JUDGMENT OF THE COURT (Third Chamber)

22 December 2008 *

In Case C-487/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 27 November 2006,

British Aggregates Association, represented by C. Pouncey, Solicitor, assisted by L. Van Den Hende, advocaat,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by J. Flett, B. Martenczuk and T. Scharf, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by T. Harris, M. Hall and G. Facenna, acting as Agents,

intervener at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2008,

gives the following

Judgment

1 By its appeal, British Aggregates Association ('BAA' or 'the appellant') seeks the annulment of the judgment delivered by the Court of First Instance of the European Communities on 13 September 2006 in Case T-210/02 *British Aggregates* v *Commission* [2006] ECR II-2789 ('the judgment under appeal'), in which the Court of First Instance dismissed BAA's application for partial annulment of Commission Decision C(2002) 1478 final of 24 April 2002 on State aid file N 863/01 — United Kingdom/Aggregates Levy ('the contested decision').

Background to the dispute

2 The factual background to the dispute is set out in the following terms in paragraphs 1 to 25 of the judgment under appeal:

'1 British Aggregates Association is an incorporated association, the members of which comprise small independent quarrying companies in the United Kingdom. It has 55 members, which operate over 100 quarry sites.

2 Aggregates are granular materials used in construction, which are chemically inert. They may be used as they are, for example as construction fill, or may be mixed with binders, such as cement (which produces concrete) or bitumen. Some naturally granular materials, such as sand and gravel, can be separated by screening. Other materials, such as hard rock, must be crushed before screening. Aggregates used for different purposes must meet appropriate specifications and the physical properties of the original material determine whether these are fit for the intended purposes. Thus, specifications for construction fill are less stringent than those for material used for road sub-bases, which are, in turn, less stringent than those for intensively-used surfaces, such as road surfacing or rail ballast. A wider range of materials may be used as aggregates where the requirements are less stringent, while materials satisfying the more demanding specifications are less widespread.

Finance Act 2001

3 Sections 16 to 49 of Part II and schedules 4 to 10 of the Finance Act 2001 ("the Act") impose a levy on aggregates ("the AGL") in the United Kingdom.

4 The AGL was brought into force on 1 April 2002, by statutory implementing regulations.

5 The Act was amended by sections 129 to 133 of and schedule 38 to the Finance Act 2002. The amended legislation lays down exemptions for spoils resulting from the

extraction of certain minerals, including slate, shale, ball clay and china clay. In addition, it provides for a phased introduction of the levy in Northern Ireland.

6 The AGL is charged at the rate of GBP 1.60 per tonne of aggregate subject to commercial exploitation (section 16(4) of the Act).

7 Section 16(2) of the Act, as amended, states that the charge to the AGL is to arise whenever a quantity of taxable aggregate is subjected, on or after the commencement date under the Act, to commercial exploitation within the United Kingdom. It therefore applies to imported aggregates in the same way as to aggregates extracted in the United Kingdom.

8 Regulation 13(2)(a) of the implementing regulations makes a tax credit available to the operator when taxable aggregate is exported or removed from the United Kingdom without further processing.

9 Section 17(1) of the Act, as amended, states:

"In this Part, 'aggregate' means (subject to section 18 below) any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it."

10 Section 17(2) of the Act provides that an aggregate is not taxable in four cases: if it is expressly exempted; if it has previously been used for construction purposes; if it has already been subject to a charge to the AGL, or, if, on the commencement date under the Act, it was not on its originating site.

11 Section 17(3) and (4) of the Act, as amended, specify certain exemptions from the levy.

12 In addition, section 18(1), (2) and (3) of the Act, as amended, lay down the processes that are exempted from the levy and the materials to which that exemption relates.

The administrative procedure and the dispute before the national court

13 By letter of 24 September 2001, the Commission received a [first] complaint … on behalf of two undertakings which had no connection with the applicant and which requested that their identity be withheld from the Member State concerned, pursuant to Article 6(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1). The complainants essentially took the view that the exclusion of certain materials from the scope of the AGL, the exemption for exports and the derogations relating to Northern Ireland constituted State aid.

14 By letter of 20 December 2001, the United Kingdom of Great Britain and Northern Ireland notified an aid scheme to the Commission with the title "phased introduction of the aggregates levy in Northern Ireland".

15 By letter of 6 February 2002, the Commission sent a summary of the first complaint to that Member State and invited it to submit comments on the complaint and to provide further information relating to the AGL, which it did by letter of 19 February 2002.

16 On 11 February 2002, the applicant brought an action for judicial review before the High Court of Justice … The grounds of the action included infringement of the Community rules relating to State aid. By judgment of 19 April 2002, the High Court of Justice dismissed the action, but gave the applicant leave to appeal before the Court of Appeal … On [BAA's] lodging of its appeal, the Court of Appeal ordered the proceedings to be stayed, in view of the bringing of this action before the Court of First Instance of the European Communities.

17 By letter of 15 April 2002, the applicant had meanwhile submitted a complaint to the Commission against the AGL... It essentially argued that the exclusion of certain materials from the scope of the AGL and the exemption in favour of exports constituted State aid. The derogations concerning Northern Ireland, which had been notified by the United Kingdom, were incompatible with the common market.

The contested decision

18 On 24 April 2002, the Commission adopted [the contested decision] not to raise objections against the AGL …

19 On 2 May 2002, the contested decision was communicated to the applicant by the United Kingdom authorities. It was formally notified to the applicant by the Commission by letter of 27 June 2002.

20 In its decision (point 43), the Commission found that the levy did not comprise any elements of State aid within the meaning of Article 87(1) EC, inasmuch as its scope was justified by the logic and nature of the tax system. It also held that the exemption for Northern Ireland, which was notified to the Commission, was compatible with the common market.

21 In its description of the scope of the AGL, the Commission noted, in essence, that the levy is to be applied to virgin aggregate, which is "defined as aggregate produced from naturally occurring mineral deposits on its first extraction" and consists of "fragments of rock, sand and gravel that may be used in their natural state or after mechanical processing such as crushing, washing and sizing" (points 8 and 9). With respect to excluded materials and the objectives pursued, it stated in points 11 to 13 of the contested decision:

"The AGL will not be levied on materials that arise as by-products or waste products from other processes. According to the United Kingdom authorities, such products include slate waste, china clay waste, colliery spoil, ash, blast furnace slag, waste glass and rubber. Nor will the AGL be levied on recycled aggregate, which includes rock, sand or gravel that has been used at least once (normally for construction or civil engineering purposes).

According to the United Kingdom authorities, the purpose of excluding such products from the scope of the AGL is to encourage their use as construction materials and reduce the need for unnecessary extraction of virgin aggregate, thereby encouraging resource efficiency.

The initial projections of the United Kingdom authorities are based on the assumption that the AGL will reduce demand for virgin aggregates by an average of 20 million tonnes per year, out of a total yearly demand within the United Kingdom in the region of 230 to 250 million tonnes."

22 As regards the assessment of the scope of the AGL, the contested decision states in points 29 and 31:

"The Commission notes that the AGL will only be levied on the commercial exploitation of rock, sand and gravel when used as aggregate. It will not be levied on these materials when used for purposes other than as an aggregate. The AGL will be levied only on virgin aggregate. It will not be levied on aggregates extracted as a by-product or waste from other processes (secondary aggregates), nor will it be levied on recycled aggregates. Accordingly, the Commission considers that the AGL concerns only certain sectors and certain undertakings. The Commission notes, therefore, that it falls to be considered whether the scope of the AGL is justified by the logic and nature of the system of taxation.

… The United Kingdom, in the exercise of its freedom to determine its national tax system, has designed the AGL in such a way as to maximise the use of recycled aggregate and other alternatives to virgin aggregate, and to promote the efficient use of virgin aggregate, which is a non-renewable natural resource. The

environmental costs of aggregate extraction that the United Kingdom seeks to address through the AGL include noise, dust, damage to biodiversity and visual amenity."

23 The Commission concluded from that (in point 32) that "the AGL is a specific tax, with a very narrow scope, which has been defined by the Member State in view of the specific features of the relevant sector" and that "the structure and scope of the tax reflect the clear distinction between the extraction of virgin aggregates, bearing with it undesirable environmental consequences, and the production of secondary or recycled aggregates, which makes an important contribution to the treatment of rock, gravel and sand incidentally arising from excavations or from other works or treatments lawfully carried out for different purposes".

24 With respect to the exemption for aggregate that is exported without processing within the United Kingdom, recital 33 of the contested decision states:

"… such an arrangement is justified by the fact that aggregate in the United Kingdom may be exempted if it is used for exempt processes (for example, the manufacture of glass, plastics, paper, fertiliser and pesticides). Since the United Kingdom authorities have no control over the use of aggregate outside their jurisdiction, the exemption for exports is necessary in order to provide legal certainty to aggregates exporters and to avoid imposing an unequal treatment on exports of aggregate that would otherwise qualify for an exemption within the United Kingdom."

25 In point 34, the Commission states:

> "It is in the nature and general scheme of such a levy that it should not apply to secondary aggregates or to recycled aggregates. The imposition of a levy on the extraction of virgin aggregates will contribute to a reduction of the extraction of primary aggregate and to reductions in the use of non-renewable resources and negative environmental consequences. The Commission considers accordingly that any advantages arising for certain undertakings from the definition of the scope of the AGL are justified by the nature and general scheme of the system of taxation concerned."'

The action before the Court of First Instance and the judgment under appeal

3 By application lodged at the Registry of the Court of First Instance on 12 July 2002, BAA brought an action for the partial annulment of the contested decision.

