V

(Yttranden)

FÖRFARANDEN FÖR GENOMFÖRANDE AV KONKURRENSPOLITIKEN

EUROPEISKA KOMMISSIONEN

STATLIGT STÖD – FÖRENADE KUNGARIKET

Statligt stöd SA.34775 (2013/C) (ex 2012/NN) – Aggregates Levy

Uppmaning enligt artikel 108.2 i fördraget om Europeiska unionens funktionssätt att inkomma med synpunkter

(Text av betydelse för EES)

(2013/C 348/05)

Genom den skrivelse daterad den 31 oktober 2013 som återges på det giltiga språket på de sidor som följer på denna sammanfattning, underrättade kommissionen Förenade kungariket om sitt beslut att inleda det förfarande som anges i artikel 108.2 i fördraget om Europeiska unionens funktionssätt avseende den skatt på ballast som infördes i 2001 års skattelag, del 2, avsnitt 16–49.

Berörda parter kan inom en månad från dagen för offentliggörandet av denna sammanfattning och den därpå följande skrivelsen inkomma med sina synpunkter på det stöd avseende vilket kommissionen inleder förfarandet. Synpunkterna ska sändas till följande adress:

Europeiska kommissionen
Generaldirektoratet för konkurrens
Direktoratet för statligt stöd
Registreringsenheten för statligt stöd
1049 Bruxelles/Brussel
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Synpunkterna kommer att meddelas Förenade kungariket. Den tredje part som inkommer med synpunkter kan skriftligen begära konfidentiell behandling av sin identitet, med angivande av skälen för begäran.

SAMMANFATTNING

1. FÖRFARANDE

I en skrivelse av den 20 december 2001 anmälde Förenade kungariket en stödordning kallad *Etappvis införande i Nordirland av skatten på ballast* till kommissionen. I sin anmälan informerade de brittiska myndigheterna kommissionen om sin avsikt att införa en skatt på ballast (”Aggregates Levy”) från och med den 1 april 2002. Denna skatt skulle införas i del 2 i 2001 års skattelag.

Under 2001 inkom klagomål (bl.a. från British Aggregates Association) till kommissionen framför allt eftersom man ansåg att uteslutandet av vissa material från tillämpningsområdet för skatten på ballast och undantagen utgjorde statligt stöd till vissa företag.

Efter att ytterligare upplysningar inlämnats den 21 februari 2002 beslutade kommissionen den 24 april 2002 att den inte hade några invändningar avseende skatten [1]. Kommissionen ansåg att de olika undantagen i 2001 års skattelag var motiverade av skattesystemets logik och att skattelagen inte utgjorde statligt stöd. Kommissionen ansåg vidare att det stegvisa införandet av skatten i Nordirland utgjorde stöd som var förenligt med den inre marknaden.

[1] EGT C 133, 5.6.2002, s. 11.

Den 7 mars 2012 upphävde tribunalen det ovan nämnda kommissionsbeslutet. Den ansåg att kommissionen inte kunnat visa att skattedifferentieringen som orsakas av skattebefrielsen är motiverad av kriteriet för normal beskattning som ligger till grund för skatten på ballast eller med hänsyn till miljösyftet med skatten på ballast.

Då kommissionens beslut ogiltigförklarats måste kommissionen nu ompröva huruvida de skattebefrielser, skatteundantag och skattelättnader som föreskrivs i 2001 års finanslag utgör statligt stöd. Frågan om det stegvisa införandet av skatten i Nordirland är förenligt med den inre marknaden granskas i ett annat förfarande (SA.18859 (2011/C) –Förenade kungariket – undantag från skatt på ballast i Nordirland).

2. BESKRIVNING AV DEN ÅTGÄRD AVSEENDE VILKEN KOMMISSIONEN INLEDER FÖRFARANDET

Ballast används i byggsektorn. Det består i allmänhet av granulära eller partikelformiga material som på grund av sina fysiska och kemiska egenskaper är lämpliga för användning på egen hand eller med tillsats av cement, kalk eller bituminösa material i betong, gatsten och asfalt eller för dränering eller användning som fyllningsmassa. Ballast kan såväl vara naturliga material (sten, sand och grus), som tillverkade eller återvunna material.

