DECISIONS

COMMISSION DECISION

of 26 May 2010

concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03))

(notified under document C(2010) 2538)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2011/276/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

Having called on interested parties to submit their comments [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 11 February 2002 the Commission informed the Belgian authorities of the information it had in its possession concerning an agreement between the Belgian Special Tax Inspectorate and the company Umicore SA ('Umicore'), formerly known as Union Minière SA, on a reduction of a value added tax (VAT) debt. In its letter, the Commission asked the Belgian authorities to furnish it with all the information that might enable it to assess the agreement in the light of Articles 107 and 108 of the Treaty (*).

(2) The Belgian Government replied to the Commission by letter dated 7 May 2002.

(3) By letter dated 9 August 2002 the Commission requested further information to complete its assessment of the measure. This information was communicated by the Belgian Government by letter dated 18 September 2002.

(4) By letter dated 21 October 2003 the Commission asked the Belgian authorities to provide additional documentation clarifying the position of the Belgian tax authorities on the agreement with Umicore.

(5) By letter dated 31 October 2003 the Belgian authorities informed the Commission that Umicore's tax file and all the documents pertaining to the agreement in question had been seized by the investigating judge in Brussels, Mr Lugentz, who was conducting a criminal investigation against a person or persons unknown regarding the circumstances in which the agreement had been concluded between the Special Tax Inspectorate and Umicore.

(6) By letter dated 10 December 2003 the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of this aid.

(7) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [2] on 7 September 2004. The Commission called on interested parties to submit their comments on the aid in question.

(8) As a result of an error in the text published on 7 September 2004, the decision was published again in the *Official Journal of the European Union* on 17 November 2004 [3].

(9) The Commission received comments from Umicore, by letters dated 7 October and 13 December 2004, and from an anonymous third party by letter dated 4 October 2004.

(10) Following the new publication of the decision, Belgium sent its comments by letter dated 15 December 2004.

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[1] OJ C 280, 17.11.2004, p. 10.

(*) From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The provisions laid down in the respective articles are identical in both cases. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty where appropriate. Various terminological changes have also been introduced by the TFEU, such as the change from 'Community' to 'Union' and from 'common market' to 'internal market'.

[2] OJ C 223, 7.9.2004, p. 2.

[3] See footnote 1.

(11) The Commission forwarded to Belgium the comments from third parties on 13 May 2005. Belgium submitted its comments on 13 June 2005.

(12) By letter dated 12 December 2005 the Commission informed Belgium of its decision to suspend its examination of the measure until the Belgian judicial authorities had taken a decision in the pending case.

(13) In its reply dated 19 January 2006 Belgium pointed out that searches had been carried out on the tax authorities' premises and the complete tax file had been seized; Belgium promised to inform the Commission of decisions communicated to the authorities concerned by the judicial authorities.

(14) By letter dated 31 March 2008 the Commission requested information about the progress made in the legal proceedings and the possible recovery of the seized documents.

(15) In its reply to the Commission dated 16 June 2008 Belgium explained that the legal proceedings had been closed on 13 November 2007.

(16) On 28 July 2008 a meeting took place between representatives of the Special Tax Inspectorate and the Commission. After the meeting a list of questions containing the points raised by the Commission at the meeting was sent by e-mail to the Belgian authorities. The Belgian authorities replied by letter dated 9 September 2008.

(17) By letter dated 17 October 2008 the Commission reminded Belgium of its duty to take all necessary steps, including the recovery of the seized documents, to answer the Commission's questions. In the letter the Commission also stated that it could issue a formal order requiring Belgium to provide the information requested given that the information should already have been sent to the Commission following its previous requests.

(18) By e-mail dated 21 January 2009 the Commission asked the Belgian authorities to keep it informed of the action taken in response to its letter dated 17 October 2008. By letter dated 29 January 2009 the Belgian authorities replied that the Special Tax Directorate was taking steps to answer the Commission's questions.

(19) By letter dated 7 May 2009 Belgium informed the Commission that the seized documents had finally been returned to the Special Tax Inspectorate and were being examined with a view to answering the Commission's questions.

(20) By letter dated 6 August 2009 Belgium sent the Commission its answers to the questions raised by the Commission in its letter dated 17 October 2008.

(21) At the Commission's request, Belgium sent additional information on certain applicable administrative provisions by e-mail dated 22 September 2009.

II. DETAILED DESCRIPTION OF THE AID

II.1. General context of the agreement of 21 December 2000 between the Special Tax Inspectorate and Umicore

(22) As part of investigations by tax authorities in several Member States into transactions involving precious metals, the Brussels Regional Directorate of the Special Tax Inspectorate carried out checks on Umicore SA covering the period 1995 to 1999. Following these checks the Special Tax Inspectorate addressed to Umicore, on 30 November 1998 and 30 April 1999 respectively, two adjustment notices concerning the irregular application of VAT exemptions to sales of silver granules to undertakings established in Italy, Switzerland and Spain.

(23) In particular, the two adjustment notices concerned the provisional establishment of the VAT owed by Umicore, as a result of the irregular application of exemptions, and the amount of the tax fine, as well as the interest automatically payable from the date on which the VAT debt was incurred. The two notices invited Umicore to send in writing within 20 days to the Special Tax Inspectorate its approval of the amounts established or its duly justified objections.

(24) Following the second option, Umicore sent two letters to the Special Tax Inspectorate in June 1999, in which it stated its objections to the Special Tax Inspectorate's findings and claimed that the VAT exemptions applied were in order. The Special Tax Inspectorate responded to the two letters from Umicore on 23 December 1999 by reaffirming the validity of the findings in the two adjustment notices. The Special Tax Inspectorate invited Umicore either to agree to the tax established or to provide new information that would lead to the reduction or cancellation of the amount and, if appropriate, to forgo the part of the limitation period already elapsed so as to allow suspension of limitation for the recovery of the tax, the interest and the tax fines. On 30 March 2000 Umicore put forward further arguments and again rejected the Special Tax Inspectorate's conclusions.

(25) On 21 December 2000 the Special Tax Inspectorate accepted a proposal for an agreement from Umicore ('the settlement agreement') concerning the two adjustment notices, covering the application of VAT for the entire period examined by the Special Tax Inspectorate. The agreement provided for the payment by Umicore of a much lower amount than the amounts included in the adjustment notices.

II.2. Tax arrangements applicable to intra-Community supplies and exports of goods

(26) The VAT rules applicable to intra-Community supplies and exports of the goods covered by the settlement agreement from 1995 to 1998 originate in the

transposition of Council Directive 91/680/EEC [4] into the Belgian VAT Code. The Directive provides for transitional VAT arrangements with a view to the abolition of fiscal frontiers and amends the Sixth VAT Directive [5].

1. Taxation of supplies of goods

(27) The first subparagraph of Article 2 of the Belgian VAT Code states: 'supplies of goods and services carried out for consideration by a taxable person acting as such are subject to tax when they take place in Belgium.'

(28) Article 10 of the VAT Code states:

'The supply of goods shall mean the transfer of the right to dispose of property as owner. In particular, this involves making goods available to a person acquiring them pursuant to a contract transferring or dividing up ownership.'

(29) Article 15 of the VAT Code states:

'(1) Goods are supplied in Belgium when the place where the supply is deemed to take place in accordance with paragraphs 2 to 6 is in Belgium.

(2) The place of supply of goods is deemed to be the place where the goods are made available to the person acquiring them.

However, the place of supply is deemed to be:

1. where the dispatch or transport to the person to whom they are supplied begins when the goods are dispatched or transported by the supplier, by the person acquiring them or by a third party;

…

(7) Unless proven otherwise, movable goods are deemed to have been supplied in Belgium when, at the time of supply, one of the parties to the transaction has established his business or has a fixed establishment there or, in the absence of such a place of business or fixed establishment, has his permanent address or is habitually resident there.'

(30) The supply of goods (the transport of which begins in Belgium) is therefore in principle taxable in Belgium. The law has introduced a legal presumption that the supply is deemed to have taken place in Belgium when one of the parties to the transaction is established in Belgium.

2. VAT liability

(31) In accordance with Article 51(1) of the VAT Code tax is payable by the taxable person carrying out the supply of taxable goods or services that takes place in Belgium.

3. Exports

(32) Article 39(1) of the VAT Code lays down VAT exemptions for exports of goods; it states: 'The following are exempt from tax: 1. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor; 2. the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the purchaser, who is not established in Belgium …'

(33) In accordance with Article 39(3) of the VAT Code, Royal Decree No 18 of 29 December 1992 lays down the conditions in Belgian law for exempting exports of goods from Belgium to destinations outside the Community [6].

[4] OJ L 376, 31.12.1991, p. 1.

[5] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

[6] Article 5(2) of Royal Decree No 18 provides that 'a buyer not established in Belgium who takes possession of goods in Belgium must, on taking possession of the goods, provide an acknowledgment of receipt to the vendor established in Belgium. This acknowledgment of receipt must contain the date of the transfer of the goods, a description of the goods and details of the country of destination. The same document must be supplied to the vendor when a third person takes possession of the goods in Belgium on behalf of a buyer who is not established in Belgium. In this case, the document must be provided by the third person, who must declare that he is acting on behalf of the buyer'. Article 6 of Royal Decree No 18 specifies that 'Proof of export must be provided by the vendor … irrespective of the document required under Article 5(2)'. Article 3 of Royal Decree No 18 states that 'The vendor must at all times be in possession of all documents proving that the goods have been exported and must produce these documents whenever so requested by officials carrying out checks. These documents include, inter alia, order forms, transport documents, payment documents and the export declaration mentioned in Article 2', which states: 'A copy of the sales invoice or, failing that, of the dispatch note containing all the details required on a sales invoice must be handed over to the customs office to which, in line with the customs rules on exports, an export declaration must be submitted'.

4. Intra-Community supplies

(34) Article 39 *bis* of the VAT Code provides from 1 January 1993: 'The following are exempt from tax: 1. supplies of goods dispatched or transported to destinations outside Belgium, but within the Community, by or on behalf of the vendor … or the person acquiring the goods for another taxable person or non-taxable natural person acting as such in another Member State who is liable for tax on his intra-Community acquisitions of goods …'

(35) Belgian tax law lays down several conditions regarding the proof that has to be furnished to ensure correct application of the exemption provided for in Article 39 *bis* of the VAT Code. Article 1 of Royal Decree No 52 of 29 December 1992 states: 'The tax exemptions provided for in Article 39 *bis* of the Code are subject to proof that the goods were dispatched or transported outside Belgium but within the Community'. Article 2 of Royal Decree No 52 specifies that the exemption is 'also subject to proof that the supply is carried out for a taxable person … registered for VAT in another Member State.' In addition, the first subparagraph of Article 3 of Royal Decree No 52 provides: 'The vendor must at all times be in possession of all documents proving that the dispatch or transport of the goods has actually taken place …' In this connection, the extract from a press release published in *Moniteur belge* No 36 of 20 February 1993 informs taxpayers that 'transport must be carried out by or on behalf of the vendor or the person acquiring the goods. Consequently, if transport is carried out by or on behalf of a subsequent customer (e.g. in chain transactions where the transport is carried out by the final customer), supplies before the supply to the final customer may not be exempted'.

(36) In order to qualify for an exemption for intra-Community supply, the taxable person must therefore prove, inter alia, that the transport was carried out by or on behalf of either the vendor or the person acquiring the goods ([7]).

([7]) An extract from the Belgian Minister for Finance's response to Parliamentary question No 248 of 23 January 1996 (Bull. Q.R., Ch. Repr. S.O. 1995-96, No 26, 18.3.1996) states that 'An intra-Community supply from Belgium constitutes a transaction that in principle is liable to VAT in Belgium when it is carried out by a taxable person acting as such. The right to benefit from the exemption must of course be proved by the supplier claiming it. The burden of proving that the conditions for applying the exemption are fulfilled is therefore borne by the supplier'.

