.

(90) Secondly, Forum 187 seems to be drawing a comparison with certain entities which are not permanent establishments. The Commission cannot accept this comparison. Firstly, such an entity must meet extremely restrictive conditions which the centres accredited under Royal Decree No 187 do not satisfy. The centres are by definition companies under Belgian law or permanent establishments belonging to a company under non-Belgian law. These entities act on behalf of other entities and they are transparent for Belgium as far as tax is concerned; there is no taxable income associated with these entities, all income is directly taxable under the auspices of the supervisory entities. The purpose of the cost-plus method in Belgium is essentially to reconstruct a tax base for the centres, which work for their own benefit. Finally, the example given implies that the amount of costs is equal to the benefits accruing, so that the income from such transactions is zero. In view of the aim of transparency with regard to taxes, this situation implies that the sum deducted as costs by the party to which the costs are

passed on is equal to the benefits incorporated into the tax base by the party responsible for passing on the costs. However, applying the cost-plus method implies that there is no longer any automatic link between income reported in Belgium and income taxed in Belgium. The sums deducted by the parties to which the costs are passed on are therefore not necessarily the sums which will be used in calculating the tax base.

- (91) Thirdly, it cannot be concluded from the fact that a percentage of 8 % has been applied since 1964 to establish the taxable income of Belgian branches of non-Belgian companies that this practice is compatible with the Treaty. Rather, the Commission criticises the fact that a single uniform percentage is applied to all activities, as this makes it impossible for each centre to obtain a tax base in line with the principle of free competition. Nor does this long-standing practice imply, either for these branches or, still less, for the centres, that this percentage is an appropriate reference point. And even if this percentage were, on average, acceptable where Belgian branches of foreign companies are concerned, this argument would on the contrary show that it is too low for centres where it is automatically applied to a greatly reduced cost base. Finally, given that this is an administrative practice without any legal basis, it is unacceptable for this percentage, taken out of its original context, to be a constituent part of ordinary law or of the Belgian tax system.
- (92) Fourthly, the fact that the scheme appears to be disadvantageous for the centre in the event of accounting losses and neutral from the point of view of the group if the parent company is taxed on its worldwide income undoubtedly means that it is not advantageous for certain companies. However, it can certainly not be concluded from this that it is not advantageous for other companies in a different situation. Moreover, the centres' activities are confined to preparatory or ancillary activities which imply a limited risk of accounting loss. That is one of the reasons why the application of the cost-plus method is justified. As regards the taxation of the parent company's worldwide income, it should be noted that the countries where this situation applies are in a minority and that there are sometimes exceptions. Even if the parent company is based in one of these countries, there is no guarantee that a tax concession granted to the centre would be offset at the level of the parent company.
- (93) Fifthly, the flat-rate tax on staff (BEF 400 000 or EUR 10 000 per employee) is no justification for excluding staff costs from the cost-plus base. This tax was introduced after the cost-plus system and was thus not intended to compensate for the exclusion of staff costs from the cost-plus base. Moreover, it is restricted to the first 10 members of staff. To receive approval, however, a centre must employ 10 people or undertake to do so within two years of being set up. The maximum amount of tax is therefore often set at BEF 4 million (EUR 100 000). Given that there is a ceiling on this tax and that it relates only to the number of employees, it does not guarantee taxation comparable with that which would obtain if staff costs were included in the cost-plus base. As regards the exclusion of expenses, the arguments cited by Forum 187 — if they are correct — point instead to the fact that the cost-plus method is not an appropriate way to reconstruct income from particular financial activities. Under no circumstances can it be concluded from these arguments that these costs must be excluded from the cost-plus base systematically and without using an alternative method to quantify income from financial activities.
- (94) Sixthly, the Commission takes the view that the purpose of the alternative base is to limit the impact of any abuses and that it is not a base comparable with that obtainable through the traditional method based on the accounting result. This is because the alternative base includes only the special advantages granted to the centres and advantages without any *quid pro quo*, as well as ineligible expenditure. These sums are also subject to taxation in other companies and are added to the accounting profits, which the cost-plus method seeks to reconstruct for the centres.
- (95) The purpose of applying the OECD rules is to establish transfer prices that are close to the prices obtaining under conditions of free competition, in accordance with rules accepted by transnational corporations and the tax authorities of the Member States concerned. These rules make it possible to establish the division of revenue for accounting purposes among the various branches of the corporation based in each Member State. Using this method should also make it possible for each Member State to tax the corporations in question in accordance with a tax base comparable to that which would be obtained by

