

COMMISSION DECISION (EU) 2015/1583**of 4 August 2014****on the aid scheme SA.18859 (11/C) (ex 65/10 NN) implemented by United Kingdom Relief from
Aggregates Levy in Northern Ireland (ex N 2/04)***(notified under document C(2014) 5466)***(Only the English text is authentic)****(Text with EEA relevance)**

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 pursuant to those provisions ⁽¹⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) The United Kingdom notified the Commission of its intention to introduce a tax relief in Northern Ireland, applied to virgin aggregate extracted in Northern Ireland and commercially exploited there and processed products from virgin aggregate extracted in Northern Ireland commercially exploited there from a levy on aggregates set-up in the United Kingdom ('the measure') by letter of 5 January 2004, registered on 9 January 2004.
- (2) The measure was notified as a modification of the original relief from the Aggregates Levy in the Northern Ireland ⁽²⁾ which was approved by the Commission in its decision of 24 April 2002 in case N863/01 ⁽³⁾ (Decision N863/01).
- (3) On 7 May 2004, the Commission adopted a 'no objections' decision with respect to the measure ⁽⁴⁾ (Decision of 7 May 2004).
- (4) On 30 August 2004, the British Aggregates Association, Healy Bros. Ltd and David K. Trotter & Sons Ltd launched an appeal against the Decision of 7 May 2004 (the action was registered under Case T-359/04).
- (5) On 9 September 2010, the General Court annulled the Decision of 7 May 2004 ⁽⁵⁾. According to the judgment, the Commission was not entitled to adopt lawfully the decision not to raise objections as it had not examined the question of a possible tax discrimination between the domestic products in question and imported products originating from Ireland. The Commission did not appeal that judgment.
- (6) On 15 December 2010 and 21 December 2011, the United Kingdom submitted additional information concerning the measure, including documents concerning the suspension of the implementation of the measure as from 1 December 2010 by revoking the Aggregates Levy (Northern Ireland Tax Credit) Regulations 2004 (S.I. 2004/1959).
- (7) The Commission requested additional information by letter of 2 February 2011. The United Kingdom submitted further information by letters of 7 March 2011 and 10 June 2011.

⁽¹⁾ OJ C 245, 24.8.2011, p. 10 with a Corrigendum in OJ C 328, 11.11.2011, p. 11.

⁽²⁾ The phased introduction of the aggregates' levy.

⁽³⁾ OJ C 133, 5.6.2002, p. 11.

⁽⁴⁾ OJ C 81, 2.4.2005, p. 4.

⁽⁵⁾ Case T-359/04 *British Aggregates a. o. v Commission*, judgment of 9 September 2010, 2010 II-04227.

- (8) By letter dated 13 July 2011, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid.
- (9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁶⁾ (the 'Opening Decision'). The Commission invited interested parties to submit their comments on the aid.
- (10) The Commission received two comments from interested parties both on 23 September 2011. It forwarded them to the United Kingdom on 10 November 2011, which was given the opportunity to react; the United Kingdom's comments were received by letter dated 25 November 2011.
- (11) The United Kingdom submitted further information on 17 September 2012 and 10 October 2012. The Commission requested further information on 23 January 2014 and 7 February 2014, which the United Kingdom provided on 1 April 2014 and, respectively, on 4 June 2014.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Aggregates Levy

- (12) The Aggregates Levy (the 'AGL') is an environmental tax on the commercial exploitation of aggregates and is applied to rock, sand or gravel. It was introduced by the United Kingdom with effect from 1 April 2002 for environmental purposes in order to maximise the use of recycled aggregate and other alternatives to virgin aggregate and to promote the efficient extraction and use of virgin aggregate, which is a non-renewable natural resource. The environmental costs of aggregate extraction being addressed through the AGL include noise, dust, damage to biodiversity and to visual amenity.
- (13) The AGL is applied to virgin aggregate extracted in the United Kingdom and to imported virgin aggregate on its first use or sale in the United Kingdom ⁽⁷⁾. The rate at the time of the original notification was GBP 1,60 per tonne ⁽⁸⁾. The AGL is also applied to the commercial exploitation of virgin aggregate used in the manufacture of processed products. It does not apply to processed and recycled aggregates and to virgin aggregates exported from the United Kingdom.

2.2. The original AGL relief in Northern Ireland

- (14) In its Decision N863/01, the Commission considered that the phased introduction of the AGL in Northern Ireland was compatible with Section E.3.2 of the Community Guidelines on State aid for environmental protection ⁽⁹⁾ (the 2001 Environmental Aid Guidelines). The approved aid took the form of a five year degressive scheme of tax relief, starting in 2002 and ending in 2007. The original AGL relief in Northern Ireland covered only the commercial exploitation of aggregate used in the manufacture of processed products.

2.3. The modified AGL relief in Northern Ireland

- (15) This decision concerns exclusively the modified AGL relief in Northern Ireland, which was applied to virgin aggregate extracted in Northern Ireland and commercially exploited there and processed products from virgin aggregate extracted in Northern Ireland commercially exploited there.

2.3.1. Modification

- (16) As explained in recitals 12 to 14 of the Opening Decision, the United Kingdom considered that the special circumstances in Northern Ireland called for the enlargement of the scope of the relief from the AGL in Northern Ireland.

⁽⁶⁾ *Idem* [1].

⁽⁷⁾ The AGL is applied to imported raw aggregate, but not to aggregate contained in imported processed products.

⁽⁸⁾ On 2 April 2008, i.e. the day from which the 2008 Environmental Aid Guidelines were applicable, the level of AGL was GBP/tonne 1,95.

⁽⁹⁾ OJ C 37, 3.2.2001, p. 3.

- (17) The original relief scheme (phased introduction of the AGL) was modified. The relief applied to all types of virgin aggregate, i.e. not only to aggregates used in the manufacturing of processed products, as it was the case for the original relief in Decision N863/01, but also to virgin aggregates used directly in the raw state ⁽¹⁰⁾.
- (18) The relief was set at 80 % of the AGL level otherwise payable, and was intended to be a transitional arrangement. It came into effect on 1 April 2004 and was supposed to continue until 31 March 2011 (i.e. 9 years from the start of the AGL on 1 April 2002).
- (19) The relief scheme was suspended on 1 December 2010.

2.3.2. Environmental agreements

- (20) In order to more effectively achieve the intended environmental objectives, the United Kingdom made the relief conditional upon claimants formally entering into and complying with negotiated agreements with the United Kingdom, committing the claimants to a programme of environmental performance improvements over the duration of the relief.
- (21) The key criteria for entry into the scheme were that:
- (a) the requisite planning permission(s) and environmental regulatory permits, etc. had to be in place for each eligible site; and
 - (b) the site operator was required to 'sign-up' to a regime of environmental audits. The first audit had to be commissioned and submitted within 12 months of the date of entry to the scheme and updated every 2 years, thereafter.
- (22) Each agreement was individually tailored to the circumstances of the quarry, taking into account, for example, current standards and scope for improvement. The areas of performance covered were: air quality; archaeology and geo-diversity; biodiversity; blasting; community responsibility; dust; energy efficiency; groundwater; landscape and visual intrusion; noise; oil and chemical storage and handling; restoration and aftercare; use of alternatives to primary aggregates; surface water; off-site effects of transport; and waste management.
- (23) The Department of Environment in Northern Ireland was responsible for monitoring those agreements, and the relief was withdrawn for those firms having significant shortcomings.

2.3.3. Aggregates production costs, selling price and price elasticity of demand

- (24) As regards the aggregates production costs, the United Kingdom explained that they varied significantly from quarry to quarry and that the same would be valid for the prices ⁽¹¹⁾. The average selling price ex quarry for different classes of aggregates was summarised in Table 1 ⁽¹²⁾. Profit margins were again variable, but the industry estimated that 2 % to 5 % was a typical level.

Table 1

Selling price

Type of rock	Price ex-quarry before tax (GBP/tonne)
Basalt	4,21
Sandstone	4,37

⁽¹⁰⁾ The aggregates extracted in Northern Ireland and shipped to any destination in Great Britain were liable to the AGL at the full rate. That was also the case for aggregate extracted in Northern Ireland that was used in the manufacturing of processed products shipped to Great Britain. That ensured that aggregates and processed products from Northern Ireland did not enjoy a competitive advantage in the market of Great Britain.

