

COMMISSION

COMMISSION DECISION

of 29 March 2000

on the aid scheme implemented by Belgium under Article 29^{ter} of the Economic Expansion Act of 30 December 1970, as amended by the Decree of 25 June 1992

(notified under document number C(2000)1007)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2000/472/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 regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹⁾, and in particular Article 14 thereof,

Having called on interested parties to submit their comments pursuant to Article 88(2) of the EC Treaty and Article 62(1) of the EEA Agreement,

Whereas:

I. PROCEDURE

(1) On 11 March 1991, pursuant to Article 88(3) of the EC Treaty, Belgium notified a draft decree amending the Belgian Economic Expansion Act of 30 December 1970 (N 144/91)⁽²⁾. Articles 17 to 19 of the draft decree introduced new aid instruments to support Walloon firms participating in European industrial programmes for which specific international agreements had been concluded.

(2) By letter dated 9 July 1991⁽³⁾, the Commission approved Articles 1 to 16 of the Walloon decree of 25 June 1992, explicitly excluding Articles 17 to 19 from its decision. The Commission indicated that the Articles in question were too imprecise and that the situations which they covered were too diverse for it to take a position. It had therefore taken the view that the notification was incomplete and had reserved the right to examine whether the Articles were compatible with the Treaty in the light of implementation arrangements, which were to be notified to it on a case-by-case basis, as Belgium had undertaken to do.

(3) In August 1992 the Belgian authorities transmitted to the Commission for information purposes the final text, as approved by the Walloon Regional Council on 25 June 1992, of the decree amending the Economic Expansion Act of 30 December 1970⁽⁴⁾. A reading of the final text showed that certain provisions had been changed compared with the version of the draft decree on which the Commission had taken a position in its letter of 9 July 1991⁽⁵⁾. Some of the changes were of a purely linguistic nature and involved no changes of substance, while others affected the substance of the text.

(4) In the final text of the decree, Articles 17 to 19 of the draft decree were merged into a single Article 19. Article 19 of the decree provided for the insertion of a new Article 29^{ter} in the Economic Expansion Act of 30 December 1970. Article 29^{ter} of the Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992 (referred to hereinafter as 'Article 29^{ter}'), made provision for aid instruments to support Walloon firms participating in European industrial programmes for which specific international agreements had been concluded, as referred to in recital (1).

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ Letter P11/91/533/26.864 dated 11 March 1991, registered by the Commission on 14 March 1991 as aid N 144/91.

⁽³⁾ Letter SG(91) D/12925.

⁽⁴⁾ Letter P11/91/533/35.050 dated 7 August 1992.

⁽⁵⁾ See footnote 3.