(37) If the conditions for the application of the exemptions laid down in Articles 39 and 39 *bis* of the VAT Code are not fulfilled, the supply of the goods becomes taxable in Belgium and the debt is incurred as a result of the mere existence of the transaction ([8]). In the interests of fairness towards the taxable person, the Belgian tax authorities nevertheless agree to grant an exemption under these articles to a taxable person who is not able to provide all the proof necessary to show that the conditions for exemption have been met if they themselves are in possession of such proof, for example within the framework of mutual assistance from other Member States or third countries.

5. Taxation based on actual facts

(38) According to the established case law of the Belgian Court of Cassation, tax (including VAT) must be established on the basis of the actual facts ([9]). In applying this principle, the authorities are therefore required to impose tax, not on the basis of the apparent existence of an act as presented by the taxpayer, but on the basis of the actual existence of an act (resulting from the actual intention of one of the parties concerned).

6. Procedure

(39) In cases where the authorities contest VAT exemptions applied to supplies of goods, they address an adjustment notice ([10]) to the taxable person, normally together with a fine.

7. Settlement with the taxable person

(40) The second subparagraph of Article 84 of the VAT Code states that the Minister for Finance may conclude settlements with taxpayers provided that these do not

([8]) Article 16 stipulates that supply takes place at the moment the goods are made available to the person acquiring them and Article 17 specifies that the event giving rise to the tax occurs and the tax becomes payable at the moment the supply of the goods takes place.

([9]) See judgment of the Court of Cassation of 21.5.1982, Pas. I, 1982, p. 1.106.

([10]) Although this procedure is not explicitly provided for by the VAT Code, it is normal practice for the authorities to follow it in order to respect several fundamental principles, including the rights of defence and the principle of sound administration.

involve an exemption from or a reduction of the tax. Such settlements, therefore, must concern only points of fact and not points of law. They are generally possible only when both parties make concessions ([11]) (not on the amount of the tax that may arise from the established facts, but on points of fact, the setting of fines, etc.).

(41) The Minister for Finance delegates his powers in this area to the Regional Directorates of the VAT authorities and to the Special Tax Inspectorate.

8. Imposition of administrative fines

(42) As regards the imposition of fines when the right to an exemption is not proved, Article 70(1) of the VAT Code lays down a fine in proportion to the infringement of the obligation to pay VAT, equivalent to twice the amount of the unpaid tax. Nevertheless, Royal Decree No 41 of 30 January 1987 provides for a scale reducing the proportional tax fines. Article 1(1) of Royal Decree No 41 states that the fine is reduced by 10 % of the amount of the tax due (table G of the Annex) in the case of infringements against Article 39 *bis* of the VAT Code (wrongly applied exemption or lack of proof of the right to an exemption). The same proportional fine is imposed for similar infringements of Article 39 of the VAT Code.

(43) Article 70(2) of the VAT Code lays down a fine of twice the amount of the tax due on the transaction if the invoice is not supplied or contains inaccurate information, inter alia, as regards identification, the name or the address of the parties to the transaction. In accordance with the second subparagraph of Article 70(2) of the VAT Code this fine is, however, not imposed when the irregularities can be deemed to be purely accidental ([12]) or when the supplier had no reason to doubt that the other party ([13]) was a non-taxable person.

(44) Royal Decree No 41 ([14]) increases the fine to 100 % of the tax due on the transactions in the case of inaccuracies in the invoices. Article 3 of the same Royal Decree provides for full cancellation of the fine if a taxpayer rectifies the situation immediately before the intervention of the tax authorities.

9. Proportionality of fines

(45) In a judgment of 24 February 1999 ([15]) the Belgian Court of Arbitration ([16]) decided that a judge must be able to verify whether 'a decision of a punitive nature is justified by fact and by law and respects all legislative provisions and general principles incumbent on the authorities, including the principle of proportionality.' In the same judgment, the Court of Arbitration also found that administrative fines in the field of VAT are punitive in nature.

(46) In addition, recent case law from the Belgian Court of Cassation ([17]) confirmed that both the competent tax authority and the judge are obliged to apply the principle of proportionality to the calculation of administrative fines, even if this means derogating from fixed scales.

10. Possible reduction or cancellation of fines by the authorities

(47) Following the entry into force of the Law of 15 March 1999 on tax disputes, the provisions of the VAT Code ([18]) that enabled the Minister for Finance to cancel fines have been repealed. Nevertheless, on the basis of Article 9 of the Regent's Decree of 18 March 1831 ([19]) the Minister for Finance, or the official delegated by him for this purpose, retains the power to reduce or cancel fines. The Minister has delegated this power to the Director-General and the Regional Directors ([20]) of the VAT authorities ([21]).

(48) In principle this provision allows the authorities, when imposing a VAT fine, to deviate from the scales laid down in Article 70(2) of the VAT Code and in Royal Decree No 41, especially when strict application of the scales would not be in line with the principle of proportionality.

(49) If a reduction in the fine is possible, it is therefore normal, in the case of an amicable settlement between the tax authorities and the taxpayer, for the agreement also to cover the fine and for negotiations to be held on this matter.

([11]) Administrative comment No 84/91 on the VAT Code.
([12]) Especially with regard to the number and size of the transactions for which the documents are not in order compared with the number and size of transactions for which the documents are in order.
([13]) Administrative comment No 70/67 stipulates that this provision applies when the taxable person sells without an invoice to a customer who presents himself as a private individual provided that the taxable person has no serious reason to doubt that the other parties are not taxable.
([14]) See Table C.
([15]) Judgment of the Court of Arbitration of 24 February 1999 in Case No 22/99.
([16]) Now the Constitutional Court.
([17]) Cassation, 12 February 2009, RG C.07.0507.N, not reported; Cassation, 13 February 2009, RG F.06.0107.N, not reported and Cassation, 12 February 2009, RG F.06.0108.N.
([18]) See former Article 84 of the VAT Code.
([19]) Article 9 of the Regent's Decree states that the Minister for Finance shall rule on claims for the remission of fines and increases in duties in the form of fines not settled in court.
([20]) Regional Directors of the Special Tax Inspectorate have the same powers by virtue of Article 95 of the Law of 15 March 1999 replacing Article 87 of the Law of 8 August 1980.
([21]) See VAT comment No 84/59.

11. Default interest

(50) Article 91(1) of the VAT Code states that default interest is to be calculated at a rate of 0,8 % of the tax due for each month of default. Article 84 *bis* of the VAT Code provides that, in special cases, the competent Director-General may, under the conditions stipulated by himself, grant an exemption for all or part of the interest payable under Article 91 of the VAT Code.

(51) However, it is clear from administrative comments on VAT ([22]) that a partial or total remission of default interest may be granted only if the taxable person is in a difficult financial situation for reasons beyond his control. This view was confirmed by Belgium in its letter dated 13 June 2005 in response to the comments from third parties, where it stated: 'the Special Tax Inspectorate's Regional Directors have never granted a total or partial remission of default interest in any tax case. Moreover, such a remission is granted only to taxpayers in a difficult financial situation …'

12. Refund

(52) Article 77(1), number 7, of the VAT Code provides that the tax charged on the supply of goods (or services) shall be refunded in the appropriate amount in the event of the loss of a claim for payment of all or part of the purchase price.

(53) Circular No 78 on VAT refunds ([23]) specifies that a refund applies not only when the claim for payment of the purchase price is lost due to bankruptcy or composition, but also in all cases where the supplier establishes that the invoice has either not been paid at all or has only been partially paid and that he has exhausted all remedies. The point at which the loss can be deemed to be certain depends on the factual circumstances of each case ([24]).

(54) When only part of the invoice has been paid, for example if the person acquiring the goods pays the amount on the invoice excluding VAT but an amount corresponding to the VAT remains unpaid, only the part of VAT relating proportionally to the unpaid amount ([25]) can be refunded ([26]).

13. Possibility of deducting VAT from corporate tax

(55) Article 53 of the Income Tax Code provides that certain taxes are not deductible when calculating the tax base subject to income tax (including corporate tax). However, this does not include VAT.

(56) The administrative instructions on income tax ([27]) also state that the VAT paid or owed by a taxpayer to the tax authorities that is not covered by VAT charged to the customer constitutes a business expense.

14. Possibility of deducting VAT fines from corporate tax

(57) In accordance with the case law of the Court of Cassation, as confirmed in administrative comments ([28]), proportional VAT fines are deductible from corporate tax.

15. Powers of the Special Tax Inspectorate

(58) According to Article 87 of the Law of 8 August 1980, the Special Tax Inspectorate and its Regional Directors enjoy the same powers as the VAT authorities.

II.3. **The beneficiary**

(59) Umicore SA is a Belgian limited company operating in the EU and international markets that manufactures and sells special materials and precious metals; this includes the manufacture and sale of silver granules. In particular, Umicore is reputed to be one of the world's biggest silver refiners.

(60) The silver manufactured by Umicore is extracted from other materials, in most cases from industrial waste, supplied to it under tolling agreements on the recovery of precious and non-precious metals (silver, gold, platinum, palladium, rhodium, iridium, cobalt, copper, lead, etc.). Umicore specialises in the manufacture of silver granules, which are generally sold to jewellery wholesalers or to industry.

([22]) See VAT comment No 84 *bis*/4 *et seq*.
([23]) VAT Circular No 78 of 15 December 1970, point 9.
([24]) See the VAT handbook published by the VAT authorities, p. 1116, point 530.
([25]) If a taxable person initially invoices an amount of 100 plus VAT of 21, giving a total of 121, and the person acquiring the goods pays only 100, the possible refund will not cover an amount of 21, but 21 × (21/121) = 3,64.
([26]) There are no precise instructions on how to calculate the refund in the case of partial loss on the purchase price. However, there is nothing to stop a refund being applied in cases where the VAT is invoiced subsequently by the taxable person (even several years after the event giving rise to the tax).
([27]) See income tax comment No 53/88.
([28]) See income tax comments Nos 53/97 and 53/97.1.

(61) As part of its marketing activities in silver granules, Umicore carries out deliveries in particular to other Member States. According to the information provided by Umicore to the Belgian tax authorities, at the material time global consumption of silver was approximately 26 000 tonnes a year and Italy was the biggest market in Europe and one of the main geographic markets, with consumption of approximately 2 000 tonnes a year.

II.4. **Checks made and adjustment notices sent by the Special Tax Inspectorate**

(62) Following checks carried out by the Special Tax Inspectorate concerning the precious metals marketing activities carried on by Umicore from 1995 to 1999 inclusive, the Special Tax Inspectorate's Brussels Regional Directorate addressed on Umicore, on 30 November 1998 and 30 April 1999 respectively, two adjustment notices concerning the irregular application of the exemption under Article 39 *bis* of the VAT Code (and in certain cases under Article 39 of the Code concerning the exemption for the export of goods outside the European Union) with respect to various deliveries of silver granules to Italy on behalf of Italian, Spanish and Swiss customers. In particular, the investigations carried out by the relevant authorities of the Member States concerned had made it possible to establish that some of Umicore's foreign customers were fictitious and linked to 'carrousel fraud' type mechanisms implemented to evade payment of VAT.

(63) The irregularities found by the Special Tax Inspectorate concerned, in particular, infringements of Articles 39 and 39 *bis* of the VAT Code and Articles 1 to 3 of Royal Decree No 52 relating to exemptions applied by Umicore to certain intra-Community supplies and exports. In particular, the tax authorities considered that the company was not in a position to prove that the conditions for application of the exemption under Articles 39 and 39 *bis* of the VAT Code had been fulfilled for the supplies. The Special Tax Inspectorate was therefore of the opinion, on a preliminary basis, that Umicore had wrongfully applied the VAT exemption to certain intra-Community supplies or certain exports.

(64) With respect to certain sales to various Italian and Spanish companies in particular (in the 1995-96 period), the Special Tax Inspectorate considered (on a preliminary basis) that the goods had been transported, not by either Umicore or the purchasers indicated on the invoices, or on their behalf, but by subsequent customers, further down the supply chain in Italy. According to the Special Tax Inspectorate, the supplies concerned did not therefore fulfil the conditions laid down in Article 39 *bis* of the VAT Code concerning exemptions on intra-Community supplies of goods.