⁽¹¹⁾ The information was submitted by the United Kingdom for the purposes of an assessment of the measure on the basis of the 2008 Environmental Aid Guidelines. DETI Minerals Statement 2009.

⁽¹²⁾ Distribution costs depend on haulage distances, with haulage costs in the range of GBP 0,15 – 0,20 per tonne per mile, with aggregate being delivered within 10 to 15 miles, depending on local circumstances.

Type of rock	Price ex-quarry before tax (GBP/tonne)
Limestone	3,72
Sand & Gravel	4,80
Other	5,57
Weighted average price	4,42

- (25) Following the Opening Decision, the United Kingdom provided further information as regards the productions costs of the aggregates in Northern Ireland and Great Britain. There are higher costs of electricity and planning permission in Northern Ireland compared with Great Britain. Electricity costs a small/medium sized firm in Northern Ireland an average of around 14p/kWh and 11p/kWh for similarly sized firms in the United Kingdom as a whole. Large and very large consumers of electricity in Northern Ireland will pay, on average, 10p/kWh, compared with around 8p/kWh in the United Kingdom as a whole. Estimates provided by the industry suggest that electricity and fuel costs would make up between 30-46p for each tonne of aggregate produced. In addition, Northern Ireland quarries face significantly greater planning costs than their counterparts in Great Britain and the Republic of Ireland. The United Kingdom provided cost comparisons in support of that statement.
- (26) As regards, in general, the difference in price levels between Northern Ireland and Great Britain, the United Kingdom had explained that suppliers in Northern Ireland have never been able to charge the same price as in Great Britain. The United Kingdom had illustrated this by way of average aggregates prices in Northern Ireland and Great Britain between 2001 and 2008. The levy at the full rate would therefore have represented a much higher proportion of the selling price in an already suppressed market. This inability to pass on costs to customers has been a significant historic factor in the lack of investment in environmental improvement and is explained by economic (fragmentation of the market) and geological factors.
- (27) Following the Opening Decision, the United Kingdom provided more detailed information in regard to the average aggregates prices. Apparently, except in the case of highly valuable, specialist aggregate materials, it is not economical to transport aggregates from Northern Ireland to Great Britain or even within Great Britain from Scotland, for example, for use in London. Table 2 shows average ex-quarry prices in Northern Ireland and in Great Britain between 2006 and 2011, in the case of Northern Ireland, and 2012 in the case of Great Britain.

Table 2 ⁽¹³⁾**Average ex-quarry prices**

Year	Price per tonne in Northern Ireland (GBP)		Price per tonne in Great Britain (GBP)	
	sand and gravel	crushed rocks	sand and gravel	crushed rocks
2006	3,81	3,60	9,18	7,34
2007	4,68	4,07	9,08	7,01
2008	3,74	4,84	10,05	8,11
2009	4,80	4,30	10,04	8,03
2010	3,38	4,25	10,47	7,90
2011	2,93	4,30	10,70	7,77
2012			10,02	8,28

⁽¹³⁾ Data for Northern Ireland from Annual Minerals Survey Department of Enterprise, Trade and Investment Northern Ireland and data for Great Britain from ONS data collected through the Annual Minerals Raised Survey.

- (28) The more detailed information regarding pricing point to the same conclusion the UK had previously reported (recital 26), i.e. that the AGL at the full rate would therefore have represented a much higher proportion of the selling price in an already suppressed market. The data shows that sand and gravel or crushed rock aggregate material from Northern Ireland would be unable to compete with average prices in Great Britain once the GBP [...] (*) tonne costs of transporting it over by sea are taken into account. The low price of aggregate in general precludes its sale in far-away markets as, even at GBP [...] a tonne, a journey of [...] miles would add almost [...] % to the ex-quarry price. It is likely, in most instances, that a closer quarry would be able to offer a more competitive price.
- (29) As regards the price elasticity of demand, the United Kingdom had explained, that the price elasticity of demand for aggregates ranges from 0,2 to 0,5. The United Kingdom' examination of aggregates quantity and price data for Great Britain and Northern Ireland suggested that for most types of aggregates the price elasticity ranged from close to zero to about 0,52. Following the Opening Decision, the United Kingdom showed that estimates of the price elasticity of demand for the mainland of the United Kingdom cannot, be applied to Northern Ireland due to the differences between the two markets. Therefore, the figures initially provided are not relevant for the Northern Ireland market. The United Kingdom indicated that they tried to determine the elasticity applicable solely for Northern Ireland, but that relevant data for the calculation were missing.
- (30) Following the Opening Decision, the United Kingdom provided information showing how price differences affect demand on the Northern Ireland market. Information was received for such purposes from four out of the five largest firms in the quarrying industry in Northern Ireland. As transportation costs tend to limit the market into which quarries can sell products at competitive prices, a direct correlation between prices and market shares was difficult to establish. Demand and market share are more likely to respond to the commencement or completion of large construction projects in the local area than nationwide price differences. Moreover, those companies which have the largest share of the market in Northern Ireland also sometimes sell higher quality, specialist products thus a comparison between producers for determining a market trend would not be accurate. Nevertheless, the United Kingdom shows that price differences do affect demand, but rather on a more local basis. Companies that operate near the border with the Republic of Ireland, i.e. within approximately 23 miles of the border, showed that they experienced significant reductions in sales when they increased their prices. Specific data were provided in regard to [...] and [...]. Table 3 shows the impact of price changes at [...] and [...]'s [...] site between 2009 and 2013 showing significant reduction in sales volumes and revenues following the removal of the suspension of the relief in 2010. When attempting to pass on the levy in full, [...] and [...]'s [...] site lost [...] % of its sales — a significant reduction.

Table 3

The impact of price changes at [...] and [...]'s [...] site between 2009 and 2013

Year	Tonnes	Sales	Avg Price
2009	[...]	[...]	[...]
2010	[...]	[...]	[...]
2011	[...]	[...]	[...]
2012	[...]	[...]	[...]
2013	[...]	[...]	[...]

- (31) Processed product sites close to the border with the Republic of Ireland also experienced significant reductions in their sales when attempting to pass on the costs of the aggregates levy in full. For example, [...]'s [...] in [...], which is only a mile from the border, saw its production fall from [...] m³ in 2005 to only [...] m³ in 2013, following an increase in the prices of its materials.

(*) Business secret.

- (32) Moreover, the United Kingdom provided information showing the evolution of infrastructure and other public sector work between 2000 and 2012. The evolution shows an increase in public work output in the period 2007 to 2009 followed by a decrease and a slight increase in 2012. However, the Commission notes that construction works in general have been influenced by the economic downturn, therefore, such trends cannot be taken into consideration on a stand-alone basis as they may be due to the economic environment and trends in the construction market.
- (33) The United Kingdom also provided tender prices for the period 2007 to 2013 for aggregates purchased by the Northern Ireland Roads Procurement Department (Table 4) including the costs of transportation to the local Roads Department depots. The data clearly shows that after 2010, when the AGL relief was suspended, the prices either decreased, sometimes dramatically, or slightly increased, but to a much lesser extent than the amount of the full rate AGL, GBP 1,95. That shows that even as regards public sales the Northern Ireland aggregates producers could not pass on the AGL to their customers. This is more evident as the public sector is less likely to have been affected by the economic downturn and public sector construction work, such as that carried out by the Roads Department, increased its share of the overall demand for aggregates.

Table 4

Tender prices for the period 2007 to 2013 for aggregates purchased by the Northern Ireland Roads Procurement Department

Year	10 mm chippings (GBP)	Sand for concrete (GBP)	Type 3 stone (GBP)
2007	8,43	9,52	4,67
2008	8,49	9,52	4,70
2009	[...]	[...]	[...]
2010	[...]	[...]	[...]
2011	[...]	[...]	[...]
2012	[...]	[...]	[...]
2013	[...]	[...]	[...]