4 By order of 28 November 2002, the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission.

5 In support of its action, BAA pleaded, first, infringement of Article 87(1) EC, secondly, a failure to state adequate reasons, thirdly, infringement by the Commission of its duty to initiate the formal investigation procedure and, fourthly, failure by the Commission to carry out its obligations in relation to the preliminary stage of the procedure.

6 Without raising a formal objection of inadmissibility, the Commission had challenged the admissibility of the action, arguing that the contested decision was not of 'individual' concern to BAA for the purposes of the fourth paragraph of Article 230 EC.

7 By the judgment under appeal, the Court of First Instance declared the action to be admissible on the grounds set out in paragraphs 45 to 68 of that judgment. The Court of First Instance also rejected the first and second pleas, which it examined together, and subsequently the third and fourth pleas, for the reasons set out respectively in paragraphs 104 to 156, 163 to 172 and 173 to 179 of the judgment under appeal. The Court of First Instance accordingly dismissed the action in its entirety.

Forms of order sought by the parties to the appeal

8 BAA claims that the Court should:

— dismiss the cross-appeal;

— set aside the judgment under appeal;

— annul the contested decision, save as regards the exemption for Northern Ireland;

— order the Commission and the intervener to pay the costs of the proceedings at first instance and on appeal.

9 The Commission contends that the Court should:

— set aside the judgment under appeal and decide that the application was inadmissible; failing which

— dismiss the appeal as inadmissible and/or unfounded;

— order BAA to bear the costs of the proceedings at both instances.

10 The United Kingdom submits that the Court should dismiss the appeal in its entirety.

The cross-appeal

11 As the cross-appeal brought by the Commission relates to the admissibility of the action brought by BAA before the Court of First Instance, which is a preliminary issue in relation to those concerning the merits raised by the main appeal, it is appropriate to examine this issue first.

12 The Commission submits that the Court of First Instance erred in law in declaring the action to be admissible. The plea is divided into two parts.

The first part of the plea of inadmissibility

Arguments of the parties

13 According to the Commission, the Court of First Instance erred in law by failing to have regard to the fact that the AGL is a measure of general application. That measure, it argues, establishes a fiscal levy the conditions of which are defined in objective and abstract terms and is thus a normative act of general application which affects a potentially unlimited number of operators in the United Kingdom.

14 Where an aid measure is of direct and general application, the decision by which the Commission approves such a measure is itself of general application and cannot

therefore, contrary to what the Court of First Instance held, be a measure of 'individual' concern to the beneficiaries of the measure or their competitors within the terms of the fourth paragraph of Article 230 EC.

15 The Commission points out in this regard that when, as in the present case, an applicant challenges the soundness of the decision not to raise objections, the case-law makes the admissibility of that challenge subject to the condition that the applicant's position on the market is significantly affected by the aid which is the subject of the contested decision. By contrast, where an applicant intends to challenge a decision not to open the formal investigation procedure in order to protect its procedural rights under Article 88(2) EC, it suffices that it is a 'party concerned', within the meaning of that provision, in order to be able to challenge that decision (see, to that effect, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17).

16 A stricter test than that of the significant effect on an applicant's market position should be applied for the purpose of establishing whether the applicant is individually concerned where, as in the present case, the aid scheme is of a general character (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15; Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraphs 39 to 41; and Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraph 45).

17 The Commission also points out that, notwithstanding the general character of the measure, the Court of First Instance, at paragraphs 58 to 66 of the judgment under appeal, relied entirely on the alleged effects of the AGL on the competitive situation of three of the members of BAA. The choice of those three members, the Commission submits, is not justified by any circumstance peculiar to them.

18 Moreover, the Commission goes on, the members of BAA are not the only undertakings which are negatively affected by the levy. The AGL impacts negatively on many other undertakings and, because of the objective and abstract way in which the obligation to pay the levy is defined, the number of undertakings affected is potentially unlimited. Accordingly, the decision approving the AGL cannot be said to be of individual concern to any of the undertakings affected.

19 Were the approach taken by the Court of First Instance to be confirmed, this would, according to the Commission, have considerable systemic implications in so far as Commission decisions regarding alleged aid measures of general application, particularly in the form of tax measures, would then become challengeable by potentially unlimited numbers of individuals, to the point of depriving the concept of 'individual concern' in the fourth paragraph of Article 230 EC of its useful meaning.

20 For its part, BAA notes at the outset that the Court of First Instance concluded that it satisfied the test that its position on the market in question should be significantly affected. The Court of First Instance therefore did not have to examine whether the fact that it was a 'concerned party' for the purposes of Article 88(2) EC was sufficient for the action to be declared admissible even though it had raised pleas other than that alleging failure on the part of the Commission to meet its obligation to initiate the formal investigation procedure.

21 According to BAA, the Court of First Instance did not err in law on the ground that it failed to take account of the nature of the AGL as a measure of general application. The case-law, it argues, does not draw any distinction according to whether the measure in question is general or individual in nature when it comes to the examination of the admissibility of an action for annulment brought by a competitor against a decision taken pursuant to Article 88(3) EC.

22 Furthermore, if the character of an aid measure as a measure of general application or as an individual decision were able to constitute a criterion governing the admissibility of the action brought by one of the beneficiaries of that measure, this cannot be the case in respect of an action brought by a competitor. The character of an aid measure cannot impact on the number of competitors that are affected or on the way in which they are affected. Thus, according to BAA, an 'individual' subsidy paid to one specific undertaking may affect any number of competitors, all of which could be affected in their capacity as competitors.

23 The above judgments in *Kwekerij van der Kooy and Others* v *Commission* and *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission*, BAA submits, are obviously not pertinent inasmuch as they concerned actions brought by potential beneficiaries against decisions under Article 88(2) EC. In the above judgment in *Kahn Scheepvaart* v *Commission*, the effects that the aid measure might have had on the applicant's competitive position were not established, whereas, in the present case, the Court of First Instance established that the impact of the measure in question on the competitive position of the members of BAA was significant.

Findings of the Court

24 By the first part of this plea, the Commission is challenging the appraisal by the Court of First Instance as to the admissibility of the action in so far as that Court concluded that the contested decision is of 'individual' concern to BAA within the terms of the fourth paragraph of Article 230 EC, even though the general scope of that decision ought to have led the Court of First Instance to conclude that BAA was not individually concerned by it.

25 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.

26 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision (see, inter alia, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107; *Cook* v *Commission*, paragraph 20; *Matra* v *Commission*, paragraph 14; Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33; and Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 36).

27 As the present action concerns a Commission decision on State aid, it must be borne in mind that, in the context of the procedure for reviewing State aid provided for in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see *Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34; and *Germany and Others* v *Kronofrance*, paragraph 37).

28 It follows that, where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community Courts. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35 and the case-law cited there, and *Germany and Others* v *Kronofrance*, paragraph 38).

29 The Court has had occasion to observe that such parties concerned are any persons, undertakings or associations whose interests might be affected by the granting of aid, that is, in particular competing undertakings and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 41; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36; and *Germany and Others* v *Kronofrance*, paragraph 39).

30 On the other hand, if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as 'concerned' within the meaning of Article 88(2) EC cannot suffice for the action to be considered admissible. It must then demonstrate that it enjoys a particular status within the meaning of *Plaumann* v *Commission*. That would in particular apply where the applicant's market position would be substantially affected by the aid to which the decision at issue relates (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37; and *Germany and Others* v *Kronofrance*, paragraph 40).

31 Contrary to the view taken by the Commission, the general scope of the contested decision, which results from the fact that it is designed to authorise a tax scheme which

applies to a category of operators defined in a general and abstract manner, is not such as to constitute a barrier to the application of the case-law cited above.

32 The Court has ruled on numerous occasions that the fact that a measure is, by its nature and scope, a provision of general application inasmuch as it applies to the traders concerned in general, does not of itself prevent it being of individual concern to some of them (see, to that effect, Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853, paragraph 19, and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 58).

33 With regard to the admissibility of an action seeking the annulment of a general aid scheme, the Court has, in particular, recently ruled that an association set up to promote the collective interests of a category of persons, and which sought annulment of the decision contested in the substantive proceedings, could be regarded as being individually concerned to the extent to which 'the position of its members in the market [was] substantially affected' by the aid scheme which was the subject of the contested decision (see *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 70).

34 In addition, as the Advocate General has noted in points 40 to 43 of his Opinion, the view proposed by the Commission, to the effect that a stricter criterion than that of the substantial effect on the market position in question must be applied if the contested decision relates to a general aid scheme, cannot be inferred from the judgments cited by the Commission.

35 It follows that, irrespective of whether the aid measure in question is individual or general in nature, an applicant must, when bringing into question the soundness of the decision assessing the aid as such, demonstrate that he has a 'special status' within the

meaning of *Plaumann* v *Commission*, which will be the case, inter alia, where the position of the applicant on the market in question is substantially affected by the aid which is the subject of the decision in question.

36 Consequently, by insisting on evidence that BAA's position on the market in question was substantially affected by the adoption of the contested decision, the Court of First Instance applied entirely correctly the case-law referred to in paragraph 30 of the present judgment.

37 Indeed, in paragraph 54 of the judgment under appeal, the Court of First Instance held, without being contradicted on this point by the Commission, that BAA was not merely seeking to challenge the Commission's refusal to initiate the formal investigation procedure but was also calling into question the merits of the contested decision.

38 The Court of First Instance also acted correctly in law when, with a view to verifying compliance with the condition that the undertaking in question must be individually concerned within the meaning of the fourth paragraph of Article 230 EC, it examined whether BAA had set out in a relevant manner the reasons why the AGL was liable to have a substantial effect on the position of at least one of its members on the market in aggregates.