(65) With respect to certain sales to companies established in Switzerland, the Special Tax Inspectorate was also of the opinion that the exemption provided for in Article 39 of the VAT Code for the export of goods outside the European Union was not applicable either, given that the goods had been delivered to Italy and had not therefore left the territory of the European Union.

(66) Consequently, the Special Tax Inspectorate provisionally concluded, in its adjustment notice of 30 November 1998, that, for the years 1995 and 1996, Umicore owed the Belgian Government the following amounts:

— BEF 708 211 924 (approximately EUR 17 556 115) in VAT,

— BEF 70 820 000 (approximately EUR 1 755 582) by way of a reduced tax fine (table G annexed to Royal Decree No 41),

— 0,8 % per month of interest on arrears beginning from 21 January 1997 to be calculated on the amount of VAT owed.

(67) In addition, in its adjustment notice of 30 April 1999, the Special Tax Inspectorate concluded provisionally that, for the years 1997 and 1998, Umicore owed the Belgian Government the following amounts:

— BEF 274 966 597 (approximately EUR 6 816 243) in VAT,

— BEF 27 496 000 (approximately EUR 681 608) by way of a reduced tax fine (table G annexed to Royal Decree No 41),

— 0,8 % per month of interest on arrears beginning from 21 January 1999 to be calculated on the amount of VAT owed.

(68) In all, the amount of VAT sought from Umicore following the adjustment notices totalled EUR 24 372 358 and the tax fine calculated in the adjustment notices was EUR 2 437 235.

(69) By letters of 11 and 18 June 1999 and 31 March 2000, Umicore indicated its disagreement with the two adjustment notices. In particular, it argued that the irregularities committed by its customers were beyond its control and defended itself by pointing out that, as a wholesaler in the silver granules market, it was not supposed to know who the customers of its purchasers were, given that sales of silver were made ex works to avoid uncertainties with shipments. In addition, Umicore contended that all of its customers were registered for VAT purposes in other Member States over the period when the transactions were made, that all of the deliveries in question had been included in Umicore's quarterly intra-Community deliveries statements in accordance with Belgium's VAT Code, that the names of the companies receiving delivery had been included in the invoices identifying them for VAT purposes, in line with the agreements made on taking the orders, that the shipments had actually been made by specialised transport companies and that the goods had effectively left Belgian territory and actually been delivered in Italy. Umicore was therefore of the opinion that it had rightfully applied the VAT exemption laid down in Article 39 *bis* of the VAT Code to the transactions in question.

(70) Umicore also emphasised that some States merely required proof that goods had been shipped to a Member State other than that from which they originated, whereas Belgium demanded proof that transport had been carried out by or on behalf of the vendor or the purchaser of the goods in question, which, it held, was contrary to EU law and resulted in serious distortions of competition to the disadvantage of Umicore and other Belgian companies engaged in this type of intra-Community supply. Umicore thus held that it had acted in good faith in not applying VAT to the transactions at issue.

II.5. **Basis of the settlement agreement of 21 December 2000**

(71) On 21 December 2000 the Special Tax Inspectorate accepted a proposal for an agreement submitted by Umicore regarding its VAT liabilities for the years 1995 to 1998. In the proposed agreement it was indicated that Umicore disputed the validity of the adjustments claimed by the Special Tax Inspectorate but accepted the settlement put forward in the interests of conciliation.

(72) The agreement provides for the payment by Umicore of BEF 423 000 000, i.e. around EUR 10 485 896, in 'full and final settlement of Umicore's VAT liabilities for the years 1995 to 1999 inclusive'. The agreement further stipulates that this amount will not be deductible from corporate tax.

(73) As was indicated by Belgium during the preliminary investigation before proceedings were opened, its tax authorities are of the view that the settlement amount corresponds to a fine established pursuant to Article 70(2) of the VAT Code, reduced in application of Article 84 of the same Code. In particular, Article 70(2) stipulates that errors in invoices drafted by a taxable person 'concerning the VAT identification numbers, the names or addresses of the parties to the transaction, the nature or quantity of goods supplied or services provided, the prices or incidental expenses' result in the application of a fine equal to double the tax due on the transaction. However, the fine is reduced to 100 % of the tax due in accordance with Article 1(3) of Royal Decree No 41 (Table C annexed to Royal Decree No 41).

(74) Belgium further claims that the settlement amount agreed by Umicore and the Special Tax Inspectorate was entirely legitimate and justified under Belgian law. It derives from the following calculation:

— tax due in principle (theoretical calculation) on the transactions at issue: BEF 708 million,

— statutory fine: BEF 708 million × 200 % = BEF 1 416 million (application of Article 70(2) of the VAT Code),

— reduction to 100 % in accordance with Royal Decree No 41 (Table C) setting the level of fines regarding VAT when the breaches were not committed with the intention of evading or allowing for the evasion of VAT: BEF 708 million,

— consideration of the non-deductibility of the fine under business expenses (708 – 40,17 % of 708): BEF 423 million (approximately EUR 10 485 896).

(75) According to Belgium, such a settlement was justified because the adjustment statements in question constitute merely the first stage of a complicated administrative process aimed at establishing the tax owed by a company liable for VAT. An in-depth examination of the information and arguments presented by Umicore, which has always denied having committed fraud, allegedly convinced the Special Tax Inspectorate that no tax should be demanded in the present case. The Special Tax Inspectorate takes the view that the facts as a whole, in particular the documents provided by Umicore and the Italian authorities, led to the conclusion that the conditions for VAT exemption had been met in spite of what had been noted in the adjustment statements. Since no amount of tax due had been established, no reduction of VAT owing was granted.

III. **GROUNDS FOR OPENING THE PROCEDURE**

(76) In its decision to open the procedure, the Commission found that doubts existed as to the application of the VAT exemption to the supplies of goods covered by the adjustment statements drawn up by the Special Tax Inspectorate. It was of the opinion that a wrongfully applied VAT exemption would result in an increase in profit margins for the supplier on the sales in question.

(77) The Commission noted that an intra-Community supply of goods, taxable in theory in Belgium, could benefit from an exemption if the following two conditions were met:

— the goods were dispatched or transported by the vendor or the purchaser or on their behalf beyond the territory of a Member State but within the Union, and

— the supply of the goods was carried out for another taxable person acting as such in a Member State other than that from which the goods were dispatched or transported.

(78) According to the information at the Commission's disposal, during the checks made by the Special Tax Inspectorate, Umicore did not appear to be in a position to prove that the conditions for exemption were fulfilled. Consequently, and in line with the rules on the application of VAT to supplies of goods in Belgium, a tax liability arose out of the fact that these taxable transactions had taken place.

(79) The Commission therefore considered that the agreement in question appeared to grant an advantage to Umicore consisting of a reduction in the tax burden it would normally have borne.

(80) The Commission also noted that it would be contradictory and unjustified to inflict a fine in proportion to the VAT evaded without recovering the VAT itself.

(81) According to the Commission, Umicore's alleged lack of fraudulent intent did not warrant the imposition of a proportional fine instead of the payment of the tax itself.

(82) The Commission further noted that the amount of VAT used in the basis for calculating the proportional fine (BEF 708 million) amounted to merely a part of the liability initially established in the Special Tax Inspectorate's notices (BEF 983 million). The information provided by Belgium on the calculation concerning the settlement made did not appear to take Umicore's VAT liability for the 1997-98 period into account under the adjustment notice of 30 April 1999.

(83) The Commission, moreover, expressed doubts as to the lawfulness of a subsequent reduction of the amount in question, applied under the non-deductibility of the fine as a business cost for the purposes of corporate tax.

(84) In addition, the Commission expressed doubts as to the way in which the agreement was reached. In particular, the fact that the agreement did not specify its legal basis and its formal justification from a legal point of view constituted a departure from the normal procedure for determining and settling a VAT liability generally applicable in Belgium. In principle, in instances in which the authorities challenge the right of a taxable person to an exemption, they send him an adjustment statement, generally accompanied by a fine. In the event that the taxable person objects to the tax claimed by the authorities and his objections are incapable of convincing the department concerned, the authorities should, in principle, send him a constraining order along with a 50 % increase in the fine.

(85) As for the selective nature of the measure, the Commission noted that discretionary practices by tax authorities are likely to give rise to advantages falling within the scope of Article 107(1) of the Treaty ([29]).

(86) The Commission therefore held that an amicable settlement such as the one from which Umicore had benefited, involving a reduction in a VAT liability, fines and interest, was not generally available to all taxpayers, even assuming that they were to dispute the merits of the infringements attributed to them, and that the criterion of selectivity was thus fulfilled.

(87) According to the Commission, the aid in question did not appear to benefit from any of the exemptions laid down in Article 107 of TFEU.

([29]) See judgment of the Court of Justice in Case C-241/94 *France* v *Commission* [1996] ECR I-4551; judgment of the Court of First Instance in Joined Cases T-127/99 *Diputación Foral de Álava*, T-128/99 *Comunidad Autónoma del País Vasco* and *Gasteizko Industria Lurra* and T-148/99 *Daewoo Electronics Manufacturing España* [2002] ECR II-1275, paragraphs 151 and 154.

IV. **BELGIUM'S COMMENTS**

Concerning the procedure followed

(88) Belgium emphasises that the VAT Code does not lay down any precise formal procedure for imposing adjustments on persons liable for VAT. A standard practice has, nevertheless, become established in this respect, aimed firstly at informing the taxpayer of the adjustment planned by the authorities and asking him to submit information which might prevent such taxation. This practice is consonant with the application of the principles of sound administration and the rights of the defence. In this context, the adjustment notice merely constitutes a proposal from the authorities designed as a basis for discussion with the taxable person, without giving rise to any legal effect on the taxable person or establishing a claim for the authorities. The adjustment notice essentially therefore enables the taxpayer to challenge the initial stance of the tax authorities and provide information in support of his position.

(89) According to Belgium, after examining the arguments presented by the taxpayer in response to the adjustment notice, it can happen that the adjustment planned has to be modified or even that the taxation has to be completely abandoned.

(90) Belgium also explains that the adjustment notice does not have the effect of creating a tax liability. Only the constraining order, rendered enforceable, constitutes the legal act by which the State establishes a tax liability for VAT ([30]). As no constraining order was ever issued to Umicore in the context of the case in question, the expression 'reduction of a VAT debt' is, in Belgium's view, inaccurate.

(91) In order to show that the procedure followed in the Umicore case is also adopted with respect to other taxpayers, Belgium submits a copy of an agreement made with a taxable person in 2000 for an amount of BEF 6 million, whereas the notice issued in 1995 to the same taxable person for the same transactions indicated that they were liable for a total of BEF 14 million.

(92) With regard to the procedure followed with that taxable person, Belgium adds that tax agreements are basic instruments in VAT matters, widely acknowledged by scholarly works and case law, and explicitly provided for by Article 84 of the VAT code. Settlements are thus an intrinsic part of the procedure in itself and are available to all taxpayers without exception.

(93) As for the fact that the agreement does not specify its legal basis, Belgium explains that Article 84 of the VAT Code does not lay down any binding form or content for tax agreements on VAT. There was consequently no obligation to mention any legal basis or formal justification in the agreement.

([30]) Article 85, VAT Code.

The rules of proof

(94) Belgium notes that the Commission questioned it in 1999 about the severity shown by the Belgian authorities in their appraisal of the evidence provided by taxpayers to prove the reality of the intra-Community supplies they had carried out. It refers, in this respect, to correspondence between the Commission and the Belgian Ministry of Finance regarding the standard of proof required to obtain an exemption in the event of an intra-Community supply ([31]).

(95) Belgium also notes that there is no precise method formally provided for in European Union legislation or in Belgian law by which taxpayers could and should, in all circumstances, prove their right to an exemption. On the contrary, it is for the tax authorities initially and, where necessary, for the courts subsequently, to assess on a case-by-case basis whether or not the information aimed at establishing that the conditions for an exemption have been fulfilled is sufficiently persuasive. In this context, Belgium also submits copies of a number of judgments deciding such issues in favour of the tax authorities.