2.3.4. Northern Ireland Aggregates Market

- (34) As only Northern Ireland quarries benefited from the AGL relief and not the rest of the United Kingdom, the United Kingdom provided information on why the aggregates market of Northern Ireland is a different geographical market than the United Kingdom's general market and where the differences lie.
- (35) The United Kingdom shows that the markets for aggregates in Northern Ireland and in Great Britain are separate and distinct from each other, with very little interplay. The market for aggregates tends to be local in nature due to the relatively high cost of transporting the material in relation to its selling price. Using data available from the Department for Transport, the United Kingdom calculated that the average cost of transporting a tonne of aggregate by road amounts to GBP 0,855 per tonne per mile. The low price of aggregates products means that lengthy journeys will make aggregate products less competitive than material sourced from quarries which are more local to the customer. Moreover, exporters of aggregate material have estimated that the cost of transporting aggregate by sea between Northern Ireland and Great Britain would be approximately GBP[...] per tonne. The sea freight would then be supplemented with the necessary road freight from the quarry to the port and from the wharves of arrival to the place of use. The United Kingdom further shows that the transportation of aggregate between the two regions is uneconomical except in the case of more specialist coloured stone or higher priced aggregate materials. It is estimated that even for those materials, there is likely to be a further GBP [...] per tonne cost of road haulage from a wharf in Great Britain to the nearest asphalt plants.

- (36) The supply of aggregates differs greatly between Northern Ireland and Great Britain due to both the availability of materials and the number of different quarry operating companies. Owing to its geological nature, Northern Ireland is able to boast the widest variety of rock types of any comparably sized region of the United Kingdom. Quarries are relatively evenly spread out across Northern Ireland. Whilst different counties have greater deposits of certain rock types, crushed rock aggregates are largely interchangeable, ensuring an abundance of rock suitable for use as aggregate throughout the entire area. On the contrary, the British mainland does not have the same geological variety. Due to the diverse and rich deposits of rock, spread evenly around the country and close to all major markets, Northern Ireland has a far greater supply of interchangeable products than the market in Great Britain. That leads to greater levels of competition in Northern Ireland and reduces the margins Northern Irish aggregate producers have for increasing their prices.
- (37) As indicated by the United Kingdom, the far greater proportion of independent quarries and the higher number of quarries per square mile in Northern Ireland also ensures greater competition amongst aggregate suppliers. In Great Britain, upwards of 75 % of all aggregates are supplied by the five major firms⁽¹⁴⁾. In contrast, the top five firms in Northern Ireland make up only an estimated 39 % of total aggregate production there.
- (38) The United Kingdom show that the two markets are characterised by different demand trends as the fall in demand for aggregates during and since the economic downturn has been far greater in Northern Ireland than in Great Britain. Moreover, as construction output and demand for aggregates decrease, competition amongst quarry operators for the remaining demand intensifies.
- (39) Northern Ireland has a far greater disposition towards stand-alone operations, with vertical integration between aggregates, cement and concrete production far less common within the market in Northern Ireland when compared with Great Britain. In Great Britain, as indicated in recital 37, the five largest companies control as much as 75 % of the aggregates output. Those same companies also control 70 % of all ready-mix concrete output, and a large proportion of all asphalt plants, both key markets for aggregate sales. Thus, when construction output decreases and demand for concrete and asphalt is reduced, the five largest companies in Great Britain have control over the reduction in their aggregates output capabilities. In effect, the supply of aggregates will adjust more readily to the demand in Great Britain, limiting the downward pressure on prices. Northern Ireland differs due to the lack of vertical integration of the market, as construction output and demand for aggregates decreases, competition amongst quarry operators for the remaining demand intensifies. That makes the Northern Ireland market far more competitive than Great Britain's, with a higher number of quarries per square mile and per capita and a greater proportion of independent quarries trying to sell their products to independent, stand-alone, processed product plants.
- (40) Moreover, the United Kingdom showed that the Northern Ireland aggregates market and the Republic of Ireland aggregates market are very similar.

2.3.5. Trade exposure

- (41) After the Opening Decision, the United Kingdom provided information on the trade exposure of the Northern Ireland aggregates industry between 2002 and 2013. Official statistics could supply only amalgamated bi-annual figures due to disclosure rules of Her Majesty's Revenue and Customs (HMRC). They do not allow for a breakdown of trade exposure by type of aggregate and for some years' trade statistics are not available at all. Further difficulties were encountered due to the lack of official data on the production of processed concrete and processed asphalt products. In those instances, the United Kingdom has used estimates⁽¹⁵⁾ of the market provided by the Quarry Products Association Northern Ireland ('QPANI'). Due to the non-existence of national

⁽¹⁴⁾ The concentration of a small number of large firms and the vertical integration of their operations were given as some of the reasons for the Office of Fair Trading referring the aggregates, cement and concrete markets to the Competition Commission in August 2011. In the same referral, the Office of Fair Trading distinguishes the Northern Ireland market from the United Kingdom's general market due to its characteristics. Moreover, the Office of Fair Trading considered that the Northern Ireland aggregates market does not pose the same competition concerns as the United Kingdom's general market.

⁽¹⁵⁾ These mostly draw upon figures from Grant Thornton's InterTradeIreland report, published in 2012, and project the data forward and backwards according to annual percentage changes in overall construction output in Northern Ireland. The figures have also been verified as being fair estimates by key operators within the industry.

statistics for other categories of products, the United Kingdom has provided best guess estimates of the trade exposures of crushed rock, processed concrete products, sand and asphalt. Nevertheless, even given those limitations, the United Kingdom is of the opinion that the data on trade exposure shows the degree of trade between the Republic of Ireland and Northern Ireland. The trade exposure is detailed in Table 5. The figures are based on annual or bi-annual figures for imports and exports and for the annual outputs which were also provided to the Commission.

Table 5

Trade exposure

Crushed Rock Aggregate (GBP)						
	2006-2007	2008-2009				
Imports	13 699 717	5 986 891				
Exports	28 519 715	19 938 824				
Estimated value of domestic sales	160 426 000	143 524 581				
Trade exposure (Imports+Exports)/(Imports+Sales)	24,25 %	17,34 %				
Processed concrete products (GBP)						
	2008	2009	2010	2011	2012	2013
Imports	10	10	9	7	7,5	7,5
Exports	70	35	28	21	16	15
Estimated value of domestic sales	325	276	210	210	216	226
Trade exposure (Imports+Exports)/(Imports+Sales)	23,9 %	15,7 %	16,9 %	12,9 %	10,5 %	9,6 %
Processed asphalt products and sand ⁽¹⁾ (GBP)						
	2007-2008	2009-2010	2011-2012			
Imports asphalt products and sand	1 540 633	1 909 210	4 489 366			
Exports asphalt products and sand	12 382 394	6 220 782	4 670 559			
Estimated value of domestic sales of asphalt products and sand	384 518 301	310 666 790	293 343 700			
Trade exposure (Imports+Exports)/(Imports+Sales)	3,61 %	2,60 %	3,08 %			

⁽¹⁾ The United Kingdom showed that the importation of asphalt products and sand rose sharply in the years 2011-2012 following the suspension of the AGL in 2010. However, as a result of the HMRC disclosure rules, it is difficult to disentangle how much of that increase is due to sand and how much is due to processed asphalt products. Nevertheless, it is probable that a large proportion of that increase is attributable in processed asphalt products imported from the Republic of Ireland. Whilst sand would still be subject to the AGL when it is imported into the United Kingdom, processed asphalt products would not and would therefore be able to benefit from lower production costs and be more competitive on the same market in Northern Ireland than local asphalt.

- (42) The numbers in Table 5 show that the Northern Ireland aggregates industry is subject to a significant degree of trade exposure in its crushed rock sales. The United Kingdom shows that undeclared imports of aggregates into Northern Ireland increased significantly following the introduction of the AGL in 2002. This undeclared level of importation is likely to have accelerated once again following the suspension of the AGL relief in 2010. A survey undertaken in 2002 by the University of Ulster counted the number of trucks bringing aggregates into Northern Ireland at eight of the more important border crossings. The results of that survey showed that up to 89 trucks were transporting aggregate a day. The annual total of all officially declared imports would have needed only 243 trucks all year. That suggested that the real level of aggregate imports could have been as high as 133 times that recorded by the official statistics in 2002 meaning that the estimated trade exposures are likely to greatly underestimate the actual degree of trade exposure.