39 Contrary to the assertions of the Commission, and as the Court of First Instance correctly pointed out in paragraph 47 of the judgment under appeal, an action brought by an association acting in place of one or more of its members who could themselves have brought an admissible action will itself be admissible (see, inter alia, to that effect, the order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraphs 46 and 47).

40 It is also necessary to reject the Commission's plea concerning the allegedly arbitrary and unjustified choice of the three members of BAA the competitive situation of which was taken into consideration for the purpose of determining whether the appellant was to be regarded as being 'individually' concerned within the meaning of the fourth paragraph of Article 230 EC.

41 In the light of the foregoing, the first part of the plea of inadmissibility raised by the Commission must be rejected.

The second part of the plea of inadmissibility

Arguments of the parties

42 The Commission submits that the Court of First Instance erred in law by failing to examine properly whether the competitive situation of BAA's members had been significantly affected in so far as that Court took the view that that condition had been satisfied on the basis of isolated information and without taking account of the overall market situation.

43 So far as concerns the three undertakings to which BAA refers, the Court of First Instance found in each case that a certain part of their production was subject to AGL and that the taxed products were in competition with other products which were not taxed. However, the Court of First Instance failed to explain why the undertakings concerned were 'significantly affected in their competitive situation' within the meaning of the case-law. In particular, the Court of First Instance failed to indicate the

consequences of this competition in terms of price, market share or profitability of the undertakings, contrary to the requirements following from the case-law, which states that an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the recipient undertaking.

44 According to the Commission, it is possible that the market share for products which fall under the AGL might decline in comparison with other products and sectors and that it is not unlikely that such an overall decline of market share may also affect all undertakings in the United Kingdom which produce aggregates. However, that effect would be sectoral in nature and would not be due to any particular circumstances specific to the individual undertaking compared with other undertakings in the sector concerned. For those reasons, the interpretation of the Court of First Instance that an undertaking may be significantly affected even if its situation is in no way different from that of numerous other undertakings is not in accordance with the fourth paragraph of Article 230 EC, as interpreted by the Court of Justice.

45 BAA submits that, even if it were to be concluded that the admissibility test applicable to this case is the stricter test requiring that BAA's position on the market in question be substantially affected, which is that accepted by the Court of First Instance, the latter was correct to conclude that BAA's members are significantly affected. BAA submitted specific information on the impact of the AGL on the competitive position of some of its members, and this information was relied on by the Court of First Instance for the purpose of concluding that the competitive situation of BAA's members had been significantly affected. The assessment made by the Court of First Instance is a matter of fact which cannot be reviewed by the Court of Justice in the context of an appeal.

Findings of the Court

46 By the second part of its plea of inadmissibility, the Commission challenges the analysis which formed the basis for the finding by the Court of First Instance that the appellant's market situation had been significantly affected. The Commission essentially criticises the Court of First Instance on the ground that it failed to indicate the reasons why the undertakings in question were significantly affected in their competitive situation and, in particular, on the ground that it failed to indicate the consequences of this competition in terms of price, market share or profitability of the undertakings, contrary to the requirements following from the case-law, which states that an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid.

47 It must be pointed out that, with regard to the determination of a 'significant effect on the position' of the appellant on the market in question, the Court has had occasion to clarify that the mere fact that a measure may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure cannot in any event suffice for that undertaking to be regarded as being individually concerned by that measure (see, inter alia, Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 32).

48 Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see, inter alia, *Spain* v *Lenzing*, paragraph 33).

49 In the present case, contrary to what the Commission claims, the Court of First Instance did not confine itself to confirming that there was a mere competitive relationship between the members of BAA and the undertakings which were not subject to the AGL.

50 It is clear from paragraphs 55 to 62 of the judgment under appeal that the Court of First Instance based itself on the following factors before concluding, in paragraph 63 of that judgment, that the State measure at issue was capable of affecting the competitive position of a number of the appellant's members and that that 'effect was significant':

— the purpose of the AGL is to transfer some of the demand for virgin aggregates to other products, which are exempted in order to encourage their use as aggregates and to reduce the extraction of virgin aggregates. According to the projections of the United Kingdom authorities, which are set out in the contested decision and are not the subject of dispute, the AGL will allow demand for virgin aggregates to be reduced by an average of around 8% to 9% a year (paragraph 55 of the judgment under appeal);

— according to information which neither the Commission nor the United Kingdom suggests is incorrect, a number of BAA's members, including Torrington Stone, Sherburn Stone Co. Ltd and Cloburn Quarry, are in direct competition with producers of exempted materials, which have become competitive as a result of the introduction of the AGL (paragraph 58 of the judgment under appeal);

— Torrington Stone, which operates a quarry in Devon, produced uncut building stone and hedging stone, sold at an average of GBP [confidential] per tonne, ex works, and cut building stone, sold at an average price of GBP [confidential] per tonne, ex works. Those products represent 3% to 5% of the volume of extracted rock. The remaining 95% is accounted for by secondary products, in this case general fills (sold at an average price of GBP [confidential] per tonne, ex works) and crushed fills (sold at an average price of GBP [confidential] per tonne, ex works).

Only cut building stone is not subject to the AGL. Prior to the introduction of the levy, the fills were sold within a range of some 50 kilometres. Since its introduction, they have been in competition in that area with secondary material coming in particular from china clay quarries situated over 80 kilometres away, which are not subject to the AGL (paragraph 59 of the judgment under appeal);

— Sherburn Stone Co. Ltd, which operates, inter alia, a quarry in Yorkshire, produced material with a high technical specification for the production of high-strength concrete. Those products, which account for 50% of rock extracted and have an average selling price of GBP [confidential] per tonne, ex works, are subject to the AGL. From the remaining 50% of rock extracted, Sherburn Stone Co. Ltd produces particles and clayey residues, which can be used for ballast purposes and are sold at an average price of GBP [confidential] per tonne, ex works. Since the introduction of the AGL, the sale of those by-products has become increasingly difficult and their stocks have become unmanageable (paragraph 60 of the judgment under appeal);

— Cloburn Quarry, which operates a quarry in Scotland, had oriented its production towards higher-grade aggregates which can bear higher transport costs. All of its products are subject to the AGL. Red chippings and high specification granite, produced by that company and used inter alia as ballast and in high-specification concrete and with asphalt, are sold at an average price of GBP [confidential] per tonne, ex works, and are not subject to competition from untaxed materials that are by-products of china clay or slate production. By contrast, the 25% of secondary products extracted from Cloburn Quarry, which consist mainly of particles and are sold at an average price of GBP [confidential] per tonne, ex works, for use as bulk fill, are in competition with untaxed materials (paragraph 61 of the judgment under appeal);

— the activity of those companies on the aggregates market is more than merely insignificant in relation to their principal activity, and it is clear from the figures provided above that the commercial exploitation of by-products as aggregates represents a relatively important part of the activity of those companies (paragraph 62 of the judgment under appeal).

51 Likewise, the Court of First Instance relied on the following factors for the purpose of concluding that the State measure in dispute, in so far as it concerned the exemption of exports, was liable to affect the competitive position of certain of BAA's members and that that impact was substantial:

— BAA argues that that exemption has a negative impact on the competitive position of those of its members which export very little or not at all, unlike their larger competitors on the United Kingdom market. The exemption for exports confers on those competitors, and in particular the operator of the Glensanda Quarry, which is the source of over 90% of exported aggregates, the advantage of having no losses to recoup through the price of its products sold in the United Kingdom. By contrast, the appellant's members are led to sell their taxed aggregates at a loss and to recoup the cost of the AGL across all their products. (paragraph 65 of the judgment under appeal);

— the competitive position of at least one of BAA's members is liable to be substantially affected by the exemption for exports, inasmuch as BAA states, without, being challenged by the Commission or the intervener, that, on the market for granite with a high technical specification used inter alia as railway ballast (subject to the AGL), Cloburn Quarry is in direct competition with Glensanda Quarry, which is likewise located in Scotland. As BAA observes in its reply, without being challenged by the other parties, Glensanda Quarry exports 50% of its production. The exemption for exports of materials of a low technical specification thus offers the company which operates that quarry a competitive advantage on the market for aggregates with a high technical specification in Scotland, in that, unlike

Cloburn Quarry, which sells its aggregates with a low technical specification in the United Kingdom at a loss and recovers that loss through the prices of materials with a high technical specification, the total amount of the AGL which Glensanda Quarry has to pass on to its customers on the national market is proportionally reduced by 50% in comparison with the amount which a non-exporting competitor passes on (paragraph 66 of the judgment under appeal).

52 It follows that, far from confining itself to establishing that there was a mere competitive relationship between the members of BAA and the undertakings not subject to the AGL, the Court of First Instance did indeed examine whether the contested State measure was liable to affect the competitive position of certain of BAA's members and whether that impact was substantial.

53 Contrary to what the Commission asserts, it does not follow from the Court's case-law that a special status of this kind, which distinguishes a 'person other than the persons addressed', within the meaning of *Plaumann* v *Commission*, from any other economic operator, must necessarily be inferred from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can have an adverse effect on the competitive situation of an operator in other ways too, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid. Similarly, the seriousness of such an effect may vary according to a large number of factors such as, in particular, the structure of the market concerned or the nature of the aid in question. Demonstrating a substantial adverse effect on a competitor's position on the market cannot, therefore,

simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance (*Spain* v *Lenzing*, paragraphs 34 and 35).

54 The Commission also criticises the Court of First Instance on the ground that it held that BAA was significantly affected, even though its position was not absolutely different from that of numerous other undertakings, whereas that Court ought to have applied a more stringent test in order to establish that a general aid scheme such as that here in issue had an impact on the appellant's competitive position.