Skatten på ballast infördes av Förenade kungariket med verkan från och med den 1 april 2002 för miljöändamål, främst för att maximera användningen av återanvänd ballast och andra alternativ till nyutvunnen ballast, samt för att främja en effektiv utvinning och användning av ballast för att minska effekterna av ballastutvinning på miljön (särskilt skador för den biologiska mångfalden och förfulning). Lagen tillämpas på utvinning för första gången av sten, sand och grus samt på bearbetade produkter. Lagen omfattar ballast som utvunnits i Förenade kungariket och importerad ballast vid sin första användning eller försäljning i Förenade kungariket. Den gäller inte exporterad ballast. Dessutom gäller lagen inte sten, sand och grus som antingen erhålls genom vissa specifika processer, har vissa geologiska egenskaper eller som redan har beskattats.

3. BEDÖMNING AV ÅTGÄRDEN

3.1. Förekomst av stöd i den mening som avses i artikel 107.1 i EUF-fördraget

Kommissionen har undersökt huruvida skatten på ballast, och särskilt bestämmelserna om skatteundantag, skattebefrielse och skattelättnad i lagen utgör statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget. Enligt artikel 107.1 i EUF-fördraget utgör en åtgärd statligt stöd om den uppfyller fyra villkor: För det första ger åtgärden upphov till en fördel för mottagarna. För det andra gynnar åtgärden vissa företag eller ekonomiska verksamheter (selektivitet). För det tredje beviljas stödet av staten eller finansieras med statliga resurser. För det fjärde kan åtgärden påverka handeln mellan medlemsstaterna och snedvrida konkurrensen på den inre marknaden.

Det råder inget tvivel om att åtgärden finansieras med statliga medel och skulle kunna påverka handeln mellan medlemsstaterna och snedvrida konkurrensen på den inre marknaden, men frågan om huruvida åtgärden innebär en selektiv fördel för stödmottagarna kräver en ingående granskning. Det kommer att bero på huruvida skatteundantagen, skattebefrielserna och skattelättnaderna är motiverade av ballastskattens art och logik.

På grundval av de uppgifter som lämnats av Förenade kungariket under 2001–2002 och av de upplysningar som lämnats av den klagande, inklusive uppgifter som lämnats under domstolsförfarandet som också bygger på tribunalens slutsatser och ytterligare förklaringar som inkommit från Förenade kungariket efter ogiltigförklarandet av beslutet, drar kommissionen slutsatsen att den normala beskattningsprincipen omfattar beskattning av sten, grus och sand som bryts för att användas som ballast och som är föremål för kommersiell utvinning i Förenade kungariket efter den 1 april 2002. Skatten på ballast har utformats för att säkerställa att ballastutvinningens miljöpåverkan återspeglas tydligare i priserna, för att få till stånd en mer effektiv utvinning och användning av ballast. Lagen syftar också till att uppmuntra att efterfrågan på ballast som utvunnits för att användas som ballast sjunker till förmån för alternativ ballast i form av återvunnet material och biprodukter eller rester från utvinnings- eller industriprocesser.

På denna grundval drar kommissionen slutsatsen att de skatteundantag, skattebefrielser och skattelättnader som fastställs i avsnitten 17.2 b, 17.2 c, 17.2 d, 17.3 b, 17. 3 c, 17.3 d och 17.3 da, 17.4 d och 17.4 e, avsnitt 17.4 a (i den mån det undantagna materialet består helt av kol, brunkol, bituminös skiffer och skiffer som används för andra ändamål än som ballast), avsnitt 17.4 c (när det består helt av schaktavfall, 17.4 f (utom lera), 18.2 a, avsnitt 18.2 b (i den mån som den hänför sig till material som inte används som ballast), 18.2 c, 30.1 a, 30.1 b (i den mån som den avser att undanta processer i den mening som avses i avsnitt 18.2 a och c, 30.1 b (i den mån som den hänför sig till en undantagsprocess i den mening som avses i avsnitt 18.2 b som gäller material som inte används som ballast) och 30.1 c i skattelagen från 2001, ändrad genom skattelagarna från 2002 och 2007, överensstämmer med beskattningsprinciperna och beskattningslogiken i lagen om ballast. Följaktligen ger de inte någon selektiv fördel för producenter av de berörda undantagna materialen och utgör inte statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget.