Change in the authorities' appraisal

(96) With regard to the first adjustment notice concerning the years 1995 and 1996, Belgium explains that the following factors were taken into account in deciding not to levy the taxation initially considered:

— the non-involvement of Umicore in the fraudulent system,

— the goods were paid for before being transported by professional hauliers appointed by the purchasers,

— proof of the goods being transported to Italy was provided, even though this was essentially furnished by the Italian authorities rather than Umicore ([32]).

(97) Belgium indicates, however, that having recorded Umicore's shortcomings in terms of identifying the real customers, the Special Tax Inspectorate was of the opinion that a significant fine should be imposed on it. Against this backdrop, the authorities only compromised on the amount of the fine, as can be shown by the fact that the taxpayer's payment was recorded as a proportional fine in the Government accounts.

([31]) In its letter (SG(99) 3364) of 10 May 1999, the Commission indicated that, although the Belgian provisions appear reasonable and proportionate, the Commission had received a number of complaints from which it was apparent, in particular, that if the purchaser transports the goods acquired itself, the authorities require documents that the vendor cannot provide, inter alia, the freight papers.

([32]) In this respect, Belgium refers to Belgian case law according to which taxation must be based on the facts of the case and the principle of sound administration. On the basis of these principles, the tax authorities believe that they must take account of evidence furnished by the authorities of other countries in granting any exemption from VAT for intra-Community supplies.

(98) As for the second adjustment notice concerning the years 1997 and 1998, Belgium notes that proposal not to levy VAT is warranted as the conditions for the exemption were proven to have effectively been met. The goods were indeed sent to another Member State (Italy) and the deliveries were made to a company registered for VAT purposes in another Member State (the United Kingdom) ([33]).

(99) Belgium also indicated that the change in appraisal flowed from the fact that not all the relevant documents had become available in 1998 and 1999. When they were obtained, however, it was up to the authorities to assess, on the basis of all the information at its disposal, whether they could refuse the exemption and whether they would have a reasonable chance of success in defending such a decision before the courts. Belgium adds that, on the basis of a risk analysis similar to that of any private creditor, the Special Tax Inspectorate preferred an immediate, tangible and undisputed result rather than engaging in long and costly litigation the outcome of which was less than certain.

Imposition of a fine

(100) Belgium notes that when the adjustment notices were drawn up, the staff responsible automatically applied the legal provisions relating to the taxation concerned. In the event of an exemption wrongfully claimed or applied without fraudulent intent, Article 70(1) of the VAT Code and Table G (point VII.2.A) of Royal Decree No 41 provide for a fine of 10 % of the tax due. Belgium emphasises that in doing so the Special Tax Inspectorate's staff had necessarily considered that it was not possible to establish any fraudulent intent on Umicore's part.

(101) According to Belgium, the motive for the fine accepted in the agreement of 21 December 2000 was radically different from that underpinning the fine considered in the adjustment notices. With the reality of the intra-Community supplies having been established to the requisite legal standard, Belgium emphasises that it would have been completely contradictory to impose a fine based on Article 70(1) of the VAT Code on the ground that the exemption under Article 39 *bis* of that Code had been wrongfully claimed.

(102) Belgium further highlights that, although the reality of the intra-Community supplies had been established, the invoices produced by Umicore nonetheless showed gross negligence with respect to identifying the real Italian customers for the silver supplied. The fact that Umicore is a major player in economic terms, active essentially and continually at the international and, thus, European level, was taken into account when assessing the seriousness of this negligence. It was

([33]) In this instance, the Swiss company which purchased the goods had appointed a representative in the United Kingdom, who was registered for VAT and discharged his tax obligations in the United Kingdom.

therefore assumed that the company's managers must have known that the invoices bore shortcomings in the identification of customers and did not thus entirely comply with Belgian regulations. In view of the lack of other elements, however, this assumption was insufficient to establish fraudulent intent on the part of Umicore.

(103) Belgium refers to the way in which the amount of the settlement was calculated and explains that the imposition of a proportional fine when no VAT is due does not run counter to the legislation in force. When a transaction is taxable in principle ([34]), the VAT Code grants a subsequent exemption, which is entirely ex post, from tax in Belgium for certain transactions such as intra-Community supplies. It follows from this that a proportional fine can be imposed on the amount of tax due in principle on the transactions concerned, even if those transactions are subsequently exempted ([35]).

(104) Belgium concludes that the fine referred to in Article 70(2) of the VAT Code is a punishment for the inexactitude of the indications on invoices, irrespective of the VAT scheme to be applied to the transactions concerned. It is therefore, in its view, not true that such a fine cannot be imposed in the event of a transaction which is not taxable pursuant to Article 2 of the VAT Code. The fine provided for under Article 70(2) of the VAT Code is not, moreover, a punishment for failing to pay the tax, which is punished under Article 70(1) of the Code, but for making it possible to evade tax due at subsequent stages of the marketing of the goods concerned. By disguising the true identity of the purchaser of the goods, the authorities would lose track of them and would not be able to secure payment of either VAT or even the direct taxes due as result of the subsequent transactions involving the goods supplied. The administrative guidelines for the VAT Code are very clear in this respect ([36]).

(105) Regarding the calculation of the proportional fine, Belgium explains that a reduction from 200 %, as laid down in Article 70(2) of the VAT Code, to 100 % is entirely legal, since such a reduction is in line with the levels of fines stipulated in Table C of Royal Decree No 41 when there is no fraudulent intent.

(106) Belgium also emphasises that, according to the settled case law of the Belgian Court of Cassation, proportional fines for VAT are deductible from the tax base for corporate tax ([37]). Given the fact that Umicore wished to bring this deduction forward, so to speak, in order to put an end to its dispute with the Special Tax Inspectorate before the end of the 2000 financial year, the authorities reportedly accepted to included the effect of bringing the deduction forward in the settlement of 21 December 2000. Belgium further emphasises that accepting this request fell entirely within the Ministry's powers to reduce or waive fines. It also stresses that Umicore actually paid the amount of BEF 423 million before 31 December 2000 as it had undertaken to do.

The existence of State aid

(107) Belgium disputes ever having granted aid to Umicore. It also emphasises that the settlement under consideration did not bear any special feature or advantage for Umicore and it did not strengthen the position of the company in relation to competitors in trade between Member States in any way. It is of the opinion that Umicore did not benefit from any special treatment whatsoever, but was merely the subject of the material application to a particular case of a basic instrument which is very widely used.

(108) According to Belgium, such settlement agreements are commonplace not only in Belgium but, for obvious reasons (that is, to avoid long and costly litigation the outcome of which is uncertain) with the authorities of numerous other Member States. In this respect, Belgium notes that the Commission itself had recourse to a settlement agreement with Philip Morris International in a case involving the loss of customs duties and VAT which should have been paid for legal imports ([38]).

(109) Belgium adds that if VAT had been charged on the transactions at issue, that VAT would have had to be reimbursed to Umicore's customers by the tax authorities, since those customers could use their right to the deduction of VAT as undertakings registered for VAT. It would therefore have had no financial impact on Belgium's public accounts, with no transfer of state resources.

(110) As for the criterion of specificity, Belgium indicates that, contrary to what the Commission argued in its decision to open the procedure, the mere fact that the settlement agreement related only to Umicore is not enough to claim that the criterion of specificity has been fulfilled ([39]). In order to determine if there was a specific advantage, the measure would have to be assessed in the light of the treatment given to undertakings in similar factual and legal circumstances as the allegedly favoured undertaking ([40]).

([34]) Article 2 of the VAT Code stipulates that the supply of goods or services effected for consideration is subject to VAT if it takes place within Belgium. And Article 53(2) of the VAT Code makes it compulsory to issue an invoice for the supply of any goods or services, irrespective of whether or not it is actually taxed in Belgium.

([35]) Article 70(2) of the VAT Code would thus apply when invoices which are required to be issued under Articles 53, 53 *octies* and 54 of the Code, have not been drawn up or have not been drawn up correctly.

([36]) See VAT comment No 70/60 to 70/62.

([37]) See income tax comments Nos 53/97 and 53/97.1.

([38]) See press release of 9 July 2004, IP/04/882.

([39]) See paragraph 55 of the opening decision.

([40]) See the Opinion of the Advocate-General in Case C-353/95 *Schmid* [1997] ECR I-7007, paragraph 30.

(111) According to Belgium, if, as in this case, any person subject to VAT has the possibility to contest an adjustment notice, to present his arguments before the authorities and to conclude an agreement with the authorities relating to his specific case, which does not imply any derogation from the law and is confined, as indicated by the evidence submitted, to accepting the merits of the facts as established by the taxable person, the measure would be general and would not constitute aid within the meaning of Article 107 of the Treaty. According to Belgium, the procedure applicable to Umicore is open to other undertakings and applies in a similar manner to all disputes.

(112) In this respect, Belgium emphasizes that in this case the authorities did not have and did not use any discretionary or arbitrary powers in applying VAT law.

(113) According to Belgium, the measure under investigation is justified also by the nature and structure of the Belgian tax system. Under any administrative procedure, it is logical to expect a correct solution as soon as possible, which contributes to legal certainty while ensuring strict procedural compliance and effective recovery of the tax. The agreements concluded with taxpayers such as Umicore ultimately serve the purpose of avoiding protracted and indecisive legal disputes.

(114) The Belgian authorities point out that, to the best of their knowledge, the European competitors of Umicore supplied fine silver to the same Italian customers as Umicore and under the same terms, and that the VAT situation of those producers has not been the object of any adjustment applied by their national authorities on the ground that the fraud occurred in Italy and not at the producers. Because it accepted to pay a significant fine, while its competitors paid neither VAT nor any administrative fines, Umicore was certainly not an aid recipient, but the object of a measure that affected its competitive position in the relevant market. If there was any distortion of trade, it was to its disadvantage.

(115) Belgium considers therefore that the measure does not meet any of the conditions required in order to establish the existence of State aid under the Treaty. The case does not involve any transfer of resources, advantage, selectivity or distortion of competition or trade between Member States.

General comment on the application of Article 107 of the Treaty to tax agreements

(116) Belgium concludes that if the Commission intends henceforth to attack the very mechanism of tax settlements, even though it is widely used and essential for the proper functioning of tax collection by any tax authorities, in order to assess the substantive application of law it will have, in each case, to substitute itself for the national court acting as 'appeal court' for decisions by national authorities.

V. COMMENTS FROM INTERESTED PARTIES

V.1. Umicore

Outline of the general background

(117) Umicore begins by pointing out that, under the current practice developed in the area of international trade in precious metals, deliveries take place at the plant ('ex works'), the transportation of the goods being taken care of by the buyer. This type of sale appears to be very risky under the new VAT system for intra-Community supplies. The seller has to prove the reality of the transport operation, but in this case the documents proving the transport operation are in the possession of the buyer (given that, since 1993, the ultimate proof of transport, namely the customs stamp on the export document, no longer applies to intra-Community supplies).

(118) As regards the proof of transport of the goods, more particularly, Umicore emphasizes that it submitted to the Special Tax Inspectorate very detailed documentation justifying the transport.

(119) Umicore also mentions that it acted in good faith in connection with the disputed transactions, as witness the 10 % fine indicated in the adjustment notices, which applies only to taxable persons who act in good faith. In this context, Umicore also points out that it cooperated spontaneously with the Italian legal authorities, which, convinced of its good faith, did not proceed against it.

(120) Umicore also underscores that, in its opinion, the Italian authorities are liable to the extent that they did not cancel the VAT numbers of the fictitious Italian companies as soon as serious irregularities were found by the Italian tax authorities.

(121) Umicore also maintains that other competing silver producers, established in other Member States, carried out deliveries to the same Swiss and Italian intermediaries under the same circumstances and terms as those of the deliveries carried out by itself but their deliveries have not been questioned by their tax authorities. It is therefore unacceptable for Umicore, after having paid BEF 423 million (EUR 10 485 896), to be considered a State aid recipient when those other competing companies escape any prosecution.

(122) Finally, Umicore agrees with the comments submitted by Belgium, according to which an adjustment notice, contrary to a constraining order, does not in any way create a VAT debt under Belgian law.