2.3.6. *Pass-on and sales reductions*

- (43) As regards the pass-on of increased production costs to final customers and potential sales reductions, the United Kingdom had provided information showing that, following the introduction of the levy in 2002, the average price of aggregate in Northern Ireland had increased by much less than would have been expected if the AGL had been passed on in full, and that this was linked to a fall in legitimate sales, which was proportionally much larger than the fall recorded in Great Britain.
- (44) The United Kingdom had also explained that the sales of low-grade aggregate and fill, fell in the year ending 31 March 2003 compared with the levels experienced in the two pre-AGL years. The production from legitimate quarries in calendar year 2002 was significantly below the established trend in aggregate sales (generally, over the last 30 years, there had been a rising trend in aggregate sales in Northern Ireland). In Great Britain aggregate production fell in 2002 by 5,7 %, compared with a slight increase the previous year (however, trend analysis showed that, in Great Britain, the production had generally been in a declining trend over the previous 10 years).
- (45) The United Kingdom had also explained that once the levy had been introduced at GBP/tonne 1,60, the average price of aggregates in Northern Ireland had risen by about GBP 0,25-0,30/tonne in 2002 compared with 2001, whereas in Great Britain the price had risen by GBP/tonne 1-1,40. Even allowing for the fact that aggregate used in processed products, which benefited from an 80 % relief under the original 2002 degressive credit scheme in Northern Ireland, is included in that average, that implies that quarry operators in Northern Ireland were having to absorb a substantial proportion of the levy. On the assumption that processed products used half of the aggregate production in Northern Ireland, and that their price was unaffected by the levy in 2002, that still implies according to the United Kingdom that, on average, over GBP/tonne 1 of the levy had to be absorbed on each tonne of aggregate sold for use in its raw state.
- (46) Following the Opening Decision, the United Kingdom provided further explanations for their assertion in recital 45 that, once the AGL was introduced, the average price in Northern Ireland increased by much less than the rate of the levy, whereas in Great Britain it increased by GBP/tonne 1-1,40 given that manufacturers of processed products from aggregates had never paid the full rate of the AGL. The United Kingdom shows estimates that between a third and half of all aggregate produced in Northern Ireland is used in the manufacture of processed products. Even if, for the sake of argument, one were to take the higher figure and apply the full 100 % relief that applied to processed products during the first year of the levy, and accordingly assume there was no increase in production costs as a result of the levy on 50 % of aggregates, then this only doubles the price increase on the remaining 50 %. Such a doubling would indicate that the increase in price obtained was GBP 0,50-60/tonne, which is still significantly lower than that obtained in Great Britain, and does not come close to passing on the full additional GBP 1,60/tonne cost imposed by the levy in the first of application.
- (47) Furthermore, the United Kingdom provided data collected from representative samples of the Northern Ireland aggregates industry as regard the trends in aggregates production, turnover and profits. However, the trends shown are linked and cannot be dissociated from the trends of the constructions market and the economic recession starting in 2008.
- (48) The data showed that profitability and prices were already so low before the suspension of the relief scheme that a complete absorption of the tax would not have been financially viable. Companies instead showed that they passed on the tax, and, in return, had to accept further losses in sales, on top of those already caused by the challenging economic circumstances. In order to continue to operate their businesses, the industry delayed critical capital investments, and dismissed personnel. Survey returns indicate that passing the GBP 1,95 per tonne levy on to customers was challenging as prices to customers would increase by between 50 % and 66 %. Due also to

the economic climate, customers are reluctant to pay higher prices and instead either defer investment or look to competitors for alternative materials or a more competitive price. This is damaging to the Northern Ireland aggregates business resulting in a loss of customers, a reduction in sales volumes and pressure to reduce profit margins further.

- (49) Therefore, although the data collected from the representative samples of the Northern Ireland aggregates industry are a good indication of the evolution of the turnover and profits of the Northern Ireland aggregates industry, they cannot be dissociated from the economic context and are not conclusive to assess the effects of the full AGL on a stand-alone basis.

2.3.7. Other information

- (50) The estimated annual budget of the relief scheme (State resources foregone) varied at the time of the original notification between GBP 15 million (2004-2005) and GBP 35 million (2010-2011).
- (51) As regards the number of beneficiaries, it was estimated that approximately 170 quarry operators would be eligible for the relief.
- (52) The granting authority of the AGL relief in Northern Ireland was HMRC.

2.3.8. Grounds for initiating the formal investigation procedure

- (53) As explained in recitals 47 to 54 of the Opening Decision, the Commission doubted whether the modified AGL relief applicable in Northern Ireland complied with the Treaty, in particular its Article 110. Those doubts precluded the Commission from finding the measure compatible with the internal market at that stage.
- (54) The Commission considered that the AGL amounted to internal taxation within the meaning of Article 110 of the Treaty. It went on to find that there was a distinction in the application of the AGL between producers in Northern Ireland and producers from other Member States that could not be justified.
- (55) As explained in recital 56 of the Opening Decision, the Commission considered, based on the relevant case-law, as a result of the annulment of the Decision of 7 May 2004, that the measure as applied since that date (and until its suspension on 1 December 2010) must be viewed as being unlawful. Moreover, the Commission has stated that it will always assess the compatibility of unlawful State aid with the internal market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted⁽¹⁶⁾. As the aid is to be considered unlawful and it was granted during the period covering the applicability of the 2001 Environmental Aid Guidelines as well as after the publication of the 2008 Environmental Aid Guidelines⁽¹⁷⁾, the Commission assessed the compatibility of the AGL relief scheme under the instrument in force at the time when the aid was granted as follows:
- (a) the 2001 Environmental Aid Guidelines; and
- (b) the 2008 Environmental Aid Guidelines as from 2 April 2008.
- (56) On the assessment of the measure under the 2001 Environmental Aid Guidelines, the Commission concluded that the compatibility conditions laid down therein may be considered as being fulfilled. However, it recalled that in view of the doubts expressed in relation to Article 110 of the Treaty, it was precluded from finding the measure compatible with the internal market on the basis of the 2001 Environmental Aid Guidelines at that stage.
- (57) As regards the compatibility of the measure under the 2008 Environmental Aid Guidelines the Commission concluded:
- (a) that the AGL relief in Northern Ireland contributes at least indirectly to an improvement in environmental protection and that it does not undermine the general objective pursued by the AGL in accordance with point 151 of the 2008 Environmental Aid Guidelines;

⁽¹⁶⁾ Commission Notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

⁽¹⁷⁾ Community Guidelines on State aid for environmental protection of 2008 (OJ C 82, 1.4.2008, p. 1).