På grundval av de uppgifter som hittills mottagits, kan kommissionen inte utan tvivel avgöra om de skatteundantag och skattebefrielser som fastställs i avsnitten 17.3 e och 17.f i och ii, avsnitt 17.4 a (i den mån det undantagna materialet består helt av kol, brunkol, bituminös skiffer och skiffer som används för andra ändamål än som ballast), avsnitt 17.4 c i och ii (när det främst består av schaktavfall, 17.4 f (när det gäller lera), 18.2 a, avsnitt 18.2 b (i den mån som den hänför sig till en undantagsprocess som gäller material som används som ballast), 30.1 b (i den mån som den avser en undantagsprocess i den mening som avses i avsnitt 18.2 b, som gäller material som används som ballast, i skattelagen från 2001, ändrad genom skattelagarna från 2002 och 2007, överensstämmer med

beskattningsprinciperna och skattens logik. Därför kan kommissionen i detta skede inte utesluta att dessa skatteundantag, skattebefrielser och skattelättnader medför en selektiv fördel för producenterna av den ballast som omfattas av undantagen i fråga, eftersom de befrias från en kostnad som de normalt skulle betala.

3.2. **Stödets laglighet**

Även om skatten på ballast anmäldes av Förenade kungariket innan den trädde ikraft kan mottagarna av stödet inte hysa berättigade förväntningar vad gäller genomförandet av stödets lagenlighet, eftersom kommissionens beslut i god tid överklagades till tribunalen [1]. Då kommissionens beslut ogiltigförklarades av tribunalen ska det beslutet betraktas som ogiltigt med avseende på alla personer från och med dagen för dess antagande. Eftersom upphävandet av kommissionens beslut retroaktivt sätter stopp för tillämpningen av antagande om lagenlighet, måste genomförandet av det aktuella stödet anses vara olagligt [2]. Dessutom konstaterar kommissionen att lagen trädde i kraft (1 april 2002) innan kommissionen fattade sitt beslut av den 24 april 2002.

3.3. **Förenlighet**

Med tanke på lagens miljösyfte har kommissionen granskat förenligheten enligt artikel 107.3 c i EUF-fördraget och enligt riktlinjerna för statligt stöd till skydd för miljön.

Eftersom undantagen utgör en befrielse från en miljöskatt, kan de potentiellt granskas mot bakgrund av punkterna 47–48 i 2001 års miljöskyddsriktlinjer för stöd som beviljats mellan den 1 april 2002 och den 31 mars 2008 och punkterna 158–159 i 2008 års miljöskyddsriktlinjer för stöd som beviljats från och med den 1 april 2008. Då kommissionen inte förfogar över de uppgifter som är nödvändiga för att bedöma om undantagen skulle vara förenliga med dessa bestämmelser och eftersom inga ytterligare uppgifter har lagts fram för att motivera undantagen, tvivlar kommissionen i detta skede på åtgärdernas förenlighet med den inre marknaden. I enlighet med artikel 4.4 i förordning nr 659/1999 har kommissionen därför beslutat att inleda det formella granskningsförfarandet när det gäller avsnitt 17.3 e, 17.3 f i och ii, avsnitt 17.4 a (i den mån det undantagna materialet består helt av kol, brunkol, bituminös skiffer och skiffer som används som ballast eller främst består av kol, brunkol, bituminös skiffer och skiffer), avsnitt 17.4 c i och ii (när de består främst av schaktavfall, 17.4 f (när det gäller lera), 18.2 a, avsnitt 18.2 b (i den mån som den hänför sig till en undantagsprocess som gäller material som används som ballast), och 30.1 b (i den mån som den hänför sig till en undantagsprocess i den mening som avses i avsnitt 18.2 b som gäller material som används som ballast) i skattelagen från 2001, ändrad genom skattelagarna från 2002 och 2007, och därvid uppmanat Förende kungariket att inkomma med synpunkter och ytterligare upplysningar.

I enlighet med artikel 14 i rådets förordning (EG) nr 659/1999 kan allt olagligt stöd komma att återkrävas från mottagaren.

[1] Se mål C-199/06 CELF [2008] REG I-469, punkterna 63 och 66–68.

[2] Se mål C-199/06 CELF, angivet ovan, punkterna 61 och 64.

SJÄLVA SKRIVELSEN

”The Commission wishes to inform the United Kingdom that it has re-examined the notification supplied by your authorities on the measure referred to above after the Judgment of the General Court of the European Union of 7 March 2012 in case T-210/02 RENV (British Aggregates Association v Commission). The reasoning followed by the General Court in its judgment of 7 March 2012 shows that there are objective reasons for the Commission to have doubts as to whether certain tax exemptions are in line with the logic and nature of the aggregates levy. The reasoning followed by the General Court also shows that those doubts exist for certain exemptions but not for all of them and do not put into question the aggregates levy in its entirety.