calculating the difference between the assets and liabilities of a company operating in an environment subject to free competition. Where — as is the case in Belgium — this comparable base is subject to the normal rate of corporation tax, the ultimate objective of establishing a comparable amount of tax has been achieved, and the application of the cost-plus method confers no advantages. The Commission's view is that the cost-plus method used by Belgium as part of the scheme covering the centres does not guarantee that income from free competition is taken into account; still less does it guarantee taxation comparable with that applied to other companies subject to the ordinary tax system. The cumulative effect of excluding significant costs from the cost-plus base and the application of a single rate, generally set at 8 %, without differentiating the types of activities carried out by the centre, is to reduce taxes, thereby conferring an economic advantage, as referred to in Article 87 of the EC Treaty.

VI.2.2. *Use of State resources*

(96) The Commission stands by its view that the economic advantages referred to in recital 75 are paid for using State resources. Applying the special scheme for coordination centres based in Belgium implies a reduction in tax by comparison with the ordinary law. This means that the Belgian State is forfeiting a proportion of its tax revenue.

(97) The increase in tax revenue referred to is based on a comparison between the total tax revenue from all Belgian companies between the introduction of the scheme and the present date. The issue of whether a measure constitutes aid must be assessed on an individual basis with reference to the beneficiary company at a particular time, in order to establish whether individual companies receive more from the State or contribute less to the financing of public goods and services. If this were not the case, all forms of aid would be justified if such aid ensured that a company was persuaded to set up in a Member State, that its future taxable income increased or that it was discouraged from leaving the country in question.

(98) Moreover, the fact that Belgium forfeits other tax revenue through other exemptions is irrelevant to an assessment of whether the exemption in question constitutes aid. As already mentioned in this Decision, the other exemptions

referred to may be classed as incompatible or compatible State aid, or, indeed, as not being State aid at all; this depends on their individual characteristics. The use of State resources is not ruled out for any of these three sorts of measure.

VI.2.3. *Distortion of competition and adverse effects on trade between the Member States*

(99) The Commission also stands by its view that the advantages referred to in this Decision distort competition between companies based in Belgium, or that there is a risk of such distortion, and that such distortion affects intra-Community trade. According to the case law of the European Court of Justice ⁽⁴¹⁾ and as noted in point 11 of the Notice, 'the mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected'.

(100) Firstly, the Commission believes that it provided sufficient — albeit concise — justification for this aspect of its decision to initiate the procedure in points 56 and 57 of the letter initiating the procedure, even as regards the judgment ⁽⁴²⁾ referred to in the footnote. According to paragraphs 65 and 66 of that judgment, the statement of reasons required by Article 190 of the EC Treaty (now Article 253) must be appropriate to the measure at issue 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 competent Community Court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case. According to the Court, it is not necessary for the reasoning to go into all the relevant facts and points of law. As regards decisions on State aid, in particular, the Court has ruled that although in certain cases the very circumstances in which aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision. The arguments set forth, however, indicate that the centres, thanks to the

⁽⁴¹⁾ Case 730/79 Philip Morris v Commission [1980] ECR I-2671.