55 However, as has been pointed out in paragraph 35 of the present judgment, it follows from well-established case-law that, irrespective of whether the aid measure in question is individual or general in nature, an applicant must, when bringing into question the soundness of the decision assessing the aid as such, demonstrate that he has a 'special status' within the meaning of *Plaumann* v *Commission*, which will be the case, inter alia, where the position of the applicant on the market is substantially affected by the aid which is the subject of the decision in question (see, inter alia, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 70).

56 If an effect of that kind is established, the fact that an undefined number of other competitors may, in appropriate circumstances, allege that they have suffered similar harm does not constitute an obstacle to the admissibility of the action brought by the appellant undertaking. As the Advocate General has, moreover, noted in point 65 of his Opinion, the AGL is specifically designed to have an effect on the structure of the market in question by transferring some of the demand for aggregates from virgin aggregates to alternative products, with the result that that levy is specifically intended to affect the competitive position of undertakings active on the market.

57 The Court of First Instance thus did not err in law in its examination of the condition requiring that the appellant must have been individually concerned.

58 In the light of the foregoing, the second part of the plea relating to inadmissibility must be rejected. The cross-appeal must consequently be dismissed in its entirety.

The main appeal

59 BAA raises six pleas in support of its appeal. It claims that the Court of First Instance erred in law:

— by assessing the existence of State aid in a non-objective way;

— by applying the wrong 'standard of review';

— by assessing incorrectly the 'nature and general scheme' of the AGL;

— in relation to the export exemption;

— by confirming that the Commission was under no obligation to initiate a formal investigation procedure;

— by finding that the contested decision was sufficiently reasoned.

The first plea in law: incorrect assessment as to the existence of State aid

60 BAA puts forward three grounds in support of this plea. First, it argues that the Court of First Instance did not apply an objective concept, as, it claims, is evident in particular from paragraph 117 of the judgment under appeal. Next, the Court of First Instance, in paragraphs 120 and 121 of the judgment under appeal, erred in distinguishing the present case from the situation at issue in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365. Finally, BAA argues that the Court of First Instance erred in law by accepting that an environmental levy is non-selective because it is applied to a specific sector, without providing a clear definition of that sector.

The first and second parts of the first plea

61 As the first and second parts of the first plea are closely connected, it is appropriate to examine them together.

— Arguments of the parties

62 BAA takes the view that the Court of First Instance assessed the existence of State aid in a non-objective way. According to well-established case-law, a tax measure applied selectively to sectors that are comparable with regard the objective pursued must qualify as State aid (see, to that effect Case C-75/97 *Belgium* v *Commission*[1999] ECR I-3671, paragraph 31).

63 The fact that a tax measure pursues objectives of general policy does not prevent that measure from qualifying as State aid. Consequently, distinctions made by an environmental levy cannot avoid being qualified as State aid unless they are justified by the environmental logic inherent in the levy.

64 According to BAA, the Court of First Instance put forward a different approach in paragraph 117 of the judgment under appeal, confirmed in paragraphs 115 and 128 thereof, from which it follows that there is no selectivity if a Member State imposes environmental levies on some sectors or on certain designated goods or services, but does not impose those levies on all similar activities which have a 'comparable impact' on the environment or in all the sectors involving the operation of quarries and mines having the 'same impact' on the environment.

65 In other words, BAA argues, the Court of First Instance explicitly found that the taxed and untaxed undertakings were in a situation that was comparable in the light of the environmental objective being pursued by the measure in question, but none the less did not conclude that those differences resulted in selectivity and State aid, even if, as it held in paragraph 128 of the judgment under appeal, that choice is based on a desire to maintain the international competitiveness of certain sectors.

66 The Court of First Instance, BAA also claims, erred in law in paragraphs 120 and 121 of the judgment under appeal in distinguishing the present case from the situation at issue in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, which concerned a rebate of tax on the consumption of electricity and natural gas granted to certain undertakings.

67 BAA argues, in that regard, that the only thing that counts is the effect of a tax measure and that there is no difference between exemption from a tax defined broadly and exclusion from the application of a tax defined narrowly. The effect is the same in that it favours certain undertakings or the production of certain goods.

68 The appellant reinforces its argument by reaffirming that quarries and mines which extract materials such as slate, china clay, ball clay, coal and lignite have been excluded from the scope of the AGL with the specific purpose of protecting their international competitiveness.

69 The Commission and the United Kingdom reject those heads of criticism.

70 The assertion that a tax measure which is applied selectively to comparable sectors must be classified as 'State aid' is, they argue, supported neither by paragraph 31 of the judgment in Case C-75/97 *Belgium* v *Commission* nor by general case-law. An environmental levy such as the AGL imposes an exceptional duty and does not confer a selective advantage on certain undertakings, but imposes rather a selective disadvantage on producers of aggregates. No undertakings in the United Kingdom other than producers of aggregates are subject to that levy, with the result that that 'advantage' is not selective in any meaning of the term.

71 According to the United Kingdom, an environmental levy is to be distinguished from a measure that gives relief from taxation inasmuch as the former imposes an exceptional burden on a particular sector, whereas the latter provides a selective advantage in the form of an exception to the system of burdens normally imposed on undertakings.

72 The Court of First Instance, it argues, found that the alleged inconsistencies were justified by the logic and objectives of the AGL as determined by the United Kingdom. It is not for the Commission to substitute itself for the Member State in regard to the definition of the environmental objectives to be pursued by means of an autonomous fiscal measure such as an environmental levy.

73 Contrary to what BAA argues, the Court of First Instance did not, in paragraph 117 of the judgment under appeal, introduce a non-objective concept of State aid, but referred in particular to the content of Article 6 EC, which provides that environmental protection requirements must be integrated into the Community policies referred to in Article 3 EC, which include competition policy.

74 The Commission adds that, contrary to what BAA alleges, the Court of First Instance did not seek, in paragraph 115 of the judgment under appeal, to justify the exemption from the AGL enjoyed by certain products or undertakings which, according to the objectives pursued by the fiscal measure in question, ought to have been subject to that levy. Rather, the Court of First Instance was referring to the prerogative of each Member State to define, in the current state of Community law, the priorities in terms of environmental protection which it wishes to pursue through the imposition of eco-taxes.

75 In response to the points of criticism levelled by BAA at paragraph 128 of the judgment under appeal, the Commission points out that the question as to whether a measure constitutes State aid must be examined on the basis of the effects of the measure, and not by reference to its causes or aims. Moreover, the appellant once again overlooks the

fact that a tax is a disadvantage, rather than an advantage, which explains why Member States remain in principle free to refrain from imposing exceptional fiscal burdens on their undertakings.

76 Furthermore, the Court of First Instance acted correctly when it distinguished the present case from the facts of *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*. Having reference in particular to the environmental objectives of the measure at issue in *Adria-Wien*, the limitation of the rebate to the manufacturing sector, to the exclusion of the services sector, could not be justified on the basis of the nature or the general scheme of the system.

77 There is, the Commission submits, no such contradiction in the present case. While it was not contested in the present case that mining for coal or lignite could have certain environmental implications, it cannot be assumed that those implications are identical to those of aggregates quarrying and therefore necessarily require the imposition of an identical tax burden. The exclusion of such activities from the scope of the AGL is consistent with the overall policy scheme which the latter pursues.

78 The United Kingdom adds that *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* concerned selective relief from an environmental levy which would otherwise have been applicable. In other words, it was a selective advantage, whereas the exclusion of certain sectors and activities from the scope of the AGL is a product of the logic and scope of the latter and is not an exemption from an otherwise applicable tax.

— Findings of the Court

79 By the first and second parts of this plea, BAA argues that the judgment under appeal disregards Article 87(1) EC in so far as the Court of First Instance, notwithstanding the finding that the undertakings subject to the AGL and those which are not subject to it are, so far as the environmental objective pursued by that levy is concerned, in a comparable situation, found that the disputed measure was not selective. BAA refers, in this connection, to paragraphs 115, 117 and 128 of the judgment under appeal. It also takes issue with paragraphs 120 and 121 of that judgment, in which, it argues, the Court of First Instance incorrectly distinguished the present case from the facts of *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*.

80 The paragraphs of the judgment under appeal challenged by this part of the first plea are worded as follows:

‘115 It must be emphasised in that regard that it is open to the Member States, which, in the current state of Community law, retain, in the absence of coordination in that field, their powers in relation to environmental policy, to introduce sectoral environmental levies in order to attain those environmental objectives referred to in the preceding paragraph. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or services, and cannot be seen as part of an overall system of taxation which applies to all similar activities which have a comparable impact on the environment, does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage.

…

117 In that legal framework, since environmental levies constitute by their nature specific measures adopted by the Member States as part of their environmental policies, a field in which they retain their powers in the absence of measures for harmonisation, it is for the Commission, when assessing an environmental levy for the purposes of the Community rules on State aid, to take account of the environmental protection requirements referred to in Article 6 EC. That article provides that those requirements are to be integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market.

…

120 This case can be distinguished from the dispute which formed the subject-matter of *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, on which the applicant relies. In that judgment, the Court of Justice was called upon to consider, not the definition of the material scope of an environmental levy, as in the present case, but the partial exemption from payment of such a levy, imposed in that case under the Strukturanpassungsgesetz (Austrian Structural Adjustment Law) of 1996, on the consumption of natural gas and electricity, which was granted only to undertakings which were involved in the manufacture of goods.