On this basis and after re-examination of the notification, the Commission has decided to:

— raise no objections to the tax exemptions, tax exclusions and tax reliefs established in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d) and 17(3)(da), 17(4)(d)) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2) (b) that provides for materials that are not used as aggregates) and Section 30(1)(c) of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007, on the ground that they do not constitute State aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union;

— initiate the procedure laid down in Article 108(2) of the Treaty in respect of the tax exemptions, tax exclusions and tax reliefs established in Sections 17(3)(e), 17(3)(f)(i) and (ii), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used as aggregate or consist mainly of coal, lignite, shale and slate), Section 17(4)(c)(i) and (ii) (when it consists mainly of the spoil), 17(4)(f) (as far as clay is concerned), 18(2)(b) (in so far as it relates to an exempt process that provides for materials that are used as aggregates) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are used as aggregates) of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007.

1. **PROCEDURE**

(1) By letter dated 20 December 2001 (registered on 28 December 2001), the United Kingdom authorities ("UK authorities") notified to the Commission an aid scheme with the title "*phased introduction of the aggregates levy in Northern Ireland*". In their notification, the UK authorities informed the Commission that they intended to introduce a levy on aggregates with effect from 1 April 2002. This levy was to be introduced by the Finance Act 2001, Part 2, Sections 16 to 49 and schedules 4 to 10. The aid scheme itself (phased introduction of the aggregates levy in Northern Ireland) was described as consisting of the introduction of the levy in several stages in Northern Ireland so as to preserve the international competitiveness of companies in Northern Ireland that manufacture processed products such as concrete and asphalt from aggregates. This staged introduction of the levy for Northern Ireland was to be introduced by the Finance Act 2002.

(2) In addition to the notification, the Commission received on 27 September 2001 a complaint from two companies engaged in the extraction and processing of aggregates and, on 15 April 2002, an additional complaint, submitted by the British Aggregates Association. The complainants considered that the Finance Act 2001 entailed State aid for the products and processes exempted from the aggregates levy (the "AGL") and considered that the derogations relating to Northern Ireland were aid incompatible with the internal market.

(3) After the submission of additional information on 21 February 2002, the Commission adopted, on 24 April 2002, a no objections decision with respect to the AGL ([1]). It considered that the different exemptions foreseen in the Finance Act 2001 were justified by the logic of the tax and that the Finance Act 2001 did not entail any State aid. The Commission further considered that the staged introduction of the AGL in Northern Ireland constituted aid that was compatible with the internal market.

(4) On 12 July 2002, the British Aggregates Association brought an action for annulment of the above mentioned Commission decision, registered as Case T-210/02. On 13 September 2006, the General Court dismissed the action in its entirety. On 27 November 2006, the British Aggregates Association appealed the judgment of the General Court. By judgment of 22 December 2008 in Case C-487/06 P, the Court of Justice set aside the appealed judgment and referred the case back to the General Court.

(5) On 7 March 2012, in its judgment in Case T-210/02 RENV, the General Court annulled the Commission decision mentioned in recital 3 above.. The General Court found that the Commission failed to demonstrate that the tax differentiation associated with the exemption is justified on the basis of the normal taxation principle underpinning the AGL or on the basis of the environmental objective of the AGL. The General Court found in particular that the Commission had failed to take account of the normal taxation principle in determining the selective nature of any advantage generated by the AGL. In this connection, the General Court pointed to the inconsistencies in terminology used by the Commission in its decision, namely as regards the terms "virgin", "primary" and "secondary" aggregates, which did not correspond to the terms used in the Finance Act 2001 as amended. Also, the Commission had failed to explain in its decision why certain exempt materials (used as aggregates, like clay aggregates) were not in the same legal and factual situation as taxed material.

([1]) OJ C 133 of 05.06.2002, p. 11.

(6) Following the annulment of the Commission decision finding that the Finance Act 2001 did not entail State aid, the Commission registered the file under a NN reference, since the AGL has been in force since 1 April 2002. The Commission must now re-assess whether the exemptions, exclusions and tax reliefs foreseen in the 2001 Finance Act, as amended by the Finance Act 2002 and Finance Act 2007, constitute State aid. The issue of the compatibility of the staged introduction of the AGL in Northern Ireland is being examined in the context of another procedure (see SA.18859 (2011/C) – United Kingdom – Relief from Aggregates Levy in Northern Ireland).