- (b) that the beneficiaries of the relief are defined using criteria that are objective and transparent in accordance with point 158(a) of the 2008 Environmental Aid Guidelines;
- (c) that the tax without reduction leads to the substantial increase in production costs required by point 158(b) of the 2008 Environmental Aid Guidelines;
- (d) that the condition of proportionality of the aid as provided by point 159 of the 2008 Environmental Aid Guidelines is complied with as the beneficiaries of the AGL relief in Northern Ireland still pay 20 % of the tax.
- (58) Although the information provided by the United Kingdom showed a very significant increase of the production costs due to the AGL, which would normally make it likely that such increase could not have been passed on without important sales reductions, the Commission at that stage could not conclude in the light of the information provided, in particular the insufficiently detailed information, that the compatibility condition in point 158(c) of the 2008 Environmental Aid Guidelines was met.
- (59) Under point 158(c) of the 2008 Environmental Aid Guidelines compliance with the necessity criteria requires that the substantial increase in production costs referred to in recital 58 cannot be passed on to customers without leading to important sales reductions. In that respect, the Member State may provide estimations of, inter alia, the product price elasticity of the sector concerned in the relevant geographic market as well as estimates of lost sales and/or reduced profits for the companies in the sector or category concerned.
- (60) The Commission noted in this context that the arguments of the United Kingdom that the increase in production costs could not be passed on without leading to important sales reductions were based on a comparison between the increase in price due to the introduction of the AGL (about GBP 0,25-0,30/tonne in 2002 compared with 2001 in Northern Ireland, whereas in Great Britain the price had risen by GBP/tonne 1 – 1,40). As regards the reduction in (legitimate) sales in Northern Ireland, the Commission noted that they varied in total for all types of aggregates between – 17,6 % (2001-2003) and – 22,8 % (2002-2003) and were proportionally much larger than those recorded in Great Britain. The Commission considered that those arguments could be considered as an indication of the difficulties encountered in passing on the increased production costs in Northern Ireland.
- (61) The Commission nevertheless pointed out that the United Kingdom had not provided sufficiently detailed data demonstrating and quantifying the impact on those arguments of the fact that the manufacturers of processed products from aggregates had never paid the full AGL as its introduction in the Northern Ireland had been phased.
- (62) Furthermore, with respect to the demonstration of sales reductions, the United Kingdom had not provided explanations concerning the development of the aggregates markets in Northern Ireland after 2002. Figure 2 of the Quarry Products Association Northern Ireland Report to the Office of Fair Trading Market Study into the UK Aggregates Sector ⁽¹⁸⁾ as submitted by the United Kingdom showed an increase in production from 2004 to 2007.
- (63) The United Kingdom had stated in their submission that the ‘costs increase affected operators’ turnover and reduced their profits’. Nevertheless, no data supporting that statement had been provided.
- (64) To demonstrate its compliance with the compatibility condition under point 158(c) of the 2008 Environmental Aid Guidelines, the United Kingdom had submitted only data on the overall industry level, no representative samples of individual beneficiaries based, for instance, on their size had been provided.
- (65) Finally, the Commission noted that the United Kingdom’s observations suggested that for most types of aggregates the price elasticity ranged from close to zero to about 0,52, i.e. appearing to be relatively inelastic. In principle that would mean that the increase in production costs could have been passed on to final customers. The United Kingdom had not provided any further explanations nor calculations concerning specifically the impact of the relative inelasticity as concluded on the arguments provided with respect to (the inability to) pass on the production costs increase to final customers.

⁽¹⁸⁾ See: <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/markets-work/aggregates/>, accessed on 18 July 2014.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments received from QPANI on 23 September 2011

- (66) QPANI submitted that the aggregate producers in Northern Ireland entered the relief scheme in good faith relying on the fact that the United Kingdom had sought the approval of the Commission and that the Commission issued a positive decision. In addition, they entered into environmental agreements which meant significant investments on their side.
- (67) The applicants that challenged the Commission decision approving the relief scheme never proved with examples that there was actual discrimination against imported aggregates.
- (68) QPANI alleges that any recovery of the State aid would breach the legitimate expectations of the quarry operators in Northern Ireland that the aid was lawful. Since the quarry operators already invested to deliver environmental improvements, a recovery order would actually mean that those companies bear the costs twice. In addition, recovery would be contrary to the principle of legal certainty.
- (69) QPANI goes on to mention that imported aggregates into Northern Ireland have always been minimal. They show that after the introduction of the AGL imports actually increased as private housing development increased and public sector construction spending increased.
- (70) As regards the impossibility for the AGL to be passed on to customers, QPANI puts forward that the significant increase in production costs, already acknowledged by the Commission, could not be passed on due to the over capacity of the aggregates sector and the much more competitive market in Northern Ireland. In addition, in Northern Ireland there is a sizeable volume of material exempt from the AGL, such as shale, which is used both in public and private construction projects and by farmers. A QPANI survey of monthly private stone sales (September 2001-September 2002) showed a considerable drop in business from April 2002 compared to the previous year. The statistics branch of the Department of Enterprise Trade and Investment (NI) in the 2002 annual minerals statement revealed a drop of approximately 2,7 million tonnes in aggregate production in Northern Ireland representing some 11 % of production.
- (71) QPANI submits that the Northern Ireland Affairs Committee enquiry, 'Introduction of the Aggregates Levy — One Year On, third report of session 2003 – 2004' brings clear evidence showing the impact on aggregate sales and employment levels by the introduction of the AGL.
- (72) QPANI argues that the reason for the increase in aggregate production in Northern Ireland from 2004 to 2007 was a result of increased construction activity within the province.
- (73) QPANI further argues that increasing costs affected operators' profit margins as demonstrated by the fact that price increases were only rising by GBP 0,25 to 0,30 as stated in recital 81 of the Opening Decision. Thus they were absorbing the bulk of the increased production costs caused by the AGL and, given the capital intensive and high overhead nature of the industry, it became evident that operators' narrow profit margins were further reduced.
- (74) QPANI argues that the data on price elasticity relates to the aggregates market in Great Britain and did not reflect the situation in Northern Ireland.

3.2. Comments received from the British Aggregates Association ('BAA') on 23 September 2011

- (75) BAA submits that it would be impossible for the United Kingdom to retroactively rectify the tax discrimination of products imported from other Member States. It is claimed that even if the United Kingdom were to pay back any amounts paid as aggregates levy for products imported into Northern Ireland from other Member States, this could not remove the severe dissuasive effect of the tax discrimination. Therefore, the retroactive approval of the relief scheme would not be possible.

- (76) BAA alleges that the AGL relief scheme does not comply with the 2001 Environmental Aid Guidelines. Allegedly the AGL does not have an appreciable impact on the environment as required by point 51(2)(a) of the 2001 Environmental Aid Guidelines; the 2004 relief scheme was not approved when the AGL was adopted as required by point 51(2)(b) of the 2001 Environmental Aid Guidelines; 20 % is not a significant proportion of the tax as required by point 51(1)(b) of the 2001 Environmental Aid Guidelines.
- (77) BAA goes on to state that the relief scheme does not comply with the 2008 Environmental Aid Guidelines either. The AGL relief undermines the environmental objective pursued by the AGL, contrary to point 151 of the 2008 Environmental Aid Guidelines, as it has given rise to significant 'importation' of aggregates from Northern Ireland into Great Britain since 2004. That would suggest that the rules requiring aggregate extracted in Northern Ireland, but used in Great Britain, to be taxed at the full rate were being circumvented.
- (78) In addition, BAA puts forward that the AGL relief does not comply with point 158(c) of the 2008 Environmental Aid Guidelines as the impossibility of passing on the substantial increase in production costs has not been proven. Specifically, the economic data put forward by the United Kingdom, referred to in recitals 21 to 23 of the Opening Decision, are implausible and possibly misleading. The average prices submitted by the United Kingdom are, allegedly, meaningless, as there are many different types of aggregate and, correspondingly, a large number of prices. In addition, the ex-quarry price also depends on the location of the quarry and the distance from construction sites. Thus, a comparison of the average price for Northern Ireland (a relatively small and rural area) and an average price for the entirety of Great Britain would not be relevant. Allegedly, if indeed ex-quarry prices in Northern Ireland were 50 % lower than the prices in Great Britain, there would have been a huge demand for Northern Irish aggregate in Great Britain. BAA claims that transportation costs from Northern Ireland to London are not higher than transportation costs from Scotland to London.

4. COMMENTS FROM THE UNITED KINGDOM RECEIVED ON 25 NOVEMBER 2011

- (79) The United Kingdom argues that the aid should not be considered unlawful aid and that, in assessing compatibility of the measure with the internal market, only the 2001 Environmental Aid Guidelines may be applied.
- (80) The United Kingdom argues that the Commission should take into account the fact that its Decision of 7 May 2004 approving the aid was declared void due to the Commission's unlawful failure to open the formal investigation. The measure was notified to the Commission and was approved prior to any tax relief being granted. When the aid was granted, it was not unlawful aid.
- (81) The United Kingdom allege that since the Decision of 7 May 2004 was void, the Commission did not actually take a decision in accordance with Article 4 of Council Regulation (EC) No 659/1999⁽¹⁹⁾ (the 'Procedural Regulation'), within the time limit of two months. Thus, the measure should be considered as authorised. If Article 4(6) of the Procedural Regulation is applied to the initial notification, then the aid was deemed approved in 2004, and the Commission has no competence to adopt a fresh decision pursuant to Article 4. Instead, the measure is to be treated as existing aid, which is subject to review only as to its future effects and which cannot be the subject of a retrospective recovery order. However, a decision in accordance with Article 4(3) was taken, albeit unlawfully and despite being subsequently declared void, in which case Article 4(6) of the Procedural Regulation is no longer applicable. The United Kingdom claims that it should also be entitled to rely on the fact that an approval decision pursuant to Article 4(3) of the Procedural Regulation was taken prior to the tax relief being granted, so that the grant of aid was not unlawful in the sense of being granted without Commission approval.
- (82) The United Kingdom claim that, in this case, the reason the aid is regarded as unlawful is solely that the Decision of 7 May 2004 was declared void in that it failed to open the formal investigation in 2004. It is not the case that the United Kingdom was, at the time the measure was put into effect, in breach of Article 108(3) of the Treaty. In assessing compatibility of the measure with the internal market, only the 2001 Environmental Aid Guidelines should be applied. The Commission should proceed to assess the aid on the basis of the notification in 2004 and apply the rules applicable at that time.