- (5) Following the discovery of these amendments to the version of the scheme on which the Commission had taken a position, the case was classified as unnotified aid (NN 113/92).
- (6) The Belgian authorities subsequently notified the Commission by letter dated 22 December 1992⁽⁶⁾ of certain provisions of the final version of the decree of 25 June 1992 which, according to them, had been amended as to the substance. Article 19 was not included. They also asked the Commission to confirm that provisions which had not been amended as to the substance and which the Commission had accepted in its Decision of 9 July 1991 could still be implemented.
- (7) By letter dated 28 January 1993⁽⁷⁾, the Commission replied that it accepted the implementation only of those provisions of the decree of 25 June 1992 which had been included in the approval decision of 9 July 1991⁽⁸⁾ and whose wording had not been altered since then.
- (8) By letter dated 17 January 1994⁽⁹⁾, the Commission informed the Belgian authorities that it had decided not to raise any objections to the unnotified amendments to the decree of 25 June 1992 (NN 113/92). At the same time, it stressed that its decision not to raise objections did not concern Article 19 of the decree by which the new Article 29ter was inserted into the Economic Expansion Act.
- (9) On 12 January 1993, reacting to information published in the press, the Commission sent the Belgian authorities a request for further information on aid granted by the Walloon region to provide partial cover against exchange risks.
- (10) The Walloon regional authorities replied by fax dated 15 March 1993, stating that the Walloon Executive had decided to allocate an amount of BEF 315 million as partial cover for exchange-rate differentials relating to the implementation of various programmes. The Belgian authorities stated that the decision had been taken on 4 June 1992 in anticipation of the decree of 25 June 1992 amending the Economic Expansion Act of 30 December 1970. They also pointed out that the fax should be regarded as being equivalent to notification within the meaning of Article 88(3) and the operational procedures laid down pursuant to Article 29ter, and that this was the first case in which that Article had been applied.
- (11) By letter dated 29 March 1993, the Commission asked whether aid had already been paid under Article 29ter.
- (12) By letter dated 30 April 1993, the Belgian authorities stated that aid had been paid at the end of March 1993. They also confirmed that this was the first time that Article 29ter had been applied.
- (13) By letter dated 2 December 1993⁽¹⁰⁾, the Commission informed the Belgian authorities that it had decided to initiate the procedure laid down in Article 88(2) in respect of the 'Article 29ter' aid scheme.
- (14) The decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽¹¹⁾. The Commission invited interested parties to submit their comments on the aid scheme.
- (15) The Commission received no comments from interested parties.
- (16) The Commission received the Belgian authorities' official reply by letter dated 10 February 1994⁽¹²⁾. In this letter the Belgian authorities undertook to notify the Commission, pursuant to Article 88(3) of the EC Treaty, of any plan to grant aid under Article 29ter. The Belgian authorities confirmed this undertaking by letter dated 6 April 1994⁽¹³⁾.
- (17) By letter dated 26 May 1994⁽¹⁴⁾, the Commission requested the abrogation of Article 29ter. By letter dated 16 June 1994⁽¹⁵⁾, the Belgian authorities argued that the complexity of parliamentary procedures meant that abrogating Article 29ter was not a practicable proposition. By letter dated 30 January 1996, the Belgian authorities informed the Commission of their decision to initiate the parliamentary procedure to abrogate Article 29ter. By letter dated 29 February 1996⁽¹⁶⁾, the Commission took note of the Belgian authorities' decision to abrogate Article 29ter.
- (18) By letters dated 10 May 1996⁽¹⁷⁾, 10 July 1996⁽¹⁸⁾, 2 July 1997⁽¹⁹⁾ and 26 November 1997⁽²⁰⁾, the Belgian authorities informed the Commission of progress in the parliamentary procedure to abrogate Article 29ter. By letter dated 13 February 1998⁽²¹⁾, the Belgian authorities informed the Commission that the Walloon

⁽⁶⁾ Letter P11/91/533/37.107.

⁽⁷⁾ Letter DG IV.E.3-D/06258.

⁽⁸⁾ See footnote 3.

⁽⁹⁾ Letter SG(94) D/607.

⁽¹⁰⁾ Letter SG(93) D/19520.

⁽¹¹⁾ OJ C 170, 23.6.1994, p. 5.

⁽¹²⁾ Letter P11/91/533/43.927.

⁽¹³⁾ Letter P11/91/533/44.740.

⁽¹⁴⁾ Letter D/4596.

⁽¹⁵⁾ Letter P11/91/533/45.789.

⁽¹⁶⁾ Letter DG IV.E.3.-D/13056.

⁽¹⁷⁾ Letter P12/533/54.981.

⁽¹⁸⁾ Letter P12/533/55.773.

⁽¹⁹⁾ Letter P12/533/61.758

⁽²⁰⁾ Letter P12/533/64.012

⁽²¹⁾ Letter P12/533/65.339

Regional Council had abrogated Article 29ter of the Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, and that this decision had been published in the *Belgian Official Gazette* on 4 February 1998.

- (19) By letter dated 10 June 1998⁽²²⁾, the Commission asked the Belgian authorities to provide a list of companies that had been granted aid under Article 29ter. The Belgian authorities provided this information by letters dated 20 August 1998 and 9 November 1998⁽²³⁾.