⁽⁴²⁾ See footnote 22.

advantages they enjoy, are strengthening their competitive position in the sector of services provided to members of the group — in which sector they compete directly with organisations including financial institutions, trusts and consultancies specialising in tax, recruitment, IT, and so on — in addition to strengthening the competitive position of firms belonging to the group which are active in numerous economic sectors. These are all sectors characterised by intensive international and intra-Community trade, where large multinational corporations compete directly with other multinational or local firms of different sizes.

(101) Secondly, the existence of comparable or competing provisions in other Member States is no justification for allocating State aid. Like the centres scheme, every measure needs to be analysed in the context of the tax system of the Member concerned. These measures can be classed as general measures, compatible aid or incompatible aid, depending on their inherent characteristics. However, none of these descriptions automatically rules out the existence of distortions of competition or an adverse impact on trade. The Commission takes the view that Belgium's demand that it empirically demonstrate distortion of competition and the adverse impact on trade goes too far, and in this connection it refers to the judgments in cases C-15/98 and C-105/99.

(102) Thirdly, the Commission is well aware of the phenomenon of concentrating activities within multinational groups in entities such as coordination centres. It has no criticisms of this provided that the only reason for such concentration is the economies of scale to which it is supposed to lead. However, it cannot accept the setting up of such entities in conjunction with specific tax schemes that are considerably more favourable than ordinary law. The Commission also rejects the argument that all multinational corporations have such entities or can set them up in Belgium or other countries. That argument is based on the assumption that the only competitors of large multinational groups in intra-Community trade are other large multinational groups. This assumption is unwarranted, as local firms or smaller multinational groups are also engaged in intra-Community trade, but are not eligible for the tax advantages granted to coordination centres.

(103) Fourthly, the group benefits directly and indirectly from the financial advantages conferred by the tax scheme

applicable to the coordination centres. These advantages strengthen the group's financial position, which can affect the rating given to it by banks, thereby strengthening its financial position still further by giving it access to more favourable conditions.

VI.2.4. *Selectivity/specificity of the measure*

(104) The Commission confirms that the advantages are specific, as they favour particular companies in the way referred to in Article 87 of the EC Treaty. The scheme is directly applicable to the coordination centres and, directly or indirectly, to the other companies within the multinational group to which these centres must necessarily belong. The selective nature of application results not from regional or sectoral criteria, but from the compulsory criteria which the centres and the groups to which they belong must satisfy in order to be approved and thereby to be able to take advantage of the scheme (see recital 13). These criteria include those relating to the size and multinational character of the group and the nature and type of activities carried out within it. The arguments set forth by the interested parties have done nothing to change the Commission's views on the selective nature of application and the absence of any justification inherent in the nature or structure of the tax system.

(105) Firstly, as regards discretionary powers, the Commission accepts the argument about carrying out insurance and reinsurance activities. Nor does it contest the fact that the administration has few — if any — powers of discretion to grant or withhold approval of a centre, and that it is thus not a specific feature of the scheme. However, it does repeat its conviction that discretionary powers were used when deciding that the standard percentage set out in the administrative circular should be set at 8 %. Systematic application of a single low percentage may, given the limited base to which it applies, reduce the tax base, thereby giving rise to an economic advantage as referred to in Article 87(1) of the EC Treaty.

(106) Secondly, the Notice does not establish any further obligations on the Member States. In the course of the various stages of the procedure, the Commission has explained its reasons for judging the measures in question to be selective and for denying a justification based on the nature and structure of the scheme. In order to allay the doubts expressed by the Commission, the Member State may, for

example, demonstrate that the measure is not selective. Another possibility would be to prove that the specificity of the measure is justified by the nature or structure of the tax system, which results in the scheme being regarded as a general measure. In the absence of convincing arguments, the Commission therefore concludes that its view that the measure is selective was well-founded.