⁽¹⁹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 of the Treaty] (OJ L 83, 27.3.1999, p. 1).

- (83) Since the United Kingdom claims the aid is not unlawful, it alleges that the Commission is not entitled to divide the aid granted between the periods when the 2001 Environmental Aid Guidelines and the 2008 Environmental Aid Guidelines were respectively in force. It follows that, since the Commission has found that the measure was consistent with the 2001 Environmental Aid Guidelines, all aid granted under the scheme should be declared compatible with the internal market.
- (84) The United Kingdom rejects the arguments put forward by the British Aggregates Association ('BAA') in its response to the Opening Decision, in which BAA argues that the measure, as notified in 2004, did not comply with the 2001 Environmental Aid Guidelines. The United Kingdom highlights the fact that the Commission already found as stated in recital 63 of the Opening Decision that the AGL had appreciable environmental effects and that BAA does not dispute the Commission's finding that the environmental agreements concluded with aggregates companies in Northern Ireland benefiting from the 80 % AGL relief have positive environmental effects and do not undermine the objectives pursued by the AGL. In addition, the United Kingdom demonstrates that the measure approved by the Commission in 2004 was an extension of the relief scheme that was originally introduced at the same time as the tax. Point 51(2)(b) of the 2001 Environmental Aid Guidelines does not require that every single aspect of the derogation must have been fixed or implemented at the time the tax was introduced. If that were the case it would never be possible to introduce a modified derogation and point 51(2) would be a redundant provision. Moreover, the United Kingdom puts forward that point 51(1)(b) of the 2001 Environmental Aid Guidelines is met and, as the Commission already acknowledged in recital 67 of the Opening Decision, the requirement to pay 20 % of the AGL represents a requirement to pay a significant proportion of the tax. The question whether that proportion is significant must also take into account that quarry operators who are eligible for the relief must bear the costs of making improvements in environmental performance and that aggregate prices are generally lower in Northern Ireland than in the rest of the United Kingdom. In absolute terms, the monetary value of 20 % of the national tax payable is therefore greater than in the rest of the United Kingdom.
- (85) The United Kingdom asserts that the notion that the relief scheme could constitute discriminatory taxation contrary to Article 110 of the Treaty is incorrect. Imports from Ireland into the United Kingdom are taxed in an equivalent manner to production within the United Kingdom, including production in Northern Ireland where the conditions for the relief are not satisfied. There is, therefore, no discrimination between products imported from Ireland into the United Kingdom and products produced in the United Kingdom. Northern Ireland is not a Member State, so that it is not appropriate to apply Article 110 of the Treaty to determine that a specific tax treatment of certain producers within that area constitutes discrimination against products imported from other Member States and sold within that area. The United Kingdom alleges that discrimination should be assessed having regard to national products, and, that since the national products in the United Kingdom are subject to the full AGL, there can be no discrimination. Moreover, the fact that certain producers in a given area of a Member State are afforded a tax relief is a matter for State aid control under Article 107 of the Treaty, not Article 110. Only Article 107(3) of the Treaty should be applicable to fiscal aid measures granted to producers and not Article 110. Otherwise all fiscal aid to producers would have to be extended to products from other Member States. Moreover, there is no rule of Union law that requires aid granted by way of a tax relief to producers in a part of a Member State to be made available equally to importers of similar products from other Member States.
- (86) The United Kingdom does not accept that the aid is unlawful, but were it to be deemed so by the Commission, they believe that a recovery order is not appropriate. A recovery order would infringe the legitimate expectations of the recipients and would be disproportionate.

5. ASSESSMENT OF THE MEASURE

5.1. State aid within the meaning of Article 107(1) of the Treaty (ex Article 87(1) EC)

- (87) State aid is defined in Article 107(1) of the Treaty as 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 in so far as it affects trade between Member States.

- (88) The AGL relief was granted through State resources, in the form of a tax rate reduction, to companies situated in a defined part of the territory of the United Kingdom (Northern Ireland), favouring them by reducing the costs that they would normally have to bear. The recipients of the aid are involved in the extraction of aggregates or in the manufacturing of processed products, which are economic activities involving trade between Member States.
- (89) Accordingly, the Commission concluded in recital 39 of the Opening Decision that the notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty (ex Article 87(1) of the Treaty Establishing the European Community).

5.2. Assessment of the State aid

5.2.1. Legal basis

- (90) As described in recital 55, the Commission concluded that as the aid is to be considered unlawful aid, and, considering the environmental objective of the measure, the Commission should assess the compatibility of the measure according to Article 107(3)(c) of the Treaty based on the legal basis in force at the moment the aid was granted, as follows:
- (a) the 2001 Environmental Aid Guidelines; and
 - (b) the 2008 Environmental Aid Guidelines as from 2 April 2008.
- (91) The United Kingdom considers, for the reasons described in recitals 79 to 83, that the aid should not be considered unlawful aid and that it should be assessed only on the basis of the 2001 Environmental Aid Guidelines.
- (92) In addition to its findings in this regard in the Opening Decision, given the position expressed by the United Kingdom, the Commission points out that the Court of Justice has consistently held that where a positive Commission decision is challenged within the prescribed time-limits and annulled by the Court, the general principles of Union law, and in particular the principles of legal certainty and protection of legitimate expectations, do not preclude the Commission from declaring that a given aid measure constitutes unlawful and incompatible aid and from ordering recovery. In CELF I ⁽²⁰⁾, the Court stated that 'aid implemented after the Commission's positive decision is presumed lawful until the Community court decides to annul that decision. Subsequently, on the latter decision, the aid in question is deemed, in accordance with the first paragraph of Article 231 EC, not to have been declared compatible by the annulled decision, with the result that its implementation must be regarded as unlawful.' In CELF II ⁽²¹⁾ the Court confirms its findings that 'a positive decision of the Commission cannot give rise to a legitimate expectation on the part of the aid recipient, first, where that decision has been challenged in due time before the Community judicature, which annulled it, or, secondly, so long as the period for bringing an action has not expired or, where an action has been brought, so long as the Community judicature has not delivered a definitive ruling'.
- (93) The Commission, therefore, maintains its view that the AGL relief should be considered unlawful aid. Consequently, aid granted after 2 April 2008 is subject to the 2008 Environmental Aid Guidelines. Nevertheless, even, as the United Kingdom claims, the AGL relief were to be considered as existing aid, it would still have had to be adapted to the 2008 Environmental Aid Guidelines as per point 200 therein.

5.2.2. Breach of Article 110 of the Treaty

- (94) As explained in recitals 53 and 54, the Commission considered that the AGL relief not being granted to products imported into Northern Ireland from other Member States could breach Article 110 of the Treaty.
- (95) The first paragraph of Article 110 of the Treaty appears to preclude a national scheme such as the AGL relief scheme applicable in Northern Ireland which provides for a reduction of the AGL rate as regards virgin aggregate extracted in Northern Ireland by producers having entered into environmental agreements, whereas identical products imported from other Member States are excluded from the reduced rate scheme and are thus taxed at

⁽²⁰⁾ C-199/06 — CELF and ministre de la Culture and de la Communication, paragraph 63, 2008 I-00469.

⁽²¹⁾ C-1/09 — CELF and ministre de la Culture and de la Communication, paragraph 45, 2010 I-02099. See also T-116/01 — P & O European Ferries (Vizcaya) v Commission, paragraph 205, 2003 II-02957.

the full AGL rate ⁽²²⁾. Contrary to the submission of the United Kingdom described in recital 85, the fact that the reduced rate scheme is to apply to a defined area solely, does not change this interpretation. Indeed if provisions, such as the UK relief scheme, were allowed, Member States could easily circumvent the non-discrimination principle laid down in Article 110 of the Treaty.