II. DETAILED DESCRIPTION OF THE AID

- (20) Article 29ter provides for aid for Walloon firms participating in Community industrial programmes for which specific international agreements had been concluded. Aid may take the form of:

- (a) a guarantee covering exchange-rate risks based on a central rate established by the Walloon Executive in accordance with procedures determined by it;
- (b) a guarantee in respect of divergent trends in economic indicators, in accordance with procedures determined by the Executive;
- (c) financing in the form of recoverable advances or cover for financing costs in respect of no more than 50 % of funds mobilised for the performance of a contract, in accordance with procedures determined by the Executive.

- (21) In its decision to initiate the Article 88(2) procedure⁽²⁴⁾, the Commission expressed doubts regarding both the lawfulness and compatibility of the aid measure.

- (22) *Regarding the unlawful nature of the aid:*

The Commission took the view that the decision of 4 June 1992 by the Walloon Executive to grant aid under Article 29ter was improper because it had not been notified. The Commission regards aid as having been granted as from the point in time when a decision is taken to that effect by the competent authorities, as opposed to the time of actual disbursement⁽²⁵⁾. The fax of 15 March 1993, in which the Belgian authorities stated that the information provided must be regarded as constituting notification pursuant to Article 88(3) of

the EC Treaty, was sent some time after the date on which the Walloon authorities decided to grant aid under Article 29ter (namely 4 June 1992).

- (23) *Regarding the incompatibility of the aid with the common market:*

Article 29ter (exchange-rate guarantee, guarantee in respect of divergent trends in economic indicators, financing of or cover for funds mobilised for the performance of the contract) enabled the Belgian authorities to grant operating aid in Wallonia, a region which was only partially eligible under Article 87(3)(c) of the EC Treaty.

Under Community rules applying to national regional aid both at the time and now⁽²⁶⁾, operating aid is allowed only in regions eligible under Article 87(3)(a) of the EC Treaty and only by way of a derogation and subject to certain conditions.

III. COMMENTS FROM BELGIUM

- (24) By letter dated 10 February 1994⁽²⁷⁾, the Belgian authorities disputed the unlawful nature of the aid granted under Article 29ter on the basis of the following arguments:

- (a) by letter dated 9 July 1991⁽²⁸⁾, the Commission had approved the draft decree amending the Economic Expansion Act of 30 December 1970, stating that it could not take a position on Articles 17 to 19 and that it would examine the compatibility of those articles on a case-by-case basis;

- (b) the final version of the decree adopted by the Walloon Regional Council on 25 June 1992 differed from the version of the decree on which the Commission had taken a position, but the changes were very minor. As regards Articles 17 to 19, there had been no changes of substance. The main change was a merger of the three Articles into one single Article 19. Other changes were of a purely linguistic nature. In its letter of 29 January 1993⁽²⁹⁾, the Commission agreed that the measures which it had approved by letter dated 9 July 1991 could be implemented. In that letter, it also identified the Articles of the final version of the decree which it considered to have been substantially amended and which required a new authorisation procedure. Article 19 was not one of the Articles identified in this manner;

⁽²²⁾ Letter D/52407.

⁽²³⁾ Letter P11/533/68.255 and P11/533/69.298

⁽²⁴⁾ Letter SG(93) D/19520.

⁽²⁵⁾ Letter from the Commission to the Member States dated 27 April 1989 (Ref: SG(89) D/5521).

⁽²⁶⁾ Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2), and guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

⁽²⁷⁾ See footnote 12.

⁽²⁸⁾ See footnote 3.

⁽²⁹⁾ Letter DG IV.E.3-D/06258.