Justification on the grounds of the nature or structure of the system

- (107) The arguments on withholding tax set out in recitals 56 to 59 are unconvincing, for the following reasons.
- (108) Firstly, withholding tax was introduced as a form of taxation, and it is not true to claim that its main purpose is to tax natural and legal persons who/which are not obliged to declare the income that is subject to withholding tax. As regards the other tax exemptions referred to, their existence does not mean that all exemptions are justified by the nature or structure of the Belgian tax system, nor, specifically, that the selective criteria established by law for the centres are justifiable. All these exemptions can be classed as not constituting aid, or as constituting compatible or incompatible aid, depending on their inherent characteristics. For instance, following the announcement of the employment zones scheme in 1982, the Commission explicitly classed as aid the exemptions from withholding tax and capital duty conferred on companies based in the employment zones, before declaring them to be compatible with the common market.
- (109) The exemptions provided for by the ordinary law with respect to income paid to non-residents, to which the interested parties also refer, are generally conditional and limited to 'non-resident savers', that is, natural persons who are not using movable property which produces income to practise a professional activity.
- (110) Secondly, the example given by the Belgian authorities to show that the deduction of withholding tax is incompatible with cash pooling is irrelevant in this context. The erroneous assumption is made here that the company which receives the income also pays tax in Belgium, but in such a case the ordinary law is sufficient to exempt the transaction from withholding tax. Moreover, it is not the purpose of the associated procedure to make withholding tax obligatory on all transactions carried out by a centre, as it does not relate in any way to the many exemptions provided for in the ordinary law and which the centres can continue to use. The chance that the coordination centres might deduct withholding tax from all income paid out is thus restricted to cases in which all income was paid to taxpayers who are unable to avail themselves of the general exemptions provided for by Belgian and EU law and the international agreements signed by Belgium. And in this case the centre would simply be exposed to the same risks as other companies engaged in the same activities in a group that does not satisfy the conditions laid down in Royal Decree No 187.
- (111) Thirdly, the risk of double international taxation is the same for the other firms engaged in the same activities as coordination centres, but which are not covered by the exemption scheme. Moreover, given the extensive network of international agreements concluded by Belgium, such risks are confined to transactions with countries with which Belgium has not concluded any such agreement.
- (112) Fourthly, no indication is given as to why activities performed at the head office should necessarily benefit from an exemption scheme. Above all, no arguments were presented to justify the selective criteria used to restrict access to the scheme on the basis of the nature or structure of the scheme. Firms belonging to smaller groups or whose activities are confined to two countries can also perform activities in their head office, but this does not qualify them for inclusion in the scheme. The selective nature of the scheme under Directive 90/435/EEC is not more or less the same as that of Royal Decree No 187, as the conditions relate to the percentage share held by a firm (the parent company) in another firm (the subsidiary) and the duration of this share. At all events, in adopting this directive the Council ensured that the Member States' tax regulations were harmonised; consequently, provided that they are in line with the obligatory provisions of the directive in future, they will no longer be attributable to a particular Member State and cannot therefore be classed as state aid. Finally, no further explanation was given of the need, which arose in 1983, to exempt all the centres' transactions in view of the innovative nature of the financial instruments which they were to develop. At any rate, it seems that this need can no longer be invoked to advocate a special scheme for coordination centres. Given

the current prevalence of this type of financial instrument, this argument would, however, seem to confirm the evolution of the markets on which the centres operate.

VI.3. Compatibility with the common market

(113) In order to be compatible with the common market an aid scheme must strictly conform to one of the situations described in Article 87(2) and (3) of the EC Treaty. After examining the arguments presented by the interested parties, the Commission confirms that the scheme for coordination centres satisfies none of the exceptions contained in these provisions. The scheme is not aimed at individual consumers, is not intended to make good the damage caused by exceptional occurrences, or to remedy a serious disturbance in the Belgian economy, or to promote the execution of an important project of common European interest, or to promote culture and heritage conservation.