- (96) The Court of Justice has found ⁽²³⁾, as the United Kingdom themselves claim, that ‘Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 90 EC’. Such differentiation is, however, compatible with Union law, ‘only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products’. In respect of the AGL relief, the different treatment of imported aggregates is manifestly not compliant with the requirements for differentiation as laid down by the Court.
- (97) The guiding principle in respect of Union law is that the Treaty principles should be interpreted and applied in a way that gives effect to their aims. Article 110 of the Treaty sets out specific provisions in respect of international taxation, which prohibit Member States from imposing internal taxation of a discriminatory nature. In order for a tax measure, which constitutes aid, to be valid the Commission must, therefore, be satisfied that the measure in question, firstly, does not infringe Article 110 of the Treaty, and secondly, satisfies all the relevant conditions set out in Articles 107 and 108 ⁽²⁴⁾. There is no reason to consider that an aid measure in the form of a tax relief that is applied only in a part of a Member State should constitute an exception from that interpretation.
- (98) Nevertheless, the Commission takes note that United Kingdom undertook by way of their letter from 1 April 2014 to rectify the incompatibility of the AGL relief with Article 110 of the Treaty by reimbursing the amounts collected that are incompatible with the internal market in accordance with the criteria described in recitals 99 to 103. The scope of the remedy is to enable acquisitions of aggregate into Northern Ireland from other Member States, and that paid the full rate of the AGL during the period in which AGL relief scheme operated between 2004 and 2010, to benefit from the 80 % aggregates levy credit that was available to Northern Ireland quarry operators participating in the AGL relief. The aim of introducing the proposed scheme would be to address any inequity that may have occurred.
- (99) The Commission notes the impossibility, alleged by the United Kingdom in its letter of 17 September 2012, of identifying the foreign quarries that sold aggregates subject to the AGL that were imported and used in Northern Ireland. The Commission further notes that the actual entities paying the AGL were not the foreign quarries, but the importers registered for the payment of the tax. Therefore, it appears appropriate and consistent with the Commission’s case practice ⁽²⁵⁾ that the entities actually paying the tax and that caused the aggregates to pass the tax point are the ones entitled to reimbursement. The retroactive scheme proposed ensures that anyone who provides evidence that they accounted to HMRC for the AGL at the full rate on acquisitions of aggregate that were imported into Northern Ireland from other Member States between 1 April 2004 and 30 November 2010 (‘the relevant period’), and met specific environmental criteria and specified conditions, would be eligible to claim an 80 % credit on the levy paid.
- (100) As the retroactive scheme needs to ensure that only the imports of aggregates from quarries that meet the same environmental standards as the Northern Ireland quarries that were eligible for the relief, benefit from the reimbursement mechanism, the United Kingdom had to provide for a verification mechanism. The Commission acknowledges that for the retroactive scheme to be actually applicable and not unnecessarily burdensome, the United Kingdom will not verify if the foreign quarries met the exact standards imposed on Northern Ireland quarries, as in reality they would have had no incentive to do so, but at least the environmental standards provided at the time by the Union relevant legislation transposed in the respective national legislations. The Department of Environment (DoE) Northern Ireland would assure the environmental standards of any potential claimant and would run a year-long registration period starting from the publication of the draft retroactive relief legislation in the United Kingdom.

⁽²²⁾ See Case C-221/06, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten*, paragraphs 56-73, 2007 I-09643.

⁽²³⁾ *Idem* 22.

⁽²⁴⁾ E. Szyszczak, *Research Handbook on European State Aid Law*, Edward Elgar Publishing Limited, UK, 2011, p. 287.

⁽²⁵⁾ C-43/02 (ex NN 75/01) — Luxembourg, C-7/05 — Slovenia, NN 162/A/2003 and N 317/A/2006 — Austria, C-4/09 (ex N 679/97) — France.

- (101) In order to be entitled to the relief, the claimant would have to show the quarry outside of the United Kingdom from which the aggregate originated and apply to the DoE in Northern Ireland for a certificate that environmental standards compliant with Union legislation were met by the quarry at the time. The DoE would then consult authorities in other Member States to ascertain the applicable standards and their compliance. If satisfied, the DoE would then issue a compliance certificate that would be available to HMRC ⁽²⁶⁾ ensuring it had the necessary information to process claims for repayment of levy. For applications regarding the same quarry the same certificate would be applicable.
- (102) Claims for reimbursement would have to contain the following documentary evidence: the aggregates have been acquired from a quarry from another Member State during the relevant period; the quarry has been certified by the DoE; the full rate AGL was paid; and no relief for other purposes has been claimed. Proof of acquisition could consist of appropriate commercial documentation showing the date of transaction and the origin of the aggregate. The registered taxpayers' aggregates levy account could serve as proof that the full rate AGL was paid and that no other relief was claimed. This is part of the taxpayers own records as the authorities are only provided with the total amount of the levy due on taxable aggregate commercially exploited. The Commission acknowledges the difficulties that possible claimants could have in providing such documentation due to the long period of time elapsed since the introduction of the AGL relief ⁽²⁷⁾. However, it takes note that the United Kingdom is only requiring reasonable proof available for the retroactive relief, in view of the fact that there are no public records with all such information.
- (103) The retroactive remedy proposed by the United Kingdom has the following main characteristics:
- (a) It will be widely publicised, including through advertisement in the national press in Northern Ireland and the Republic of Ireland. As the tax point for the levy on aggregate originating from a site outside the United Kingdom is when the aggregate is commercially exploited, i.e. subject to an agreement to supply in the United Kingdom, used for construction purposes or is mixed with anything other than water, possible eligible entities could be identified most accurately by relying on aggregates levy registration information in Northern Ireland. Therefore, publicising the retroactive scheme will include, amongst others, letters to each aggregates levy business registered in Northern Ireland, including anyone that might have been registered during the relevant period but who has since deregistered.
 - (b) It will be legislated for at the next feasible Finance Bill after the Commission's decision. The United Kingdom informed the Commission that work on the draft piece of legislation has already started in April 2014 while already providing the Commission with a specimen of the AGL return form. It is envisaged that the retroactive scheme could enter into force in April or May 2015.
 - (c) It will provide for a 1 year registration period with the DoE from the point at which draft legislation is published, ensuring that DoE has enough time to investigate the relevant quarries.
 - (d) It will run for 4 years from the point at which legislation is passed (i.e. after Royal Assent to the relevant Finance Bill).
 - (e) It will not be limited in terms of the fund's size.
 - (f) It will include interest payments within the retrospective reimbursement of the levy. The interest rate would be calculated in accordance with Article 9 of Commission Regulation (EC) No 794/2004 ⁽²⁸⁾.
 - (g) It will ensure payments are processed as quickly as possible (the exact period would be dependent upon the time taken by authorities in other Member States to verify the environmental credentials of quarries from which aggregate was imported into Northern Ireland).
- (104) The Commission therefore considers that the United Kingdom have undertaken to establish an appropriate instrument to remedy any discrimination which may have occurred in the past.

⁽²⁶⁾ HMRC administered the levy and the relief scheme.

⁽²⁷⁾ Businesses in the United Kingdom are normally required to keep tax records for six years for aggregates levy purposes.

⁽²⁸⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

5.2.3. Assessment under the 2001 Environmental Aid Guidelines

- (105) As indicated in recital 56, the Commission could not positively conclude on its assessment of the AGL relief under the 2001 Environmental Aid Guidelines due to the doubts it had in relation to Article 110 of the Treaty. As the United Kingdom will establish an appropriate instrument to remedy any discrimination stemming from the measure, the Commission can now conclude that the measure is compatible with the internal market on the basis of the 2001 Environmental Aid Guidelines.
- (106) The Commission notes the comments submitted by BAA in respect of the assessment of the measure in the Opening Decision and the comments from the United Kingdom in this respect. The Commission finds that no new arguments have been brought forward that had not already been taken into account by the Commission and that there are no reasons why its assessment in the Opening Decision should be altered.