Procedure followed by the Special Tax Inspectorate

(123) Umicore's arguments are similar to those made by Belgium in respect of the legality and validity of VAT agreements concluded between the authorities and taxable persons. The interested party recalls that such agreements may apply only to factual questions such as the proof of transport for intra-Community supplies (and the resulting tax base). In this context, Umicore states that the practice of concluding such agreements is widespread, including at the level of the Special Tax Inspectorate services ([41]).

(124) The interested party also mentions that the validity and legality of reductions in administrative fines, in exchange for an agreement with the taxpayer in respect of the amount, are confirmed by case law ([42]).

(125) Finally, as regards the factoring-in of the tax deductibility of the payable amount, Umicore emphasizes the following:

— the Special Tax Inspectorate does not have only VAT competences, but also competences relating to income tax,

— instead of requesting that Umicore pay a gross amount before income tax, which would have been tax deductible, the Special Tax Inspectorate accepted the payment of a net amount, after tax, provided that, of course, as specified in the agreement, the net amount was not itself tax deductible. In return, Umicore accepted to pay the (net) amount within a very short period (a week), which did not violate any applicable legal provision.

(126) Umicore considers that the amount of BEF 423 million represents VAT owed for the period 1995-96 and that the Special Tax Inspectorate exempted Umicore from paying late interest pursuant to Article 84a of the VAT Code and a proportional fine (of 10 %) pursuant to Article 9 of the Regent's Decree.

(127) As regards the reduction of the VAT owed from BEF 708 million to BEF 423 million, Umicore stresses that it is justified by the fact that the VAT claim established when Umicore invoiced the VAT to Italian and Swiss buyers remains unpaid and is therefore tax deductible.

(128) In connection with the years 1997-98, Umicore states that the adjustment notice of 30 April 1999 has not been acted upon, since the taxable person provided appropriate evidence that the sales in question could be exempted from VAT pursuant to Article 39a of the VAT Code.

Existence of an advantage

(129) Umicore considers that a tax agreement such as the agreement at issue does not constitute an advantage within the meaning of the TFEU and therefore it is not State aid. In particular, Umicore disputes the Commission's allegation that the tax agreement at issue placed the company in a more favourable position than other taxpayers.

(130) First, Umicore states that in reality the Special Tax Inspectorate itself assessed the tax agreement as more advantageous for the Treasury than the launching of a procedure whose final outcome risked being less favourable.

(131) Second, the possibility of concluding a tax agreement and reaching a compromise does not constitute in itself an advantage specific to Umicore. Such agreements are available to all taxable persons and are a current and normal practice in the field of VAT.

(132) Third, a settlement agreement, by its very nature, does not grant any advantage capable of being caught by the State aid rules. By definition, any decision to compromise involves assessing the risks for each of the parties in question by comparing a certain and immediate payment with the supposed or possible outcome of a legal dispute.

(133) Umicore considers, therefore, that it is an error to describe the terms of a settlement as an 'advantage', except in exceptional situations where one party derives from that settlement an outcome that is obviously superior to what it could expect from a legal dispute.

(134) According to Umicore, the Commission presupposes that if the tax dispute had had to be brought before the Belgian courts, by way of an appeal against the administrative decision, the court seized would necessarily have sentenced Umicore to pay a larger amount than that based on the agreement concluded between the

([41]) Umicore mentions statistical data from the Special Tax Inspectorate according to which 22 % of the additional VAT charged for increases in turnover in the period 2000-02 was determined pursuant to an agreement concluded with the taxable person.

([42]) In its judgment of 10 January 1991, in case FJ.F 91/204, the Namur General Court stated that 'tax authorities and the taxpayer may validly compromise on the VAT taxable base. Under the applicable legal and regulatory provisions, by accepting the transaction concerning the taxable base, the taxpayer also requests the benefit of a reduction in fines. The operation thus corresponds, by its very nature, to the definition of a transaction whose main feature is the existence of mutual concessions between the parties. In the case in question, the concession made by the taxpayer is the acceptance of the taxable base resulting from the adjustment notice following the check. The concession made by the tax authorities is the reduction in the legal fines linked to the agreement on the taxable base.'

Special Tax Inspectorate and Umicore. To reach such a conclusion, the Commission would have to substitute its own assessment for that of the national authorities or even that of the national courts, as applicable.

(135) Fourth, Umicore refers to the case *Déménagements-Manutention Transport SA (DMT)* ([43]), where the Court of Justice concluded that by granting payment facilities to the company in question the ONSS ([44]) acted as a public creditor which, like a private creditor, sought to obtain the amounts owed to it by a debtor in financial difficulty. The Court then decided that it was for the national courts to determine whether the payment facilities were clearly more significant than those that the company could obtain from a private creditor.

(136) Following the reasoning of the Court, Umicore estimates that in the present case the Special Tax Inspectorate, acting as a public creditor which seeks to obtain the amounts owed to it just like a private creditor, opted for the immediate payment of a net amount instead of a gross amount, which made the recovery of the amount certain and very fast. This behaviour is therefore rational and cautious from an economic standpoint, and comparable with the behaviour of a hypothetical private creditor in the same situation.

Selectivity

(137) Umicore considers that the selectivity criterion has clearly not been met in this case, since the tax agreement at issue is only one specific application of a general scheme available to all taxpayers in the same situation and the Special Tax Inspectorate does not exercise any discretionary powers when compromising.

(138) Even if the measure at issue were considered selective, it would still be justified by the nature and structure of the system. According to Umicore, even if it is selective, a tax measure should be considered as not conferring an advantage as long as it has been demonstrated that it contributes to the effectiveness of tax recovery ([45]). In the present case, Umicore considers that the measure is justified by the nature and structure of the system to the extent that the agreement concluded contributed to the effective recovery of tax ([46]).

Exceeding of powers

(139) Umicore states that interpreting the concept of State aid as including a tax agreement such as the one concluded with the Special Tax Inspectorate would inevitably lead the Commission to exceed its powers by assuming a competence in respect of the recovery of indirect taxes which it does not have, and to encroach upon the prerogatives of the national courts, which are alone competent to decide on tax disputes.

Absence of effect on competition or trade

(140) Umicore points out that it paid a considerable amount to the Special Tax Inspectorate while other competing silver producers established in other Member States did not pay any VAT, fine or interest on deliveries carried out under identical circumstances and terms.

(141) In this context, Umicore considers that the measure at issue clearly could not strengthen its competitive position in the relevant market, i.e. the market for silver granules. Consequently, Umicore takes the view that the agreement concluded with the Special Tax Inspectorate does not affect competition or trade between Member States and therefore Article 107(1) of the Treaty does not apply to the present case.

V.2. **Anonymous third party**

(142) An anonymous third party sent the Commission a copy of a letter addressed to the Belgian Finance Minister, dated 15 February 2002, containing a legal analysis of the agreement concluded with Umicore and of the transactions in question.

(143) In that letter, the anonymous third party points out that (a) the effect of the agreement concluded between the Special Tax Inspectorate and Umicore was to transform an amount of VAT due into a fine, in breach of Articles 10 and 172 of the Belgian Constitution and Article 84 of the VAT Code; (b) it is illegal to take into account the impact of corporate tax when calculating the amount of VAT due or the fine; and (c) it is illogical to apply a fine proportional to the amount of VAT without demanding payment of the VAT itself.

([43]) Case C-256/97 *DM Transport* [1999] ECR I-3913. DM Transport was liable to pay BEF 18,1 million to the Belgian National Office for Social Security (NOSS) as amounts withheld from salaries and as employer's contributions. Under Belgian law, an employer that does not pay the contributions in time is subject, among other things, to surcharges and criminal penalties. It is recognised, however, that the NOSS may grant grace periods. Considering that the payment facilities enabled the insolvent company to survive in an artificial manner, the Brussels Commercial Court made a referral for a preliminary ruling to the Court with a view to establishing whether such payment facilities could constitute State aid.

([44]) National Office for Social Security in Belgium.

([45]) Judgment in Case T-127/99 *Diputación Foral de Álava and Others* v *Commission of the European Communities* [2002] ECR II-1275, paragraphs 164-166.

([46]) In this respect, Umicore refers to paragraph 26 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), according to which the purpose of a tax system is 'to collect revenue to finance State expenditure'.

VI. BELGIUM'S REACTION TO THE COMMENTS OF THE INTERESTED PARTIES

(144) Belgium considers that the position of Umicore generally confirms the position of Belgium on the procedure in question, in particular as regards the non-existence of a formal VAT rectification procedure, the lack of legal force of an adjustment notice not signed by the taxable person, the legality of tax agreements and their availability to all taxpayers, and more generally the lack of elements constituting State aid.

(145) In connection with the anonymous letter of 1 October 2004, Belgium considers that it does not contain any specific observation relating to the State aid procedure and is therefore irrelevant.

VII. ADDITIONAL INFORMATION PROVIDED BY BELGIUM

(146) After returning the documents seized by the legal authorities, Belgium sent the Commission information and documents concerning the transactions covered by this procedure.

(147) As regards sales to customers established in Italy, Belgium has sent the documents on the basis of which it was decided to grant the exemption provided for in Article 39 *bis* of the VAT Code. More specifically, the documents in question include invoices issued by Umicore, transport invoices and other transport documents.

(148) As regards deliveries to customers established in Switzerland, Belgium has sent a number of documents intended to demonstrate that the goods were transported directly to Italy. According to Belgium, the role played by the Swiss companies was limited to a financial intervention in the purchasing and transport operations.

(149) In connection with the deliveries carried out in 1997 and 1998, Belgium has pointed out that initially the adjustment for 1995-96 was also applied in the following years. Belgium adds that the inspectors of the Special Tax Inspectorate themselves abandoned the adjustment for this period very quickly. To this end, Belgium has submitted also copies of internal memoranda showing that the inspectors in question effectively abandoned the envisaged taxation.

VIII. ASSESSMENT OF THE AID

(150) Pursuant to Article 107(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(151) The classification of a measure as State aid requires the following cumulative conditions to be met: (1) the measure in question confers an advantage through state resources; (2) the advantage is selective; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States.

(152) It should also be recalled that, according to established case law, the concept of aid includes not only positive actions such as subsidies, but also interventions, such as exemptions and tax relief, which act in various ways to provide relief from charges normally borne by company budgets ([47]).

VIII.1. Preliminary remarks

(153) It should first be noted that settlement agreements concluded with taxpayers are a normal practice of the Belgian tax authorities and in the field of VAT they are explicitly provided for in Article 84 of the VAT Code. Moreover, this Decision does not question the utility of such agreements, which serve to avoid numerous legal disputes.

(154) It should be recalled that the applicable Belgian administrative rules state that concluding a settlement with the taxpayer generally involves concessions on both sides. Nevertheless, in accordance with Article 84 of the VAT Code, such settlements are possible only to the extent that they do not involve a tax exemption or reduction. Pursuant to this principle, a settlement cannot refer to the amount of tax arising from the established facts, but rather to points of fact.

(155) In this context, the Commission considers that a settlement agreement between a person subject to VAT and the Belgian tax authorities can lead to an economic advantage only under the following conditions:

— when the concessions made by the authorities are clearly out of proportion to the concessions made by the taxable person, given the circumstances, and there are indications that the authorities clearly do not apply the same favourable treatment to other taxpayers in similar situations,

— when the legality of the agreement must be questioned, for example when the amount of tax due is reduced in violation of Article 84 of the VAT Code (tax exemption or reduction concerning a point of law).

(156) It is necessary, therefore, to examine whether the settlement concluded between the Special Tax Inspectorate and Umicore meets the conditions mentioned above.

([47]) See, for instance, judgment of the Court of Justice in Case C-387/92 *Banco de Crédito Industrial, now Banco Exterior de España SA* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13; judgment in Case C-143/99 *Adria Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, paragraph 38; judgment in Case C-53/00 *Ferring SA* v *Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067, paragraph 15; judgment in Case C-172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 36; judgment in Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium and Forum 187 ASBL* v *Commission of the European Communities* [2003] ECR I-6887, paragraph 86.