121 In that judgment, the distinction at issue thus did not relate to the type of product subject to the environmental levy in question, but to industrial consumers, depending on whether or not they carried on their activity in the primary and secondary sectors of the national economy. The Court of Justice held that the

granting of advantages to undertakings whose main activity was the manufacture of goods was not justified by the nature or general system of the tax scheme imposed under the Strukturanpassungsgesetz. It essentially held that, since energy consumption by the sector of undertakings which manufacture goods and by that of undertakings supplying services was equally damaging to the environment, the ecological considerations underlying the Strukturanpassungsgesetz did not justify each of those sectors being treated differently. It was in those circumstances that the Court of Justice rejected the argument of the Austrian Government, based on the philosophy that the competitiveness of undertakings manufacturing goods required to be maintained, that the partial reimbursement of the environmental taxes at issue to those undertakings alone was justified by the fact that they were proportionately more affected than the other undertakings by those taxes (paragraphs 44, 49 and 52 of the judgment).

…

128 In the first place, it is clear that materials exploited commercially for use otherwise than as aggregates do not fall within the sector which is subject to the AGL. Contrary to what the applicant contends, their exemption therefore does not represent a derogation in any way from the system of the environmental tax under consideration. In particular, the decision to impose an environmental levy only in the aggregates sector, and not generally in all the sectors involving the operation of quarries and mines having the same impact on the environment, falls within the power of the Member State in question to set its priorities in the economic, fiscal and environmental fields. Such a choice, even if based on a desire to maintain the international competitiveness of certain sectors, does not therefore undermine the AGL's consistency with the environmental objectives pursued (see paragraph 115 above).'

81 With a view to addressing the grounds raised by the appellant, it is appropriate to bear in mind the Court's case-law on the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid (Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54).

82 Article 87(1) EC prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid. In order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation (see, inter alia, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 47; *Portugal* v *Commission*, paragraph 54; and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 46).

83 According to equally well-established case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of which they form part (see, to that effect, inter alia, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 42, and *Portugal* v *Commission*, paragraph 52).

84 The Court has also held on numerous occasions that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 87 EC (see, inter alia, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23; and Case C-75/97 *Belgium* v *Commission*, paragraph 25).

85 Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79; Case C-241/94 *France* v *Commission*, paragraph 20; Case C-75/97 *Belgium* v *Commission*, paragraph 25; and Case C-409/00 *Spain* v *Commission*, paragraph 46).

86 In the light of that case-law, the unavoidable conclusion is that the Court of First Instance disregarded Article 87(1)EC, as interpreted by the Court of Justice, by holding, in paragraph 115 of the judgment under appeal, that Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they decide to subject to an environmental levy, with the result that the fact that such a levy does not apply to all similar activities which have a comparable impact on the environment does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage.

87 As the Advocate General noted in point 98 of his Opinion, that approach, which is based solely on a regard for the environmental objective being pursued, excludes a priori the possibility that the non-imposition of the AGL on operators in comparable situations in the light of the objective being pursued might constitute a 'selective advantage', independently of the effects of the fiscal measure in question, even though Article 87(1) EC does not make any distinction according to the causes or objectives of State interventions, but defines them on the basis of their effects.

88 That conclusion is all the more cogent in the light of paragraph 128 of the judgment under appeal, to the effect that potential inconsistencies in the definition of the scope of the AGL in relation to the environmental objectives pursued may be justified, even if they are based on objectives unrelated to environmental protection, such as the desire to maintain the international competitiveness of certain sectors. Consequently, the

distinction made as between undertakings also cannot be justified by the nature or general scheme of the system of which it forms part (see, to that effect, inter alia *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 54).

89 The Court of First Instance also erred in distinguishing, in paragraphs 120 and 121 of the judgment under appeal, the present case from the facts which gave rise to the judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* on the ground that the latter concerned, not the definition of the material scope of an environmental levy, as in the present case, but the partial exemption from payment of such a levy which was granted to a certain category of undertakings. Article 87(1) EC defines State interventions on the basis of their effects, and thus independently of the techniques used.

90 It is true, as the Court of First Instance pointed out in paragraph 117 of the judgment under appeal, that it is for the Commission, when assessing, in the light of the Community rules on State aid, a specific measure such as an environmental levy adopted by Member States in a field in which they retain their powers in the absence of harmonisation measures, to take account of the environmental protection requirements referred to in Article 6 EC, which provides that those requirements are to be integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market.

91 It should also be borne in mind that protection of the environment constitutes one of the essential objectives of the Community. In that regard, Article 2 EC states that the Community has, as one of its tasks, to promote 'a high level of protection and improvement of the quality of the environment' and, to that end, Article 3(1)(l) EC provides for the establishment of a 'policy in the sphere of the environment' (see Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13; Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8; Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 32; and Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 41).

92 However, the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article 87(1) EC (see, to that effect, inter alia Case C-409/00 *Spain* v *Commission*, paragraph 54), as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC.

93 For all of those reasons, the first and second parts of the first plea in law are well founded.

The third part of the first plea in law

— Arguments of the parties

94 According to BAA, the Court of First Instance failed to provide a clear and objective definition of the 'aggregates sector'. It criticises the Court of First Instance in particular on the ground that the latter accepted that certain geologically different types of rock, such as slate, shale, ball clay or china clay, do not form part of the aggregates sector and challenges its failure to take into account the evidence which BAA had submitted in this regard for the purpose of demonstrating that the definition of the aggregates sector accepted by the Court of First Instance was not capable of explaining why undertakings in a comparable position were treated differently for tax purposes.

95 The Commission and the United Kingdom take the view that BAA is incorrect in its contention that the Court of First Instance failed to define precisely the sector in question. They also submit that the Court of First Instance understood very well the scope of the AGL and the activities sectors concerned. That Court, they contend, also noted explicitly that materials such as, inter alia, slate and high-quality shale cannot in principle be used as aggregates by reason of their physical properties. In any event, they argue, this constitutes a finding of fact by the Court of First Instance which BAA cannot challenge on appeal.

— Findings of the Court

96 It is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, inter alia, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, paragraph 72).

97 The Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that that evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced before it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, *General Motors* v *Commission*, paragraph 52, and *Evonik Degussa* v *Commission and Council*, paragraph 73).

98 It should, moreover, be pointed out that such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see, inter alia, *General Motors* v *Commission*, paragraph 54, and *Evonik Degussa* v *Commission and Council*, paragraph 74).

99 The appellant's essential criticism is that the Court of First Instance failed to take account of the evidence which the appellant had placed before it for the purpose of demonstrating that there was no objective reason why certain geologically different types of rock, such as slate, shale, ball clay or china clay, should not form part of the 'aggregates sector' and that there was for that reason no such sector precisely defined capable of being distinguished from the 'untaxed' sectors.

100 However, as follows from the case-law referred to in paragraphs 96 to 98 of the present judgment, the Court of First Instance alone has jurisdiction to interpret the evidence and assess its probative value. As no distortion of that evidence has been demonstrated or even alleged by BAA, this part of the first plea in law must be rejected as being inadmissible.

101 Regard being had to the foregoing, the first and second parts of the first plea in law must be upheld, whereas the third part of that plea must be rejected.

The second plea in law: the scope of the judicial review carried out by the Court of First Instance

Arguments of the parties

102 BAA alleges that the Court of First Instance erred in law by limiting its review, as it states in paragraph 118 of the judgment under appeal, to checking that there was no manifest error of assessment in the contested decision, instead of carrying out a comprehensive review of the substance. The approach adopted by the Court of First Instance, which would be appropriate in the case of a decision declaring an aid measure to be compatible with the common market pursuant to Article 87(3) EC, is not appropriate in a case concerning the classification of a measure as State aid within the meaning of Article 87(1) EC (see, inter alia, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25).

103 According to BAA, by applying the wrong standard of review, the Court of First Instance committed an error of law that vitiates the entire substantive analysis in the judgment under appeal. By referring to the 'broad discretion' of the Commission, the Court of First Instance failed to have regard for the fact that the concept of State aid is an objective one.

104 According to the Commission and the United Kingdom, the appellant overlooks the fact that, in paragraph 118 of the judgment under appeal, the Court of First Instance does not discuss the concept of 'aid' within the meaning of Article 87(1) EC or the assessment of 'compatibility' for the purposes of Article 87(3) EC, but rather the standard of review of a decision taken by the Commission under Article 88(3) EC not to initiate the formal procedure provided for under Article 88(2) EC.

105 They consider that the standard of review set out by the Court of First Instance in paragraph 118 of the judgment under appeal is in accordance with the case-law (*Matra* v *Commission*, paragraphs 45 and 46). The fact that State aid is an objective concept does not affect this basic standard of review applicable to decisions taken under Article 88(3) EC.

106 They add that the pleas invoked by BAA itself at first instance sought to demonstrate that the contested decision was vitiated by a series of manifest errors of assessment.

107 The United Kingdom also notes that, in any event, the Court of First Instance did not confine itself to a limited judicial review but conducted a full review of the issue of law in question.

Findings of the Court

108 By this plea in law, BAA alleges that the Court of First Instance carried out a marginal review, limited to the absence of manifest errors of assessment, of the Commission decision refusing to classify the AGL as 'State aid' for the purposes of Article 87(1) EC.

109 In paragraph 118 of the judgment under appeal, the Court of First Instance held that, when reviewing a decision of the Commission not to initiate the formal investigation procedure provided for under Article 88(2) EC, the role of the Community Courts must be limited, 'having regard to the broad discretion which the Commission has in the application of Article 88(3) EC', to checking that the rules on procedure and the statement of reasons have been complied with, that the facts relied on in making the

contested choice are materially accurate, and that there has been no manifest error of assessment and no misuse of powers.