- (c) in view of the fact that no specific mention was made of the need to re-examine Article 19 of the final version of the decree, the Walloon authorities considered that the Commissions' agreement to the implementation of the measures approved on 9 July 1991 also covered that Article.
- (25) The Belgian authorities did not comment on the doubts expressed by the Commission as to the compatibility of the scheme with the common market.
- (26) By letter dated 13 February 1998⁽³⁰⁾, the Belgian authorities informed the Commission that the Walloon Regional Council had abrogated Article 29*ter* of the Economic Expansion Act, as amended by the decree of 25 June 1992.

IV. ASSESSMENT OF THE AID

Regarding the existence of aid:

- (27) The Commission takes the view that the aid scheme established by Article 29*ter* of the Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, constitutes State aid within the meaning of Article 87(1) of the EC Treaty because it meets all the conditions governing the application of Article 87(1) of the EC Treaty. The reasons for this are set out below.
- (28) 'Aid in any form whatsoever': under the scheme, aid is granted in the form of guarantees and recoverable advances.
- (29) 'Aid': the scheme does not contain provisions requiring the recipients of guarantees to pay a premium for those guarantees. Nor are there provisions requiring recipients to pay charges or interest on advances granted under the scheme. The fact that the guarantee can give rise to a significant transfer of resources to a recipient is illustrated by the fax dated 15 March 1993 from the Walloon regional authorities confirming that the Walloon Executive had decided to allocate BEF 315 million (around EUR 7,8 million) as partial cover for exchange-rate fluctuations.
- (30) 'Aid granted by the Member State or through State resources': in this case, aid is granted by the regional government of the Walloon Region, namely the Walloon Executive. It is also financed from the budget of the Walloon region.

⁽³⁰⁾ See footnote 21.

- (31) 'The aid favours certain undertakings': the selectivity criterion is met because the aid is granted solely to firms located in the Walloon region which are participating in Community industrial programmes for which specific international agreements have been concluded.
- (32) 'The aid distorts or threatens to distort competition': the guarantees protect recipients from the consequences of unfavourable trends in exchange rates or other economic indicators (such as labour costs). In this way, recipients are shielded from fluctuations in general economic variables which are part of the normal interplay of market forces. Such aid therefore provides recipients with an artificial edge over their competitors, who have to face the same situation without aid. Equally, the provision of interest-free advances under the scheme artificially favours recipients over their competitors, who have to pay the market interest rate in order to obtain financing from capital markets. Clearly, providing advantages of this type to certain competitors and not others may distort competition.

- (33) 'The aid distorts competition in so far as it affects trade between Member States': in the case of an aid scheme such as Article 29*ter* (as opposed to ad hoc aid), the Court of Justice has ruled as follows: 'In the case of an *aid programme* the Commission *may confine* itself to examining the characteristics of the programme in question in order to determine whether, by reason of the high amounts or percentages of aid, the nature of the investments for which aid is granted or other terms of the programme, it gives an appreciable advantage to recipients in relation to their competitors and is *likely* to benefit in particular undertakings engaged in trade between Member States'⁽³¹⁾ (emphasis added).

Article 29*ter* is applicable to all sectors (with the exception of those for which special EU State aid rules are in force). Clearly, therefore, the scheme could also be applied to companies engaged in economic activities involving trade between Member States.

Regarding the lawfulness of the aid:

- (34) In their letter of 10 February 1994⁽³²⁾, the Belgian authorities disputed the unlawful nature of the aid granted under Article 29*ter*, arguing that the Commission had given its approval to the scheme in its letter of 28 January 1993⁽³³⁾.

⁽³¹⁾ Case 248/84 *Germany v Commission* [1987] ECR 4013.

⁽³²⁾ See footnote 12.

⁽³³⁾ See footnote 29.