VIII.2. **Existence of an advantage**

(157) It is necessary, first of all, to check whether the measure grants the beneficiary any advantage that provides relief from charges normally borne by its budget ([48]). In the case under consideration, this involves determining whether the disputed settlement was concluded illegally or on the basis of disproportionate concessions made by the tax authorities.

VIII.2.1. *Regularity of the procedure*

(158) In its opening decision, the Commission stated that the procedure followed by the tax authorities could constitute a deviation from the normal course of the procedure for determining and settling VAT debt in so far as the agreement does not mention the legal basis and the tax authorities, in the absence of an agreement with the taxpayer, could issue a constraining order accompanied by a 50 % increase in the fine.

(159) As already indicated in recital 39, issuing an adjustment notice is a normal practice of the Belgian tax authorities in the field of VAT, aimed at ensuring compliance with fundamental principles such as the right to defence. Consequently, the two adjustment notices issued by the Special Tax Inspectorate and addressed to Umicore have to be considered preliminary notices issued by the tax authorities and not as giving rise to a VAT exemption.

(160) Moreover, the possibility of concluding settlement agreements with taxable persons is explicitly provided for in the Belgian VAT Code and has to be considered a normal practice of the Belgian tax authorities. However, the authorities must comply with the principle that such settlements can involve neither an exemption from nor a reduction in the amount of tax due. Therefore, such settlements can occur, in principle, only in situations where the tax authorities wish to avoid a legal dispute with the taxable person concerning facts that have not been clearly established.

(161) Furthermore, it should be noted that the tax authorities are under no obligation to issue a constraining order in cases where the authorities have not been able to reach an agreement with the taxable person on the taxation proposed in the adjustment notice. On the contrary, where there are doubts concerning the facts at issue, the competent authorities may still attempt to conclude an agreement with the taxable person.

(162) Finally, the analysis of the legal texts shows that there is no provision that establishes an obligation for the Belgian tax authorities to indicate an explicit legal basis in the agreements in question.

(163) Therefore, the Commission has to conclude, on the basis of the legal context described in this Decision, that the procedure applied by the tax authorities in relation to Umicore was carried out in compliance with the rules and practices in force and did not constitute a deviation from the normal course of the procedure.

(164) It is then necessary to analyse the settlements in question by taking into account the preliminary remarks made, with a view to determining the possible existence of an advantage. The reasoning presented below rests on the analysis of two distinct periods, one that includes the years 1995 and 1996 which were covered by the adjustment carried out by the tax authorities and one that includes the years 1997 and 1998 for which taxation was completely abandoned.

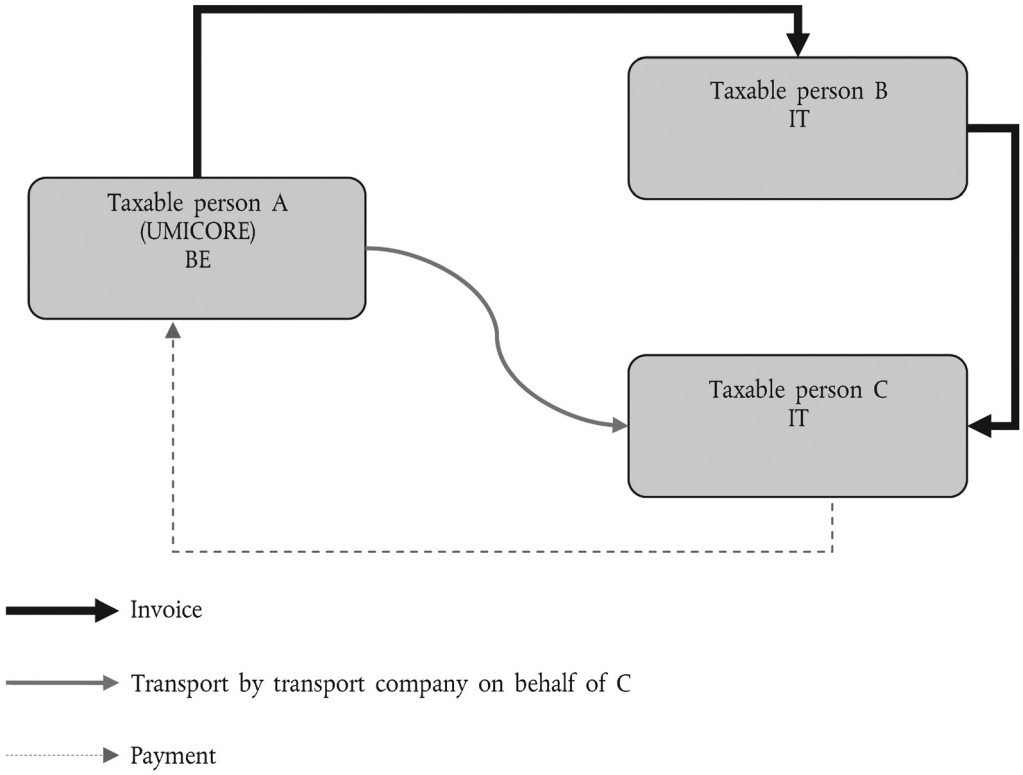
VIII.2.2. *Years 1995-96*

(165) As regards the period 1995-96, it is necessary to analyse three different types of transaction covered by the draft rectification notified to Umicore on 30 November 1998, in order to determine the possible existence of an advantage. For each type of transaction, the analysis seeks to identify the minimum amounts of VAT, fines and late interest that should have been imposed by the Belgian tax authorities on the basis of a reasonable interpretation of the facts, without excessive concessions or irregular application of the VAT rules.

1. Deliveries of goods to customers established in Italy

(166) The first case refers to transactions relating to 'ex-works' deliveries of pure silver carried out between February 1995 and February 1996, as follows:

([48]) See paragraph 9 of the 1998 notice cited in footnote 46.



(167) Umicore invoiced the goods to company B ([49]), established in Italy and holding a VAT registration number issued in that Member State. The latter company re-invoiced the goods to customer C, another taxable person subject to VAT established in Italy. The goods were transported, on behalf of C, directly from the place of production in Belgium to Italy. Most of the invoices issued by Umicore for its customer B were paid for by taxable person C.

(168) Umicore issued the invoices addressed to B under the exemption provided for in Article 39 *bis* of the VAT Code. The examination of the pro forma invoices, obtained through administrative cooperation with the Italian tax authorities, suggests that taxable person C was the consignee of the goods.

(169) In its adjustment notice of 30 November 1998, the Special Tax Inspectorate considered initially that the transport criterion for the exemption of intra-Community supplies had not been met in so far as the transport had been carried out on behalf of a subsequent customer (and not by or on behalf of the seller or the buyer, as provided for in Article 39 *bis* of the VAT Code). On this basis, the authorities took the view that the transaction concluded between Umicore and customer B constituted a delivery of goods that did not include transport and therefore could not benefit from the exemption in Article 39 *bis* of the VAT Code.

([49]) 'Company B' is actually a reference to two separate Italian companies.

(170) The information communicated by Belgium and Umicore to the Commission appears to indicate, nonetheless, that the reality of the transaction between Umicore and company B could reasonably be called into question by the Belgian tax authorities. For instance:

— the information communicated by the Italian tax authorities appeared to indicate that company B could be regarded as a 'missing trader', the role of which was confined to producing invoices charging VAT and then disappearing without fulfilling its tax obligations, including the payment of the VAT to the Italian tax authorities,

— the information communicated by the Italian tax authorities also indicated that the sole director of company B was not recorded on the police register,

— two requests for information sent by the Belgian tax authorities to their Italian counterparts on 26 August 1998 and 1 April 1999 also indicate that the Belgian tax authorities had serious doubts as to the actual existence of company B prior to the conclusion of the agreement,

— the goods had been transported to Italy on behalf of company C, a taxable person,

— the goods had been directly transported from the production site in Belgium to a warehouse in Italy where they had been made available to C,

— the vast majority of the invoices which Umicore sent to company B had been paid by company C,

— based on statements made by the Umicore managers and set out in a report, an extract from which was included in the adjustment notice, it seems that there was no contract between Umicore and company B,

— however, it seems that the actual existence of company C was never questioned by the Italian tax authorities, who had obtained full access to its accounts during an inspection.

(171) Look at separately, neither one of these observations is probably sufficient to demonstrate the fictitious nature of the sale between Umicore and company B. However, when looked at together, these observations can instil definite doubt about the reality of the sale between Umicore and company B. The Belgian tax authorities, who had been informed of suspicions about the actual existence of the activities of company B before the conclusion of the transaction with Umicore on 21 December 2000, thus enjoyed a wide discretion in assessing the reality of the transactions and, where appropriate, in reclassifying them.

(172) It must be remembered, in this respect, that in line with the settled case law of the Court of Cassation in Belgium, tax must be based on actual facts ([50]). The Belgian tax authorities are therefore required in principle to base their taxation, not on apparent transactions presented by a taxable person to justify a potential exemption, but on actual transactions based on the real intentions of the parties.

(173) If it emerged from the information available to the Belgian tax authorities that the sale between A and B was fictitious and that the real sale (involving transfer of the power to dispose of the goods) had in fact occurred between A and C, these authorities were therefore entitled to reclassify delivery of the goods between A and B as delivery of the goods between A and C, and to apply the VAT rules to this reclassified transaction.

(174) The fact that fraud had occurred in Italy through the intermediary of a missing trader does not mean that the right to exemption which Umicore could avail itself of should be called into question, since the good faith of the latter had not been disputed by the Belgian authorities.

([50]) See Section II.2.

(175) In the light of the above, the Belgian tax authorities could legitimately reclassify the transactions in question as intra-Community supplies between Umicore and company C, without this reclassification constituting a disproportionate concession or irregular application of VAT rules. They could also exempt the reclassified transactions from VAT since all the conditions for exemption had been met (including transport by or on behalf of the purchaser).

(176) It must therefore be examined (i) whether the Belgian tax authorities were entitled to impose a fine based on Article 70(2) of the VAT Code because of the inaccurate information on the invoices and, if so, (ii) what should have been the amount of this fine, and (iii) whether Umicore benefited from disproportionate concessions or irregular application of the law by the tax authorities.

(177) First, it must be pointed out that, in the case of inaccurate information featured on an invoice relating to intra-Community supplies, Royal Decree No 41 provides for a fine amounting to 100 % of the tax owed on the transactions in question. Nevertheless, as stated in recitals 45 and 46, administrative fines are subject to the principle of proportionality and the authorities have the power, pursuant to Article 9 of the Regent's Decree of 18 March 1831, to depart from the scales for fines set out in Royal Decree No 41.

(178) In the present case, it cannot be ruled out that a fine of 100 % would have been disproportionate given the good faith of the taxable person, which had not been disputed by the tax authorities. It may also be true that, in the context of the legal proceedings with Umicore, the Belgian tax authorities had attempted to maximise its revenue in the same way that a creditor tries to optimise the recovery of the amount owed to him. It must be remembered that this practice is unlikely to come within the scope of Article 107 of the Treaty in so far as it does not give rise to disproportionate or illegal concessions by the authorities.