110 As BAA correctly points out, a reading of the judgment under appeal, and in particular of paragraphs 134, 139, 154 or 171 thereof, confirms that the Court of First Instance did indeed carry out a limited review of the Commission's assessment as to whether the AGL came within the scope of Article 87(1) EC.

111 According to the Court's case-law, however, State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (see, inter alia, *France* v *Ladbroke Racing and Commission*, paragraph 25).

112 As the Advocate General noted in point 144 of his Opinion, there is nothing to justify the Commission having, when taking a decision under Article 88(3) EC, a 'broad discretion' in regard to the classification of a measure as 'State aid' for the purposes of Article 87(1) EC, which would mean that, contrary to what is apparent from the case-law cited in the previous paragraph of this judgment, the judicial review of the Commission's assessment was not in principle comprehensive.

113 This is all the more true in view of the fact that, according to settled case-law, if the Commission is unable to conclude, following an initial examination in the context of the procedure under Article 88(3) EC, that the State measure in question either is not 'aid' within the meaning of Article 87(1) EC or, if classified as aid, is compatible with the Treaty, or where that procedure does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to initiate the procedure under Article 88(2) EC, 'without having any discretion in that regard' (see, to that effect, inter alia, *Matra* v *Commission*, paragraph 33, and *Commission* v *Sytraval and Brink's France*, paragraph 39). As the Court of First Instance pointed out in paragraph 165 of the judgment under appeal, that duty is, moreover, expressly confirmed by the provisions of Article 4(4), in conjunction with Article 13(1), of Regulation No 659/1999.

114 Admittedly, the Court has also held that judicial review is limited with regard to whether a measure comes within the scope of Article 87(1) EC, in a case where the appraisals by the Commission are technical or complex in nature (see, inter alia, *France* v *Ladbroke Racing and Commission*, paragraph 25; *Matra* v *Commission*, paragraphs 29 and 30; Case C-56/93 *Belgium* v *Commission*, paragraphs 10 and 11; and *Spain* v *Lenzing*, paragraph 56). However, the Court of First Instance did not establish that this was the case here.

115 Consequently, as BAA has correctly submitted, by failing to carry out a comprehensive review of the Commission's assessment as to whether the AGL comes within the scope of Article 87(1) EC, the Court of First Instance committed an error of law which vitiates in its entirety the analysis of the substance of the contested decision.

116 In the light of the foregoing, the second plea in law must be upheld.

The third plea in law: legal errors relating to the assessment of the nature and general scheme of the AGL

117 BAA submits that the Court of First Instance erred in several respects in its assessment of the nature and general scheme of the AGL. Those submissions relate to alleged inconsistencies in the definition of the material scope of the levy as a result of the non-inclusion of certain materials or products.

118 The appellant takes the view that the theoretical justification for the distinctions made by the AGL does not correspond to its actual scope. The Court of First Instance, it claims, constructed its own rationale as to the nature and general scope of the AGL. In so doing, it misapplied Articles 88(3) EC and 253 EC and distorted the meaning of the evidence submitted to it.

119 The Commission takes the view that this plea must be declared inadmissible on the ground that it raises numerous questions of fact rather than of law. BAA, it submits, argues that the Court of First Instance distorted the facts and questions the factual findings made by the Court of First Instance in the context of its discussion of the scope of the AGL. This plea is, the Commission contends, in substance tantamount to a request for re-examination, something which goes beyond the scope of the Court's jurisdiction in the context of an appeal.

120 The United Kingdom also takes the view that this plea must be declared inadmissible, since the assessment of the evidence by the Court of First Instance, its identification of factual circumstances and the inferences it drew from the evidence before it are matters of fact which lie outside the jurisdiction of the Court of Justice. To the extent to which this plea may be declared partially admissible, it is, the United Kingdom submits, manifestly unfounded. The United Kingdom takes the view that the Court of First Instance was entitled to reach the factual conclusions at which it arrived concerning the scope of the AGL and its conclusions were adequately reasoned by reference to evidence properly before it.

Preliminary considerations

121 It is first of all appropriate to recall that, according to well-established case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 105).

122 An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, does not satisfy the requirements to state reasons under those provisions. In reality, such an appeal amounts to no more than a request for a re-examination of the application submitted to the Court of First Instance, a matter which falls outside the jurisdiction of the Court of Justice (see, inter alia, *Comunità montana della Valnerina* v *Commission*, paragraph 106).

123 However, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see, inter alia, *Comunità montana della Valnerina* v *Commission*, paragraph 107).

124 That is indeed the case here, with regard to both the first and the second and third parts of this plea, with the result that, contrary to what the Commission argues, the third plea is admissible in respect of all three of its constituent parts.

The first part of the third plea in law: imposition of the AGL on certain virgin materials which are not used as aggregates and for which there are no alternatives

— Arguments of the parties

125 In the first part of this plea, BAA takes issue with the Court of First Instance for having, in paragraphs 135 and 136 of the judgment under appeal, regarded as being justified, by virtue of the 'polluter pays' principle, the application of the AGL to certain 'virgin' materials, such as granite used as ballast and red chippings used for surfacing footpaths, which cannot be replaced by alternative products, whereas the contested decision states that sand, rock and gravel extracted as virgin materials are exempted from the levy when they are not used as aggregates, on the ground that, for such uses, there are no more environmentally-friendly alternatives.

126 As the contested decision accepted non-substitutability as a factor capable of excluding from the scope of the AGL certain uses of virgin materials which would otherwise be subject to that levy, the Court of First Instance, invoking the 'polluter pays' principle, substituted its own assessment for that of the Commission in order to justify the taxation of non-replaceable materials. The Court of First Instance also applied that principle in a selective manner and provided inadequate grounds for its conclusions.

127 In response, the Commission states that BAA fails to have regard for the fact that the AGL is a sectoral levy, limited to the aggregates sector alone, which explains why non-replaceable products such as sand, rock and gravel which are neither sold nor used as aggregates can be exempted from the levy in question. When those products are used as

aggregates, the imposition of the AGL on them serves the purpose of internalising the environmental costs of the production and use of virgin aggregates. This part of the plea is therefore, the Commission submits, unfounded.

— Findings of the Court

128 The Court of First Instance held in paragraph 124 of the judgment under appeal that the letter of notification and the contested decision, on the one hand, refer in express terms to the objective of maximising the use of recycled aggregates and other alternative materials to virgin aggregate and of promoting the efficient use of virgin aggregate, which is a non-renewable natural resource, and, on the other, refer implicitly to 'the internalisation of environmental costs in accordance with the "polluter pays" principle', by stating, in the context of the determination of the objectives of the AGL, that 'the environmental costs of aggregate extraction that the United Kingdom seeks to address through the AGL include noise, dust, damage to biodiversity and visual amenity'. The Court of First Instance adds in the same paragraph that those objectives are expressly referred to in the letter of 19 February 2002 from the United Kingdom to the Commission.

129 If one were to assume that the Court of First Instance substituted its own reasoning for that of the contested decision when it referred, in paragraph 124 of the judgment under appeal, to the 'polluter pays' principle, and in justifying, in paragraphs 135 and 136 thereof, the taxation of products which could not be replaced by alternatives in the light of the objective 'which seeks to internalise the environmental costs of the production of virgin aggregates', the reproach that the Court of First Instance developed, in paragraphs 135 and 136 of the judgment under appeal, its own logic with regard to the nature and general scheme of the AGL cannot in any event be accepted in so far as the rejection of the plea raised at first instance appears to be well founded on other grounds (see, inter alia, *Commission* v *Sytraval and Brink's France*, paragraph 47).

130 As the Commission has correctly noted, BAA's allegations, to which the Court of First Instance replied in paragraphs 135 and 136 of the judgment under appeal, are based on the mistaken premiss that the exclusion from the scope of the AGL of virgin materials which were not used as aggregates was justified on the ground that there were no alternative materials. As the Advocate General has also noted at point 108 of his Opinion, it is clear from the grounds of the contested decision that the exclusion of those materials was in fact attributable to the intention of the United Kingdom authorities to impose that levy only on materials within the aggregates sector.

131 Consequently, the head of complaint alleging a selective application of the 'polluter pays' principle must be rejected as invalid and there is, moreover, nothing to suggest that the reasoning of the relevant paragraphs of the judgment under appeal, although based on an erroneous premiss, was inadequate.

132 In those circumstances, the first part of the third plea in law must be rejected in its entirety.

The second part of the plea in law: imposition of the AGL on certain by-products of the extraction of non-replaceable primary materials which are themselves not subject to the levy

— Arguments of the parties

133 By the second part of the third plea in law, BAA takes issue, in particular, with the findings of the Court of First Instance set out in paragraphs 112 and 137 of the judgment under appeal, by which the Court of First Instance rejected the allegations that the imposition of the AGL on certain by-products of the extraction of non-replaceable

primary materials which are themselves not subject to the levy was at variance with the objectives of the AGL. According to BAA, those by-products must not be taxed in so far as they are 'secondary' aggregates.

134 In paragraph 112 of the judgment under appeal, the Court of First Instance, it is argued, incorrectly interpreted point 29 of the contested decision when it formed the view that that the concept of 'secondary' aggregates referred in general to untaxed materials. In so doing, the Court of First Instance substituted its own reasoning for that of the Commission and provided insufficient grounds for the conclusions which it reached.