5.2.4. Assessment under the 2008 Environmental Aid Guidelines

- (107) The Commission assessed in the Opening Decision the compatibility of the measure with the internal market on the basis of the 2008 Environmental Aid Guidelines. The Commission's assessment was positive in all respects except for the compliance with point 158(c) of the 2008 Environmental Aid Guidelines, i.e. with the necessity criteria which requires that the substantial increase in production costs caused by the AGL could not have been passed on to customers without leading to important sales reductions by the beneficiaries of the AGL relief in Northern Ireland.
- (108) In the Opening Decision the Commission pointed out that the United Kingdom had not taken into account properly the impact of the fact that the manufacturers of processed products from aggregates had never paid the full AGL on the average price increases in Northern Ireland as compared to price increases in Great Britain in 2001 and 2002 following the introduction of the AGL. The United Kingdom has now provided an estimate on the impact of such processed products on the data showing that, indeed, the level of the price increases points towards the impossibility to pass on the AGL (see recital 46).
- (109) Furthermore, with respect to the demonstration of sales reductions, the Commission noted that United Kingdom had not provided explanations concerning the development of the aggregates markets in Northern Ireland after 2002. The data that had been provided showed increase in production as from 2004 to 2007. As indicated in recitals 47 to 49, data from a representative sample of the aggregates producers in Northern Ireland have been provided, including production trends. However, those appear to have followed closely construction trends and were greatly affected by the economic recession starting in 2008 and thus would not be fully relevant in demonstrating sales reductions due to the introduction of the AGL.
- (110) The Commission further noted in the Opening Decision that no data had been presented in support of the submission that costs increase affected operators' turnover and reduced their profits. Despite great difficulties in collecting relevant information, the United Kingdom did provide information in support of that allegation, as described in Sections 2.3.4 to 2.3.7. In addition, the United Kingdom provided information showing the high competition which Northern Ireland aggregates producers are facing and their small margins for price increases due to the greater supply of interchangeable products, lack of vertical integration of the market, large number of producers with small market shares (see recitals 34 to 40).
- (111) The Commission also noted, in the Opening Decision, that the price elasticity of demand data pointed to the fact that the demand would be inelastic. The United Kingdom has now shown that the respective data referred to the entire United Kingdom and could not be relevant for Northern Ireland alone. The Commission acknowledges the United Kingdom's explanations that the specific elasticity for the Northern Ireland market cannot be calculated.
- (112) The Commission notes that, following BAA's comment that the economic data put forward by the United Kingdom, indicated in recitals 21 to 23 of the Opening Decision are implausible and possibly misleading, the United Kingdom provided further, more detailed data (recital 27) as regards the prices of aggregates in Northern Ireland and in Great Britain. The data shows that the AGL at the full rate would have indeed represented a much higher proportion of the selling price in an already suppressed market.

- (113) The Commission further considered why it is that the AGL could be passed on to consumers in Great Britain, but not in Northern Ireland. In this respect, the Commission acknowledges the assessment of the United Kingdom as described in recitals 34 to 40, confirmed by the Office of Fair Trading (OFT) in its report on Aggregates ⁽²⁹⁾ that the Northern Ireland aggregates market is a different geographical market than that of Great Britain and that there may be less leeway for Northern Irish aggregates producers to pass on the full levy to their customers.
- (114) The Commission also notes that the scope for price increases in Northern Ireland is also, apparently, limited to a great extent by the higher production costs they face in many areas. The United Kingdom showed that data provided by four of the top five companies within the industry revealed that profit margins are already extremely tight, with many quarries running at a loss for some years, due also to the higher costs with electricity and planning permissions (see recital 25).
- (115) The Commission notes that, although not spread by years and by type of aggregates, the data provided by the United Kingdom and described in Section 2.3.6, do show that the aggregates industry in Northern Ireland was faced with a high trade exposure, in general exceeding 10 % and reaching even 24,25 %. As pointed out by the United Kingdom, due to undeclared imports from Northern Ireland, the trade exposure could possibly even be much higher. In previous practice ⁽³⁰⁾, the Commission considered that already a trade exposure above 10 % would constitute a risk to the competitiveness of the respective industry. Moreover, the Commission acknowledged that a high trade exposure in combination with low market shares makes it impossible to pass a substantial extra cost on to consumers ⁽³¹⁾ without losing sales volumes.
- (116) The Commission however notes that the data for asphalt and sand do not follow that trend and have a much lower trade exposure. However, sand and asphalt do not follow the same trends as the other virgin or processed aggregates. In general, the figures show a decrease in imports and exports. However, sand and asphalt imports appear to have doubled in recent years. That, of course, affects the calculation of the trade exposure. Mention should be made that imported processed aggregates were never liable for the AGL, meaning that after the suspension of the AGL relief, when Northern Irish asphalt became subject to the full AGL, imported asphalt became automatically much cheaper. Therefore, the imports trend could have been influenced by that price difference.
- (117) Moreover, the Commission notes that the aggregates market for all types of virgin aggregates represents a single product market. This is due to the interchangeability of different raw aggregates and has been confirmed by the OFT in its 2012 report ⁽³²⁾ when it assessed the markets for aggregates (virgin aggregates), cement and ready-mix concrete and did not split the aggregates market. Therefore, the Commission concludes that the different trade exposure levels for sand and asphalt by comparison with the other types of aggregates are not relevant for its assessment as firstly, sand and asphalt are taken together, whereas they are in different product markets, sand belonging to the first category of crushed rock aggregate and asphalt being a processed aggregate, and, secondly, the figures are influenced by imports trends, probably relating to asphalt.
- (118) To conclude, the Commission finds that the United Kingdom has now shown that the significant increase of the production costs due to the AGL could not have been passed on without important sales reductions and that the compatibility condition provided by point 158(c) of the 2008 Environmental Aid Guidelines is met.
- (119) The Commission can thus positively conclude on the assessment of the compatibility of the measure with the Article 107(3)(c) of the Treaty on the basis of the 2008 Environmental Aid Guidelines.

6. CONCLUSION

- (120) As explained in recital 40 of the Opening Decision, the Commission found that the United Kingdom had unlawfully implemented the modified relief from the AGL in Northern Ireland in breach of Article 108(3) of the Treaty. However, the Commission, in view of the obligations for retroactive remedy undertaken by the United Kingdom, has found that the modified relief from the AGL is compatible with Article 107(3)(c) of the Treaty on the basis of the 2001 Environmental Aid Guidelines and of the 2008 Environmental Aid Guidelines.

⁽²⁹⁾ Aggregates — The OFT's reason for making a market investigation reference to the Competition Commission from January 2012.

⁽³⁰⁾ N 327/08 — Denmark, recital 64.

⁽³¹⁾ Idem 30, recital 66.

⁽³²⁾ Idem 28.

HAS ADOPTED THIS DECISION:

Article 1

The modified relief from the Aggregates Levy which the United Kingdom has implemented between 1 April 2004 and 30 November 2010 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union, on condition that the United Kingdom fulfils the undertakings set out in Article 2.

Article 2

1. To remove the discrimination suffered by companies that imported aggregates into Northern Ireland paying the full Aggregates Levy without the possibility of benefiting from the modified relief from that levy applied in Northern Ireland, the United Kingdom authorities shall implement a mechanism to retroactively reimburse 80 % of the full levy collected from importers of aggregates into Northern Ireland between 1 April 2004 and 30 November 2010.
2. The reimbursement mechanism shall provide for a one year registration period with the Department of the Environment Northern Ireland from the date of publication of the draft legislation. The reimbursement mechanism shall run for four years from the date of its entry into force.
3. The reimbursement shall be legislated for at the next feasible Finance Bill after this Decision.
4. The reimbursement mechanism shall not be limited in terms of the fund's size and will include interest payments at a rate calculated in accordance with Article 9 of Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999.
5. The United Kingdom shall widely publicise the reimbursement mechanism, including through advertisement in the national press in Northern Ireland and the Republic of Ireland.

Article 3

Within one year of the date on which this Decision is notified, the United Kingdom shall inform the Commission of the measures taken to comply with it.

It shall send the Commission yearly reports concerning the reimbursement procedure referred to in Article 2, starting from the date on which this Decision is notified until the end of the four year period referred to in Article 2(2).

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 4 August 2014.

For the Commission
Joaquín ALMUNIA
Vice-president