(179) Given the discretion available to the authorities in this context, it can reasonably be considered that, in a settlement agreement, the amount of the fine should have been set by the authorities at between 10 % and 50 %. A 10 % rate can be regarded as acceptable with reference to the 10 % rate provided for in table G of the annex to Royal Decree No 41 for infringements covered by Article 70(1) of the VAT Code and with reference to the 10 % fine referred to in the adjustment notice of 30 November 1998. In addition, the 50 % rate could be regarded as the maximum rate applicable in line with the principle of proportionality and the context of a settlement agreement. The application of a 50 %

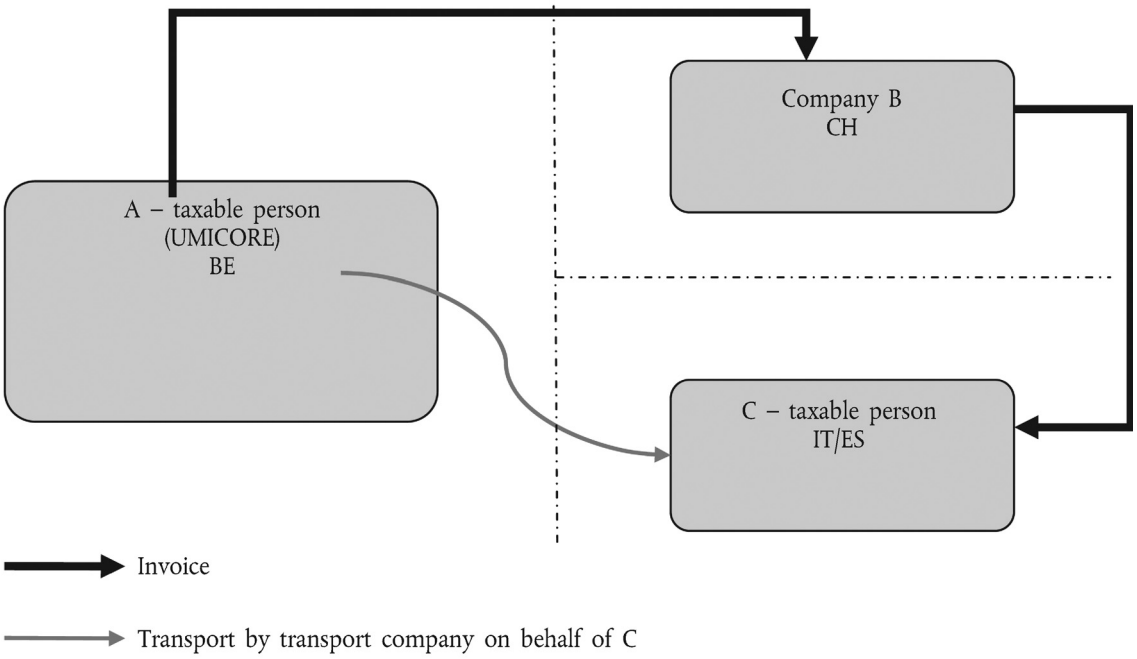
rate also appears to be supported by recent case law of the Belgian Court of Cassation ([51]). Given the fact that this last judgment concerns a criminal case, it can therefore be considered, in the present case, in which the absence of fraudulent intent on the part of Umicore has been established, that a 50 % rate is the maximum rate.

(180) It can therefore be concluded, given the circumstances of the present case, that the fine could reasonably be set at between BEF 33 238 698 (10 % of BEF 332 386 976) and BEF 166 193 488 (50 % of BEF 332 386 976).

(181) Since a selective advantage could only have resulted from disproportionate concessions by the tax authorities, only the lowest amount – BEF 33 238 698 – must be taken into account when determining the potential advantage. This amount is in principle deductible from the tax base for corporate tax ([52]).

2. Deliveries of goods to customers established in Switzerland

(182) In the second example, the sequence of disputed transactions with Swiss customers was as follows:



(183) Between February and October 1996, Umicore invoiced the goods to a company B ([53]), established in Switzerland, with no VAT registration number in any Member State. The Swiss company then re-invoiced the goods to customer C, liable for VAT, who was established in Italy. The goods were transported directly from the place of production in Belgium to Italy. On the basis of documents communicated by Belgium, it appears that the transportation was commissioned by company C. It also appears that, in some cases, company C paid the price of the goods directly to Umicore, while in others the payment was made by company B. Company C in fact refers to companies deemed fictitious by the Spanish and Italian tax authorities ([54]).

(184) The invoices which Umicore sent to Swiss company B between February and October 1996 concern sales of pure silver 'ex works (Hoboken)', with the following indications: 'Export – Exempt from VAT pursuant to Article 39 of the Code'.

(185) Although the goods in question were indeed delivered by Umicore and were exempt from VAT under Article 39 of the VAT Code, the information obtained by the Special Tax Inspectorate from the taxable person and from Belgian Customs and Excise indicated that the goods had been transported to Italy but that export had not taken place.

([51]) Cassation, judgments of 12.9.2009, cited above. The Court confirmed that a fine of 200 % was disproportionate given the circumstances and that the Court of Appeal had quite rightly reduced it to 50 %.

([52]) See Section II.2.

([53]) 'Company B' actually refers to two companies established in Switzerland.

([54]) 'C' in fact refers to the same companies as 'B' in the third example described in the next recital.

(186) Because the goods had not been exported and hence there was no entitlement to exemption under Article 39 of the VAT Code, the question once again is whether the Belgian tax authorities could have been led to conclude that the transactions between Umicore and the Swiss company were fictitious, that the real transactions had occurred between Umicore and C, and that these transactions might be exempt in line with Article 39 *bis* of the VAT Code.

(187) In its adjustment notice of 30 November 1998, the Special Tax Inspectorate had considered that the criteria for exemption in line with Article 39 of the VAT Code (exports) had not been met since no document providing evidence of actual export, and in particular no export declaration, had been produced.

(188) In view of this, the authorities had concluded that the transactions between Umicore and the Swiss companies could not be exempted from VAT in line with Article 39 of the VAT Code and were deemed to have taken place in Belgium, in accordance with Article 15(7) of the VAT Code. They were therefore subject to Belgian VAT under Article 2 of the VAT Code. The authorities thus considered that Umicore was liable for VAT amounting to BEF 312 608 393 ([55]) (EUR 7 749 359) and for a fine of 10 % of this amount.

(189) In a further reply of 30 March 2000 concerning the adjustment statements, Umicore stated that it had been established that the mechanism used was fictitious, something which Umicore's commercial department could not have known. The goods were never imported into Switzerland and it was therefore essential to point out that, in these cases as in the others, the reality of the deliveries to Italy was not disputed.

(190) It appears, moreover, that the name of the Italian taxable person, the consignee, is explicitly indicated on the pro forma invoices which Umicore sent to its Swiss customers, and that the identity of this consignee is confirmed in the waybills drawn up by the carrier.

(191) The transactions concerned cannot be reclassified as intra-Community supplies between Umicore and company C for the following reasons:

— at the time when the agreement was concluded, the Belgian authorities had already been informed that company C in fact referred to entities regarded as fictitious by the Italian and Spanish tax authorities,

— the actual existence of the Swiss companies had never been questioned by either the Belgian or the Italian tax authorities, or by Umicore,

— Umicore could not have known that it was not entitled to apply the exemption in Article 39 of the VAT Code (VAT exemption for exports) because the goods had not been exported.

(192) Consequently, the transactions in question were not eligible for a VAT exemption on the basis of Article 39 of the VAT Code (because the goods had not been exported) or for a VAT exemption under Article 39 *bis* of the VAT Code. They must, in this case, be looked upon as deliveries of goods without transport which are not eligible for a VAT exemption. Therefore, in accordance with Articles 2 and 15(2) and (7) of the VAT Code, Umicore owed VAT amounting to BEF 312 608 393 (EUR 7 749 359). Moreover, a 10 % fine, amounting to BEF 31 260 839, was also chargeable on this amount under Article 70(1) of the VAT Code and Article 1(1) of Royal Decree No 41. There is nothing in the file to lead the Commission to consider that this 10 % rate would pose a problem in terms of the principle of proportionality ([56]).

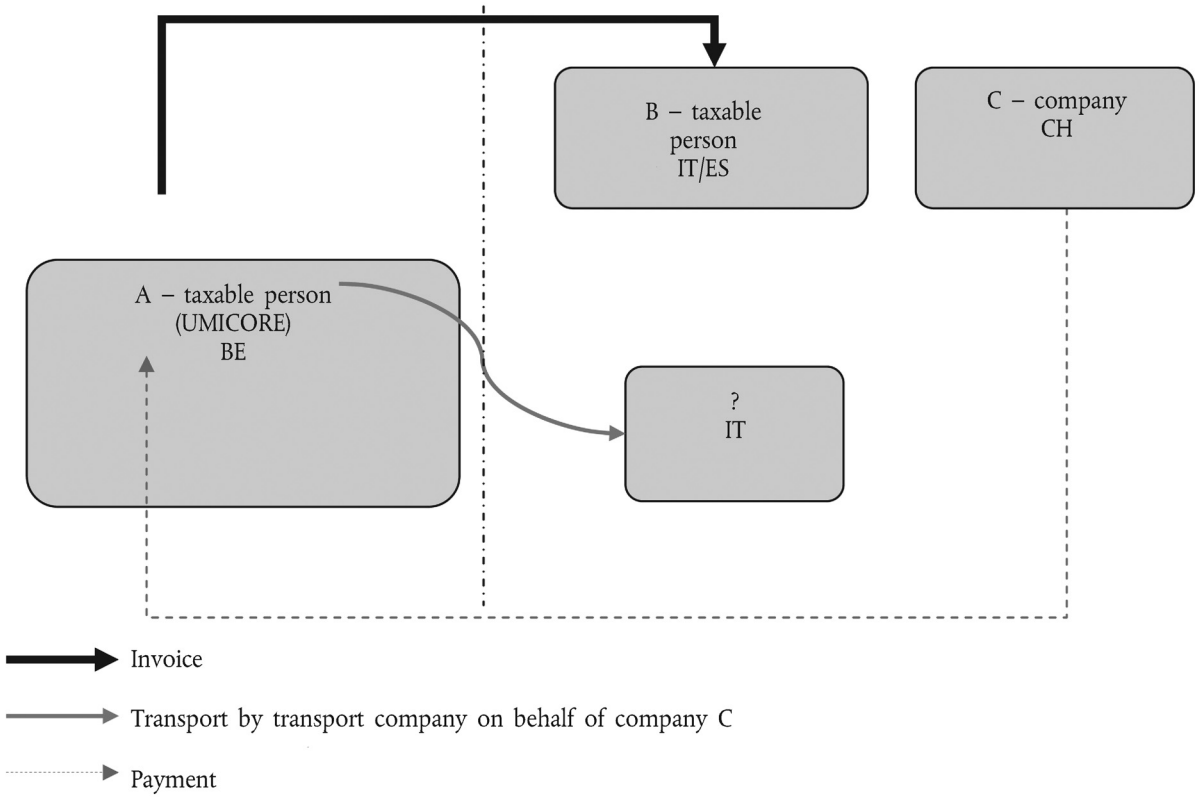
(193) In line with the tax rules applicable, the additional VAT owed by the taxable person and not invoiced to the customer must be regarded as a deductible expense when determining the taxable base for corporate tax. The amount of the administrative fine can also be deducted from corporate tax.

3. Deliveries of goods to customers established in Italy and Spain

(194) Between October and December 1996, the sequence of disputed transactions with these customers was as follows:

([55]) 21 % of BEF 1 488 611 396 = BEF 312 608 393.

([56]) In the cases to which Article 70(1) applies, the 10 % rate is the minimum applied by the tax authorities.



(195) Umicore invoiced the goods to companies 'B' established in Italy and Spain and registered for VAT there. The invoices concerned sales of pure silver ex works and were drawn up on the basis of the exemption in either Article 39 (exports) or Article 39 *bis* (intra-Community supplies) of the VAT Code. The goods were transported directly from the place of production in Belgium to Italy. In most cases, the invoices were paid by Swiss company C ([57]), which also seemed to be the company which actually commissioned the transport ([58]).

(196) Lastly, the information sent by the Italian and Spanish tax authorities to the Belgian authorities prior to the conclusion of the settlement agreement would seem to indicate that companies B were fictitious.

(197) In their adjustment notice of 30 November 1998, the Belgian tax authorities considered that the owners indicated on the invoices were incorrect and that the real owners of the goods were Swiss companies C. The Belgian authorities stated in their adjustment notice that, where goods were not exported outside the territory of the EU, the exemption provided for in Article 39 of the VAT Code did not apply and the sales in question had to be reclassified as deliveries of goods subject to Belgian VAT under Article 15(2) and (7), and Article 2 of the VAT Code. The authorities thus considered that Umicore was liable for VAT amounting to BEF 63 216 555 ([59]) (EUR 1 567 097,46) and for a fine of 10 % of this amount.

(198) In the context of an exchange of correspondence with the Special Tax Inspectorate, Umicore stated that the Swiss companies had been mandated by companies B to organise the transport of the goods and were in addition acting as the financial agent for these companies.