135 In addition, the Court of First Instance committed several errors of law in paragraph 137 of the judgment under appeal when it accepted the justification for the distinction made between secondary aggregates with regard to their liability to the AGL. BAA in particular criticises the Court of First Instance for having applied the environmental logic of the 'polluter pays' principle in a selective way, for having accepted, without any evidence whatsoever, that the lack of technical possibilities to limit the volume of by-products justified that distinction, for having relied on a relatively small difference between the price of low-quality aggregates and that of non-replaceable materials of which they are by-products, and for having incorrectly referred in this connection to paragraphs 4.10 to 4.15 of the United Kingdom's letter of 19 February 2002.

136 In response, the Commission submits that BAA errs in criticising the judgment under appeal in so far as it concluded that the taxation of low-quality aggregates which are the by-products derived from the extraction of untaxed materials, such as aggregates arising from the production of limestone, freestone or silica, was compatible with the scheme and nature of the AGL.

137 So far as concerns, first, the criticism levelled at paragraph 112 of the judgment under appeal, the Commission submits that when point 29 of the contested decision refers to primary aggregates, this is a reference to the taxed products, whereas the reference to secondary aggregates covers the exempted aggregates set out in the Act. Consequently, the finding of fact made by the Court of First Instance in paragraph 112 is not erroneous.

138 With regard to paragraph 137 of the judgment under appeal, the Commission submits that, contrary to what BAA claims, the 'polluter pays' principle does not necessarily call for application of the AGL to the by-products of certain other products which are not taxed, such as slate rock, inasmuch as it is a policy choice of Member States to impose the levy on products of the aggregates sector and not on other sectors which do not typically produce aggregates, such as slate mining and the resulting by-products.

139 As the Court of First Instance noted in paragraph 137 of the judgment under appeal, the relatively small price difference between lower-quality aggregates and non-replaceable materials whose by-products they are justifies imposition of the levy on secondary aggregates in such a way as to reduce the proportion of lower-quality aggregates. BAA's criticism of the findings of the Court of First Instance on the price relationship between the products concerned and on the reference to the United Kingdom's letter of 19 February 2002 is, the Commission submits, unfounded.

— Findings of the Court

140 BAA criticises the Court of First Instance for having held, in paragraph 112 of the judgment under appeal, that in the contested decision, and in particular in point 29 thereof, the concept of 'secondary' aggregates refers in general to aggregates not subject to the AGL, whereas, in reality, it relates to by-products obtained from the extraction of the 'primary' materials, these being the subject-matter of the principal activity of a

quarry. Consequently, it claims, the Court of First Instance substituted its own reasoning for that of the Commission.

141 In this regard, it should be noted that, in reviewing the legality of acts under Article 230 EC, the Court of Justice and the Court of First Instance have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Article 231 EC provides that, if the action is well founded, the act concerned must be declared void. The Court of Justice and the Court of First Instance cannot under any circumstances substitute their own reasoning for that of the author of the contested act (see, inter alia, Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraph 38).

142 Although, in proceedings for annulment, the Court of First Instance may be led to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons, it cannot do so where there is no material factor to justify such a course of action (*DIR International Film and Others* v *Commission*, paragraph 42).

143 According to the actual wording of point 29 of the contested decision, '… [t]he AGL will be levied only on virgin aggregate. It will not be levied on aggregates extracted as a by-product or waste from other processes (secondary aggregates), nor will it be levied on recycled aggregates'. Further, in point 32 of that decision, the Commission affirms that 'the structure and scope of the tax reflect the clear distinction between the extraction of virgin aggregates, bearing with it undesirable environmental consequences, and the production of secondary or recycled aggregates, which makes an important contribution to the treatment of rock, gravel and sand incidentally arising from excavations or from other works or treatments lawfully carried out for different purposes'.

144 Consequently, by finding in paragraph 112 of the judgment under appeal that the Commission held throughout the contested decision, and in point 29 in particular, that the term 'primary aggregates' essentially designates aggregates 'subject to the AGL', whereas the term 'secondary aggregates' essentially designates 'exempted' aggregates specifically listed in the Act, in order to infer therefrom, inter alia, that the Commission merely stated in point 29 that 'the AGL will not be levied on secondary products or waste arising from primary extraction, when they are exempted by the Act', the Court of First Instance committed an error of interpretation and substituted its own interpretation for that which follows directly from the contested decision, even though there was no substantive factor which justified its so doing.

145 In those circumstances, the first head of the second part of the third plea in law must be upheld.

146 BAA goes on to criticise the Court of First Instance on the ground that the latter recognised as being justified the imposition of the AGL on certain by-products resulting from the mining of materials not subject to that levy. The appellant alleges, in this regard, substitution of grounds, errors of appraisal and distortion of evidence.

147 In paragraph 137 of the judgment under appeal, the Court of First Instance first notes that '[t]he "polluter-pays" principle can also justify the imposition of the levy on products arising from the extraction of materials which cannot be replaced by alternative products — in particular the application of the levy to aggregates of lower quality … as is shown by the letter from the United Kingdom authorities of 19 February 2002.'

148 The Court of First Instance then goes on to state that '[f]urthermore, the imposition of the levy on those products can also be justified by the objective, also invoked by the intervener in that letter, of encouraging a more rational extraction and treatment of aggregates, so as to reduce the proportion of low-quality aggregates. That proportion, which varies from one quarry to another, as the applicant points out, may, however, be altered in a particular quarry. The Commission has emphasised in that regard, in particular in its defence, without being challenged by the applicant, the relatively small price difference between low-quality aggregates and non-replaceable materials whose by-products they are.'

149 With regard, first, to the heads of claim alleging that the Court of First Instance accepted, without any evidence whatsoever, that the lack of possibilities of limiting the volume of the by-products justified imposition of the AGL on certain types of secondary aggregates, inasmuch as the Court of First Instance wrongly relied on an alleged relatively weak difference between the price of lower-quality aggregates and that of the non-replaceable materials of which they are by-products, and inasmuch as the Court of First Instance incorrectly referred to paragraphs 4.10 to 4.15 of the United Kingdom's letter of 19 February 2002, suffice it to hold that those heads of claim amount to a questioning of findings of fact. To the extent to which no distortion of facts and evidence put before the Court of First Instance has been demonstrated, those heads of claim must be rejected as being inadmissible.

150 Furthermore, it must be held that the findings of the Court of First Instance are based not only on the 'polluter pays' principle but also on the objective which seeks to encourage more rational mining and processing of virgin aggregates, which, it is common ground, is one of the objectives referred to in point 31 of the contested decision, with the result that there was no substitution of reasoning on the part of the Court of First Instance.

151 For all of those reasons, the second part of the third plea in law must be upheld in so far as it relates to paragraph 112 of the judgment under appeal and rejected as to the remainder.

The third part of the third plea in law: exemption of certain types of virgin aggregates from the AGL

— Arguments of the parties

152 By the third part of its plea, BAA criticises the Court of First Instance on the ground that it regarded as being justified the non-taxation of certain types of virgin aggregates such as slate, shale, ball clay, china clay, clay, coal or lignite.

153 The Court of First Instance, BAA claims, substituted its own reasoning for that set out in the contested decision when it affirmed, in paragraphs 130, 131, 133 and 134 of the judgment under appeal, that that exemption was designed to encourage the use of virgin aggregates as alternative products to virgin aggregates subject to the AGL. According to BAA, the pursuit of such an objective undermines the environmental 'nature and general scheme' of the AGL.

154 The findings of the Court of First Instance, BAA argues, are the result of a distortion of the evidence adduced in the course of the proceedings, in particular the United Kingdom's letter of 19 February 2002, and breach the appellant's rights of defence in that the latter was unable to set out its views on that new interpretation of the evidence in question.

155 The Commission points out that the exemption of certain primary materials such as slate, shale, ball clay, china clay, clay, coal or lignite is justified on the ground that they are not normally used as aggregates and therefore do not belong to the aggregates sector, as the Court of First Instance accepted in paragraphs 128 and 129 of the judgment under appeal.

156 The Court of First Instance also accepted, in paragraphs 130, 131, 133 and 134 of that judgment, that the United Kingdom was justified in trying to promote the use, as aggregate, of slate spoil and similar materials as an alternative to virgin aggregate. Finally, according to the Commission, the Court of First Instance, by relying in particular on the United Kingdom's letter of 19 February 2002, did not err in law when it stated, in paragraph 133 of the judgment under appeal, that aggregates quarrying represents the primary source of damage to the environment addressed by the measure.

157 According to the Commission, it is not for the Community institutions to review how important the environmental issues addressed are in comparison with other environmental problems which may exist in the same Member State. Therefore, the question as to what precise percentage aggregates extraction represents in comparison with the overall extraction of minerals in the United Kingdom is of no consequence for the present case.

— Findings of the Court

158 In paragraph 130 of the judgment under appeal, the Court of First Instance accepted as justification, having regard to the environmental objectives pursued, the exemption of certain materials, including shale and low-quality slate, clay waste and ball clay, even

though used as aggregates, in so far as, according to a finding of fact made by the Court of First Instance, they have been 'until now rarely used as aggregates by reason of their high transport costs'.

159 From this the Court of First Instance inferred, in the same paragraph of the judgment under appeal, that the exemption of those materials from the AGL allowed them to be used as alternatives for those virgin aggregates and could, as a result, contribute to a rationalisation of the extraction and use of the latter.

160 Contrary to what BAA claims, the Court of First Instance did not, in so doing, substitute grounds, as rationalisation of the mining and use of the virgin aggregates formed one of the objectives set out in the contested decision, as has been pointed out in paragraph 150 of this judgment.

161 To the extent to which promotion of the use of virgin materials hitherto little used as aggregates is, as the Court of First Instance found without erring in law, consistent with the objective of rationalising the use of aggregates, promotion of the use of those materials also does not undermine the environmental nature and general scheme of the AGL.