- (35) In its letter of 28 January 1993, the Commission endorsed the implementation of those notified measures which had been approved on 9 July 1991 (letter SG(91) D/12925) and which had not been amended since that date.
- (36) Article 19 of the decree of 25 June 1992 amending the Economic Expansion Act of 30 December 1970⁽³⁴⁾ does not meet either of the conditions specified by the Commission:
- (a) the approval Decision of 9 July 1991 covered only Articles 1 to 16 of the draft decree amending the Economic Expansion Act of 30 December 1970. Articles 17 to 19 of the draft decree (Article 19 of the final version of the decree) were specifically excluded from the approval decision;
- (b) in their letter, the Belgian authorities themselves recognise that Article 19 was one of the articles to which (minor) amendments were made in the final version of the decree adopted on 25 June 1992 by the Walloon Regional Council.
- (37) In its Decision of 17 January 1994⁽³⁵⁾ approving the amended parts of the decree of 25 June 1992 (NN 113/29), the Commission reiterated that the approval Decision did not concern Article 19 of the decree, which added the new Article 29ter to the Economic Expansion Act of 30 December 1970.
- (41) In spite of the title of the scheme (which refers to the granting of incentives and guarantees for the carrying out of European industrial programmes covered by specific international agreements), the Commission takes the view that Article 87(3)(b) of the EC Treaty does not apply either:
- (a) Article 29bis of the Belgian Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, provides that the aid specified in Article 29ter of that Act may be granted by the Executive to companies in the region participating in a European industrial programme on the basis of provisions set out in an agreement between the State and the region. The scheme does not specify the criteria to be used by the Walloon authorities in determining whether individual projects or programmes are eligible for the aid. Given that these criteria have not been specified⁽³⁶⁾ the Commission takes the view that the scheme is too vague to qualify for exemption as provided for in Article 87(3)(b) of the EC Treaty for 'aid to promote the execution of an important project of common European interest' (emphasis added)⁽³⁷⁾;
- (b) the scheme is not intended to remedy a serious distortion in the Belgian economy.
- It should also be borne in mind that the Belgian authorities have not claimed exemption for the scheme on the basis of Article 87(3)(b).

Regarding the compatibility of the aid:

- (38) Having established that Article 29ter constituted State aid within the meaning of Article 87(1) of the EC Treaty, the Commission examined whether it qualified for one of the derogations provided for in Article 87(2) and (3) of the EC Treaty.
- (39) In the case of Article 29ter, the Commission takes the view that the exemptions provided for in Article 87(2) of the EC Treaty do not apply since the aid measure does not pursue any of the objectives listed in that Article; nor has Belgium argued that this might be the case.
- (40) Article 87(3)(a) of the EC Treaty does not apply since no part of Wallonia has ever qualified for regional aid under Article 87(3)(a) of the EC Treaty.
- (42) Article 87(3)(d) of the EC Treaty is not applicable because the scheme in question is not intended to promote culture or heritage conservation.
- (43) In the light of the above, the Commission has examined the aid on the basis of Article 87(3)(c) of the EC Treaty. This has prompted the following observations:
- (a) Article 29ter enables the Belgian authorities to provide guarantees or advances to firms without

⁽³⁴⁾ Article 19 of the decree of 25 June 1992 amends the Economic Expansion Act of 30 December 1970 by inserting the new Article 29ter.

⁽³⁵⁾ See footnote 9.

⁽³⁶⁾ This failure to indicate the criteria is the reason why the Commission did not take a position on the scheme (then Articles 17 to 19 of the draft decree) in its letter of 9 July 1991 (SG(91) D/12925) and reserved the right to examine whether the scheme was compatible in the light of the practical arrangements for its implementation, which were to be notified to it on a case-by-case basis, as Belgium had undertaken to do.