(114) As regards the investment by the centres, no evidence was provided to show that this corresponds to initial investment qualifying for aid, as described in points 4.4 and 4.5 of the Guidelines on national regional aid⁽⁴³⁾. For large firms, the category to which most of the coordination centres belong, investment aid is only allowed in the regions covered by the exceptions provided for in Article 87(3)(a) and (c). Finally, as regards job creation, the Guidelines on aid to employment⁽⁴⁴⁾ state that the level of aid may not exceed that which is necessary to stimulate job creation. In the case under consideration the Commission concludes that the tax advantages arising from the scheme for coordination centres depends on the volume of activity generated by the centre rather than the number of jobs created.

(115) The tax advantages extended to the centre are not, therefore, connected with investment, job creation or specific projects. They therefore represent permanent reductions in charges which constitute operating aid. Operating aid is in principle prohibited. However, point 4.15 of the Guidelines on national regional aid states that such aid may exceptionally be allowed in regions covered by the derogation provided for in Article 87(3)(a). Because Belgium is not covered by this derogation the aid measures in question can affect trading conditions to an

extent contrary to the common interest and are accordingly not covered by the exemption provided for in Article 87(3)(c). The comparison with the employment areas approved by the Commission in 1982 is not relevant here as an argument for the compatibility of the measure with the common market. Although it is not necessary to examine the evolution of the Commission's policy in this matter, suffice it to say that that decision related only to the employment zones of Wallonia and Flanders that were experiencing high unemployment at that time. The Commission categorically ruled out the creation of an employment area in the Brussels Region. Yet most of the coordination centres appear to be based in the Brussels Region.

(116) As regards exemption from capital duty, the Commission believes that, because the aid is incompatible with the common market, it is not necessary in the context of the present Decision to consider whether it is compatible with the terms of Directive 69/335/EEC. The Commission reserves the right to deal with this question in another suitable context.

VI.4. Legitimate expectation

(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) By issuing the approval the tax administration assumed that the approved centre would comply with the conditions for benefiting from the exemption scheme of Royal Decree No 187 for 10 years, without having to prove every year that the conditions were being met. If the administration found that the conditions were no longer being met the centre would be excluded from the scheme in future. In accordance with the Belgian Constitution, these agreements 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

⁽⁴³⁾ OJ C 74, 10.3.1998, p. 9.

⁽⁴⁴⁾ OJ C 334, 12.12.1995, p. 4.

maintained for the next 10 years. There is thus no contractual undertaking by the administration to the approved centre as regards the advantages conferred. This interpretation would seem to be supported by the reply from the Belgian State, which refers to its civil liability in connection with the losses a company might suffer, rather than its contractual liability to the company. The Belgian and European case law referred to by the Belgian State and the third parties regards respect for the principles of legal certainty and legitimate expectation in the same light. Careful reading of these judgments merely shows that the Commission may withdraw a decision with retroactive force only under very strict conditions, for example by allowing a reasonable time. However, if it applies the procedure for existing aid the Commission's action may not have retroactive force at all, given that it cannot recover aid. These judgments also state that the Commission may not, even in the future, withdraw its decision if this would cause unjustified hardship to the companies involved. Here, too, the procedure for existing aid guarantees the legal certainty of the companies by allowing the Commission the option, where necessary, of providing for a transitional period for phasing out the scheme.

(119) In this context, the Commission believes that it should indeed take into account the comments by the Belgian State and the interested parties regarding the major investment made by the companies concerned and the groups to which they belong. This investment relates, for example, to the creation and development of the infrastructure for the centre and the changes made to the organisation of the structures, networks, procedures and distribution of activities within the group. Long-term commitments were also made to staff, property companies and financial institutions. 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.

VII. 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⁽⁴⁵⁾ 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,

⁽⁴⁵⁾ See footnote 26.

HAS ADOPTED THIS DECISION:

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.

Article 3

Belgium shall inform the Commission within two months of the date of publication of this Decision of the measures taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 17 February 2003.

For the Commission

Mario MONTI

Member of the Commission