162 Finally, with regard to the allegation in this context that the evidence adduced in the course of the proceedings, in particular the United Kingdom's letter of 19 February 2002, was distorted, no such distortion is evident from the documents on the case-file, with the result that that head of claim, as well as, therefore, that alleging infringement of the rights of the defence, cannot be upheld.

163 For those reasons, the third part of the third plea in law must be rejected in its entirety.

The fourth plea in law: errors in law relating to the appraisal of the export exemption

164 BAA argues that, by holding in paragraph 147 et seq. of the judgment under appeal that the exemption from AGL for aggregates that are exported is justified by the nature of the AGL as an 'indirect' tax, the Court of First Instance, in the first place, breached Articles 91 EC and 92 EC and failed in its duty to provide reasons, and, second, allowed a retroactive improvement in the reasoning of the contested decision.

165 It is appropriate first of all to examine the second part of that plea in law.

The second part of the fourth plea in law

— Arguments of the parties

166 BAA submits that, by adopting in paragraphs 150 and 151 of the judgment under appeal the reasoning on the nature of the AGL as an indirect tax which was put forward for the first time by the Commission and the United Kingdom before the Court of First

Instance, the latter allowed a retroactive improvement of the contested decision, something which is not authorised by Community law (see, to that effect, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraphs 47 and 48).

167 The explanation provided by the Commission in point 33 of the contested decision by way of justification for the exemption of exported aggregates from the AGL is, BAA argues, irrelevant in view of the line of argument based on Article 91 EC, which was defended by the Commission and the United Kingdom before the Court of First Instance and which the latter wrongly regarded as being linked to the grounds of point 33.

168 In response, the Commission and the United Kingdom submit that, in relying on the nature of the AGL as an indirect tax, the Court of First Instance did not allow a 'retroactive improvement' of the contested decision but merely a more detailed explanation and amplification of the reasons set out in point 33 of that decision.

169 In paragraph 150 of the judgment under appeal, the Court of First Instance accepted that the reasoning based on the nature of the AGL as an indirect tax had to be taken into consideration to the extent to which it reflected the reasoning set out by the Commission in point 33 of the contested decision.

170 Article 253 EC, they argue, does not preclude reasons which are contained in a Commission decision from subsequently being explained in more detail.

171 Moreover, it is clear that, in the present case, the legal rules governing the matter in question are Article 91 EC and the principle of taxation in the country of destination. Accordingly, that provision clearly formed part of the legal context of the contested decision.

— Findings of the Court

172 So far as concerns the obligation on the Commission to provide reasons, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, *Commission* v *Sytraval and Brink's France*, paragraph 63).

173 As regards, more particularly, a Commission decision finding that no State aid as alleged by a complainant exists, the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid (*Commission* v *Sytraval and Brink's France*, paragraph 64).

174 In the present case, it must be concluded that point 33 of the contested decision justifies the exemption for exported aggregates on the ground that the aggregates can be exempted in the United Kingdom if they are used in exempted manufacturing processes, such as the manufacture of glass, plastics, paper, fertilisers and pesticides.

175 Given that the United Kingdom authorities cannot exercise control over the use of aggregates outside their territory, the exemption for exports is necessary in order to guarantee legal certainty for exporters of aggregates and to prevent unequal treatment of aggregate exports which might otherwise qualify for an exemption within the United Kingdom.

176 The grounds set out in point 33 of the contested decision thus refer to the unequal treatment which, were aggregate exports not to be exempted, would result from the fact that the aggregates which are marketed in the United Kingdom are exempted when used for certain purposes, whereas the aggregates used for the same purposes in the State of importation would be subject to the AGL by reason of the lack of means of control by the United Kingdom authorities on the use of aggregates outside the territory of the United Kingdom.

177 Those grounds do not make any reference to the nature of the AGL as 'indirect taxation' within the meaning of Article 91 EC for the purpose of justifying the exemption for exported aggregates, which rests on a distinction between, on the one hand, aggregates marketed in the United Kingdom and, on the other, aggregates that are exported.

178 Consequently, contrary to what the Court of First Instance held in paragraph 150 of the judgment under appeal, the reasoning based on Article 91 EC cannot be regarded as reflecting the reasoning set out in the contested decision, based on the fact that the United Kingdom authorities have no means by which to supervise the use of materials as aggregates outside the United Kingdom, but represents, in fact, different reasoning supplied after that decision had been adopted. The Court of First Instance for that reason failed to have regard for Article 253 EC by taking into account that reasoning in relation to the grounds set out in the contested decision.

179 Consequently, the second part of the fourth plea in law must be upheld.

The first part of the fourth plea

180 In the light of the reply to the second part of the fourth plea, it is unnecessary to examine the first part of that plea.

The fifth plea: failure to initiate the formal investigation procedure under Article 88(2) EC

Arguments of the parties

181 BAA submits that, although it correctly refers to the relevant case-law in paragraphs 165 to 167 of the judgment under appeal, the Court of First Instance erred in law in holding, in paragraphs 171 and 172, that the Commission had correctly decided not to open the formal investigation procedure.

182 According to the appellant, the Commission was not in a position 'to reach a firm view' that the AGL did not constitute State aid on the basis of the few points in the contested decision which dealt with that matter. This is borne out, in particular, by the fact that the reasoning in the judgment under appeal is much more detailed and longer than that of the contested decision, as well as by the fact that the reasoning of the judgment under appeal is based on different arguments to those set out in the contested decision.

183 In response, the Commission and the United Kingdom argue that the mere fact that the judgment under appeal is longer than the contested decision cannot justify the conclusion that the Commission erred in law in adopting its decision not to initiate the formal investigation procedure.

184 The United Kingdom adds that the Court of First Instance correctly summarised and applied the relevant case-law and concluded that the only valid arguments put forward by BAA in support of the present plea, alleging inconsistencies in the definition of the scope of the AGL, included those which it had set out in the context of the plea alleging breach of Article 87(1) EC. This plea, it is submitted, is ultimately no more than a restatement of the arguments made before the Court of First Instance.

Findings of the Court

185 As has been pointed out in paragraph 113 of the present judgment, the procedure outlined in Article 88(2) EC is indispensable where the Commission has serious difficulties in determining whether aid is compatible with the common market.

186 The Commission may therefore confine itself to the preliminary phase set out in Article 88(3) EC for the purpose of taking a decision favourable to a State measure only if it is in a position to satisfy itself, on an initial examination, either that the measure in question does not constitute 'aid' within the terms of Article 87(1) EC or, if it is to be classified as 'aid', that it is compatible with the Treaty.

187 By contrast, if that initial examination has led the Commission to the contrary conviction, or even has not enabled it to overcome all of the difficulties raised by the appraisal of the compatibility of the measure in question, the Commission is under a duty to obtain all necessary advice and to initiate, to that end, the procedure set out in Article 88(2) EC.

188 However, as the Commission and the United Kingdom have correctly pointed out, BAA's allegation that the reasoning of the judgment under appeal differs from that of the contested decision, in that it is more detailed and longer, is not, of itself, such as to establish that the Court of First Instance erred in law in concluding, in paragraph 172 of the judgment under appeal, that the Commission did not exceed the limits of its power of assessment by considering that the review, for the purposes of Article 87(1) EC, of both the definition of the material scope of the AGL and the exemption for exports did not give rise to any serious difficulty requiring it to initiate the formal investigation procedure set out in Article 88(2) EC.

189 As BAA has been unable to indicate specifically the serious difficulties of assessment which it claims that the Commission encountered, the fifth plea must be rejected.

The sixth plea: inadequate reasoning of the contested decision

Arguments of the parties

190 In support of this plea, BAA submits that the fact that the Court of First Instance developed a different line of argument to that contained in the contested decision is sufficient to justify a finding that that Court could not conclude, in paragraph 146 of the judgment under appeal, that that decision was adequately reasoned for the purpose of the requirements set out in Article 253 EC.

191 The Commission argues, first, that BAA has not put forward any specific argument in support of this plea and, second, that the contested decision was sufficiently reasoned. The United Kingdom observes that BAA merely argues that the Court of First Instance examined the arguments set out by the parties to the dispute in greater detail and at greater length than the contested decision appears to have done; consequently, it argues, this plea should be rejected.

Findings of the Court

192 It is true that, as has been pointed out in paragraph 173 of the present judgment, the Commission must, particularly in the case of a Commission decision finding that no State aid as alleged by a complainant exists, at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid.

193 However, the appellant's argument to the effect that the Court of First Instance set out reasoning that was both different from and more detailed than that adopted by the Commission is not such as to establish that the Court of First Instance erred in law in concluding that the contested decision was adequately reasoned in the light of the grounds set out therein.

194 In those circumstances, the sixth plea in law must also be rejected.

195 It follows from all of the foregoing that, in the light of the various errors of law which have been established, the judgment under appeal must be set aside.

Referral of the case back to the Court of First Instance

196 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, after quashing the decision of the Court of First Instance, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

197 In the present case, in view of the errors of law which have been established in paragraphs 86 to 92 and 110 to 115 of the present judgment, it is appropriate to refer the case back to the Court of First Instance.

198 As the case is to be referred back to the Court of First Instance, the costs relating to the present appeal shall be reserved.

On those grounds, the Court (Third Chamber) hereby:

1. **Sets aside the judgment delivered by the Court of First Instance of the European Communities on 13 September 2006 in Case T-210/02 *British Aggregates Association* v *Commission*;**

2. **Refers the case back to the Court of First Instance of the European Communities;**

3. **Reserves the costs.**

[Signatures]