(199) It must be pointed out here that there is no evidence in the file to suggest that the Swiss companies had acted as transport agents for the Italian and Spanish companies. On the contrary, all the documents communicated to the Commission would seem to indicate that the goods had been transported on behalf of the Swiss companies and that they were the recipients and actual owners of these goods.

([57]) Company C in fact refers to the same Swiss companies as were involved in the second example.

([58]) On the pro forma invoices drawn up by Umicore, company C is given as the 'owner' in the description of the goods. The waybills were initially addressed to Swiss company C and generally state that the goods were being transported to Italy on behalf of Swiss company C.

([59]) 21 % of the amounts invoiced: (29 595 944 + 34 744 972 + 32 355 113 + 73 803 950 + 130 531 237) × 21 % = BEF 63 216 555.

(200) The Commission therefore considers that the Belgian tax authorities had been quite right to reclassify the disputed transactions in their adjustment notice as deliveries of goods to the Swiss companies. These deliveries must therefore be subject to Belgian VAT pursuant to Article 15(2) and (7), and Article 2 of the VAT Code; they are not eligible for an exemption on the basis of Article 39 or 39 *bis* of this Code.

(201) Even if the tax authorities had been able to legitimately recognise the existence of the transactions with the Italian and Spanish companies, exemption on the basis of Article 39 *bis* of the VAT Code would have had to be refused on the ground that the goods had not been transported by or on behalf of the seller (Umicore) or purchaser (B).

(202) It must therefore be concluded that Umicore was liable to pay VAT amounting to BEF 63 216 555 (EUR 1 567 097,46) plus an administrative fine of BEF 6 321 655 (10 % of the VAT owed) pursuant to Article 70(1) of the VAT Code and of Article 1(1) of Royal Decree No 41.

(203) This amount of BEF 63 216 555 and the administrative fine can in principle be deducted from corporate tax.

4. Consideration of the non-deductibility of the amount of the transaction

(204) The practice of considering an administrative fine, which is in principle deductible (from the tax base) for corporate tax, as non-deductible and of then reducing the amount of this fine to take account of its non-deductibility (compensation or netting) is not in keeping with administrative rules or practice in this area ([60]). As a result, the advantage and disadvantage resulting from this practice must be looked at compared with a situation in which such compensation has not been applied by the authorities.

(205) The same reasoning can be applied to the amounts of VAT which are in principle deductible from corporate tax and which would have benefited from this compensation.

(206) Of the amounts established in the previous recitals, the following must be regarded as deductible:

BEF 33 238 698 + 312 608 393 + 31 260 839 + 63 216 555 + 6 321 655 = BEF 446 646 140.

(207) The negative impact for Umicore of not being able to deduct these amounts can, in principle, be estimated at:

BEF 446 646 140 × 40,17 % ([61]) = BEF 179 417 754.

(208) However, given that Umicore showed a tax loss in terms of taxable income for 2000, the non-deductibility of the amounts concerned actually only had a negative impact the following tax year (2001 earnings) when Umicore in fact credited the entire tax loss that could be carried over against its earnings. The compensation mechanism as applied by the Belgian authorities therefore had the effect of deferring payment of the tax and fine until the following tax year.

(209) In addition, since Belgian corporate tax is in general collected by means of advance payments made by the taxpayer during the tax year in order to avoid increases in the amount of tax to be paid ([62]), it is reasonable to consider that without compensation, Umicore would have had to make the payments in question in mid-2001, which means that in practice Umicore's obligation to pay BEF 179 417 754 was postponed for 6 months.

(210) The positive impact for Umicore of non-deductibility can therefore be estimated as follows:

BEF 179 417 754 × 0,8 % ([63]) × 6 months = BEF 8 612 052.

5. Interest on late payments

(211) The interest on late payments owed on the VAT amounts calculated above must be calculated at a monthly rate of 0,8 % from 21 January 1997 ([64]) up until the payment was actually made at the end of December 2000:

37,6 % ([65]) × (312 608 393 + 63 216 555) = BEF 141 310 180.

6. List of amounts owed for the period 1995-96

(212) The minimum amounts owed by Umicore for the period 1995-96 are listed in the table below:

(BEF)

DESCRIPTION	AMOUNTS OWED
1) First type of transaction	
Administrative fine	33 238 698
2) Second type of transaction	

([60]) See Section II.2.

([61]) Rate of corporate tax applicable when the agreement was concluded.

([62]) See Article 218 CIR92 in conjunction with Articles 157 to 168 CIR92.

([63]) Rate applied by the Belgian tax authorities to calculate interest on late payments.

([64]) Date set down in the adjustment notice in accordance with the tax authorities' usual practice.

([65]) (3 × 12 months) + 11 months = 47 months × 0,8 % = 37,6 %.

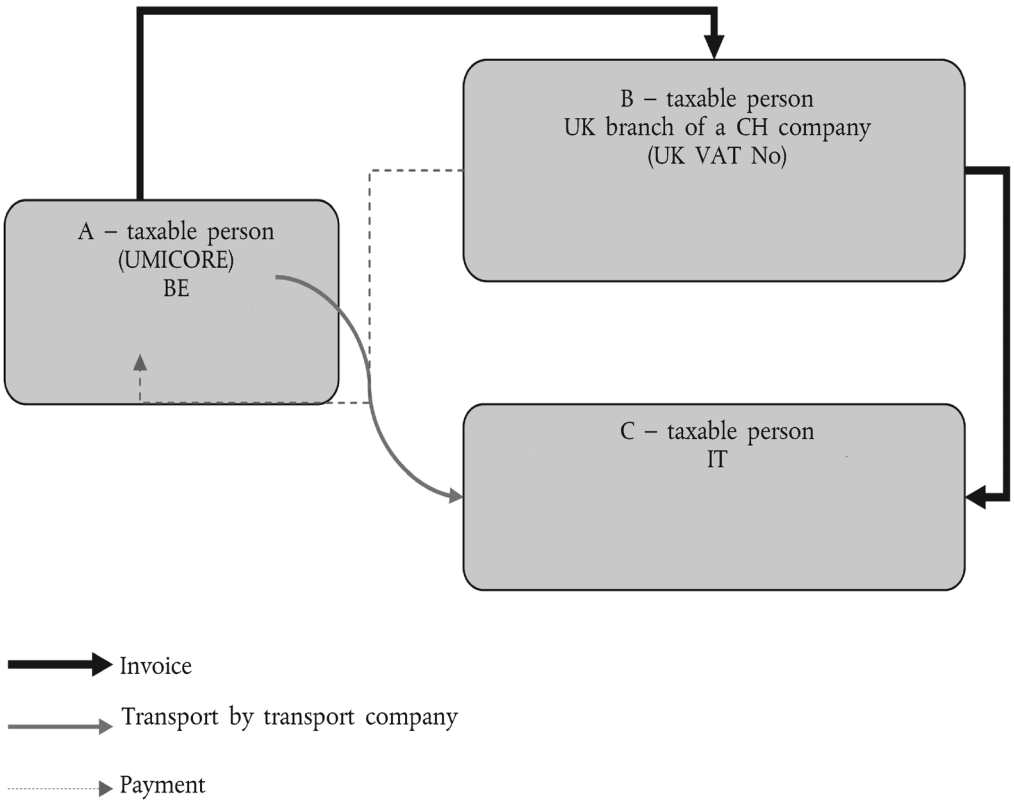
(BEF)

DESCRIPTION	AMOUNTS OWED
VAT owed	312 608 393
Administrative fine (10 %)	31 260 839
3) Third type of transaction	
VAT owed	63 216 555
Administrative fine (10 %)	6 321 655
Sub-total	**BEF 446 646 140**
4) Interest on late payments	141 310 180
Total owed in principle (VAT + interest)	**BEF 587 956 320**
5) Impact of non-deductibility:	
– negative impact of non-deductibility	– 179 417 754
+ positive impact of deferred payment	+ 8 612 052
TOTAL	**BEF 417 150 618**

(213) On the basis of the above calculation, it must be considered that the minimum amount for which Umicore was liable for 1995 and 1996 in the context of a settlement agreement with the tax authorities was BEF 587 956 320 (EUR 14 575 056,46). However, before comparing this amount with the amount in the agreement, the impact of non-deductibility must be taken into account, which reduces the amount to BEF 417 150 618 (EUR 10 340 893,71).

VIII.2.3. *Years 1997-98*

(214) For 1997 and 1998, the transactions questioned in the adjustment notice of 30 April 1999 were as follows:



(215) In this last scenario, Umicore's customer is a subsidiary (B), established in the United Kingdom, of a Swiss company registered for VAT in the UK. The subsequent customer is taxable person C, established in Italy. The goods were transported directly from the place of production in Belgium to Italy. Finally, the invoices drawn up by Umicore were paid by taxable person B.

(216) In their adjustment notice of 30 April 1999, the tax authorities considered that taxable person B was not entitled to claim the VAT exemption provided for in Article 39 *bis* of the VAT Code because it did not have a valid VAT number in Italy. In the alternative, it considered that, even if it was accepted that taxable person B had a real economic activity granting it status as an entity liable for VAT, the sales in question should be looked upon as triangular intra-Community transactions. In this case, the first sale between Umicore and taxable person B should be regarded as a national sale without transport subject to Belgian VAT without any possibility of exemption since the transport had seemingly been carried out on behalf of Italian customers.

(217) It must be noted first of all that, contrary to the period 1995-96, the Special Tax Inspectorate inspectors themselves considered subsequently that there was insufficient evidence to refuse exemption. This is clear from internal memos sent by the inspectors to their director before and after the conclusion of the agreement.

(218) Second, it emerges from the documents which Belgium sent to the Commission with its letter of 6 August 2009 that the transport had indeed been carried out on behalf of taxable person B (and not on behalf of a possible subsequent customer). Moreover, it appears to be possible to confirm this on the basis of copies of documents sent by Umicore to the Special Tax Inspectorate with its letter of 11 June 1999 which indicate that, for each sale, a fax was sent by taxable person B to Umicore to inform it of the identification of the transporter, the driver's name and the lorry's registration number.

(219) The fact that taxable person B did not have a valid VAT number in Italy, as stated by the Belgian authorities in their adjustment notice of 30 April 1999, does not appear to be relevant since taxable persons need not be registered for VAT in the Member State to which the goods are being sent. It must also be noted that the British tax authorities, which had communicated information to the Belgian authorities at their request, did not at any time dispute the reality of taxable person B's activities in the UK.

(220) Lastly, the Belgian tax authorities did not dispute the fact that the goods had indeed left Belgian territory and had been transported to another Member State.

(221) These considerations would seem to indicate clearly that the Special Tax Inspectorate did not have sufficient information to allow it to refuse the VAT exemption applied by Umicore. It must therefore be concluded that Umicore was not liable for any additional VAT payments, fines or interest for the period 1997-98.

VIII.2.4. *Conclusions concerning the existence of an economic advantage*

(222) On the strength of the above, it must be considered that the minimum amount for which Umicore was liable for 1995 to 1998 under a settlement agreement with the tax authorities was BEF 417 150 618 (EUR 10 340 893,71).

(223) In as much as this amount is lower than the amount paid by Umicore under the agreement of 21 December 2000, it cannot be concluded that the Belgian tax authorities made disproportionate concessions. The only aspect of the agreement which departs from administrative practice and rules concerns the compensation mechanism by which the amount due was reduced to take account of the non-deductibility from corporate tax. However, the economic impact of this practice was duly taken into account in the evaluation concerned.

(224) The Commission therefore considers that the Belgian tax authorities did not grant an economic or financial advantage to Umicore in the settlement agreement of 21 December 2000.

IX. **CONCLUSION**

(225) The Commission finds that the settlement agreement concluded on 21 December 2000 between the Belgian tax authorities and Umicore did not involve an advantage for the latter and does not therefore constitute State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The settlement agreement concluded on 21 December 2000 between the Belgian Government and Umicore SA (formerly Union Minière SA) concerning an amount of BEF 423 million does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 26 May 2010.

For the Commission
Joaquín ALMUNIA
Vice-President