⁽³⁷⁾ In this connection, it should be noted that, in accordance with the Community framework for State aid for research and development, in all cases where, after examination, the Commission concludes that the purpose of the aid in question is to promote the execution of an important project of common European interest, that aid may qualify for the derogation contained in Article 87(3)(b)(OJ C 45, 17.2.1996, p. 5, point 3.2).

reference to any initial investment or job creation by the recipient firms, in accordance with the Community rules applying to national regional aid both at the time and now⁽³⁸⁾;

(b) in other words, the scheme enables the Belgian authorities to grant, throughout the entire territory of Wallonia, aid intended to reduce the recipients' normal current costs. Such aid constitutes 'operating aid';

(c) in several communications, and in particular its communication on the method for the application of Article 92(3)(a) and (c) to regional aid and in the guidelines on national regional aid⁽³⁹⁾, the Commission has indicated that, in view of its particularly distorting effect, operating aid may be considered compatible with the common market only in regions qualifying under Article 87(3)(a) and provided that certain strict conditions are met;

(d) no part of the Walloon region qualifies under Article 87(3)(a). In fact, the Walloon region is only partially eligible under Article 87(3)(c);

(e) the scope of Article 29ter is not limited to R & D projects, environmental protection projects, job creation, training projects or to rescue and restructuring projects in accordance with the Community framework for State aid for research and development⁽⁴⁰⁾, the Community guidelines on State aid for environmental protection⁽⁴¹⁾, the guidelines on aid to employment⁽⁴²⁾, the framework on training aid⁽⁴³⁾ or the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁴⁴⁾. Nor is the scheme restricted to SMEs as defined in the Community guidelines on State aid for SMEs⁽⁴⁵⁾. The Commission therefore concludes that the aid granted under Article 29ter does not qualify for the derogation provided for in the above frameworks and guidelines either;

(f) lastly, it should also be borne in mind that the Belgian authorities have not requested exemption for the schemes pursuant to Article 87(3)(c).

In the light of the above, the Commission concludes that Article 29ter does not qualify for any of the derogations provided for in Article 87(3)(c).

(44) On the basis of the analysis presented in paragraphs 39 to 43, the Commission takes the view that Article 29ter of the Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, does not qualify for any of the derogations provided for in Article 87(2) and (3) and that Article 29ter is therefore incompatible with the common market.

V. CONCLUSION

(45) The Commission finds that Belgium has unlawfully implemented Article 29ter of the Belgian Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, in breach of Article 88(3) of the EC Treaty.

(46) The Commission also finds that Article 29ter of the Belgian Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, is incompatible with the common market.

(47) Pursuant to Article 14 of Council Regulation (EC) No 659/1999, and with a view to restoring competition, all State aid within the meaning of Article 87(1) of the EC Treaty granted under Article 29ter must be recovered without delay. The aid to be recovered includes interest at a rate equal to the reference rate. Recovery must be effected in accordance with the procedures of Belgian law, provided that they allow the immediate and effective execution of the Commission's Decision. To that end, Belgium should take all necessary measures to ensure the effective implementation of the Commission's Decision.

(48) The Commission takes note of the fact that the Walloon Regional Council has already abrogated Article 29ter and that this Decision was published in the *Belgian Official Gazette* on 4 February 1998. The measures concerned have therefore already been terminated,

HAS ADOPTED THIS DECISION:

Article 1

Article 29ter of the Belgian Economic Expansion Act of 30 December 1970, as amended by the decree of 25 June 1992, is incompatible with the common market.

⁽³⁸⁾ See footnote 26.

⁽³⁹⁾ See footnote 26.

⁽⁴⁰⁾ OJ C 83, 11.4.1986, p.2;
OJ C 45, 17.2.1996, p.5.

⁽⁴¹⁾ OJ C 72, 10.3.1994, p.3.

⁽⁴²⁾ OJ C 334, 12.12.1995, p. 4.

⁽⁴³⁾ OJ C 343, 11.11.1998, p.10.

⁽⁴⁴⁾ OJ C 368, 23.12.1994, p. 12.

⁽⁴⁵⁾ OJ C 213, 19.8.1992, p. 4.

Article 2

1. Belgium shall take all necessary measures to recover from the recipients the aid within the meaning of Article 87(1) of the EC Treaty unlawfully made available under the aid scheme referred to in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the recipients until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 3

Belgium shall inform the Commission, within two months of notification 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, 29 March 2000.

For the Commission

Mario MONTI

Member of the Commission