(7) In addition to the observations and submissions made during the Court proceedings, the complainant transmitted further comments and information to the Commission on 13 June 2012 and 26 October 2012. Those comments were transmitted to the UK on 15 May 2013. On 27 September 2012 and 27 May 2013, the UK authorities provided further information on the AGL.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Notion of aggregates

(8) Aggregates are used in the construction sector. They can generally [1] be described as corresponding to granular or particulate material which because of its physical and chemically inert properties is suitable for use on its own or with the addition of cement, lime or bitumous material in construction as concrete [2], roadstone, asphalt or drainage courses [3], or for use as construction fill [4]. Aggregate may be natural, manufactured or recycled [5].

(9) Natural aggregates are aggregates that occur naturally and that can be used without industrial processing. These are sand, gravel and crushed rock [6] and are extracted from quarries and gravel pits or from sea dredging.

(10) Recycled aggregates derive from reprocessing materials previously used in construction, including construction and demolition residues [7].

(11) Manufactured aggregates are generally lightweight and high density aggregates manufactured for specialist purposes. They are produced after application of an industrial process (usually a thermal process). Examples are: blastfurnace slag aggregate, expanded clay aggregate, expanded perlite aggregate, expanded polystyrene bead aggregate [8].

(12) Other terms commonly used in the industry are virgin aggregates, primary and secondary aggregates. The meaning of those terms is not uniform. Virgin aggregates usually designate aggregates freshly extracted that have not been previously used by opposition to recycled aggregates. Natural aggregates are also often referred to as primary aggregates [9]. This concept is often used by opposition to the concept of secondary aggregates used to designate aggregates derived from a range of industrial and mineral wastes such as power station ash, blast furnace slag, glass, china clay waste, slate waste and colliery spoil [10]. However, primary versus secondary aggregates are also sometimes used to designate the different grades/qualities of aggregates extracted in a quarry. In that sense, primary aggregates correspond to the premium quality aggregate while secondary aggregates correspond to lower quality grades and low-specification material [11]. In addition, mineral waste (china clay waste, slate waste, colliery spoil [12]) is

[1] Wikipedia: https://en.wikipedia.org/wiki/Construction_aggregate (29.05.2013); FAOterm: http://termportal.fao.org/faoterm/search/pages/termUrl.do?id=204 (29.05.2013), European Standard BSEN 12620:2002; Dictionary of Building, James H. Maclean and John S. Scott, Penguin Books, fourth edition; Oxford Dictionary of Construction, Surveying & Civil Engineering, Christopher Gorse, David Johnston and Martin Pritchard, Oxford University Press 2012; Glossary of Building and Civil Engineering Terms, British Standard Institution, Blackwell Scientific Publications, 1993, 100-4403; http://www.uepg.eu/what-are-aggregates. See also Case T-210/02 RENV of 7 March 2012, Britisch Aggregates Association v Commission, not yet published, paragraph 1.

[2] Concrete is a mixture of aggregates, cement and water. The purpose of the aggregates within this mixture is to provide a rigid skeletal structure and to reduce the space occupied by the cement paste.

[3] Aggregates are widely used in drainage application due to their high hydraulic conductivity value.

[4] Aggregates are used as base material under foundations, roads, and railroads. In that case, they help filling voids and protecting pipes (pipes laid to convey treated water, or as conduits for cables, need to be protected from sharp objects in the ground and are therefore laid on, and surrounded by fine aggregate before trenches are backfilled). Aggregates also help providing hard surfaces (they prevent differential settling under the road or building or railway - Unpaved roads and parking areas are covered in a surface layer of aggregate to provide a more solid surface for vehicles, from cycles to lorries. This prevents the vehicles from sinking into the soil, particularly during wet weather. Wikipedia: https://en.wikipedia.org/wiki/Construction_aggregate (29.05.2013); http://sustainableaggregates.com/overview/uses.htm (29.05.2013).

[5] European Standard BSEN 12620:2002.

[6] UEPG, http://www.uepg.eu/what-are-aggregates, visited on 28.03.2013. See also, http://www.bgs.ac.uk/planning4minerals/assets/downloads/86210_P4M_A_Guide_On_Aggregates.pdf p. 6.

[7] http://www.bgs.ac.uk/planning4minerals/Resources_1.htm (29.05.2013); http://sustainableaggregates.com/sourcesofaggregates/recycled/rib_introduction.htm (29.05.2013); http://www.uepg.eu/what-are-aggregates (29.05.2013).

[8] Glossary of Building and Civil Engineering Terms, British Standard Institution, Blackwell Scientific Publications, 1993, 630- 3.

[9] http://www.bgs.ac.uk/mineralsuk/mines/aggregates.html; http://www.bgs.ac.uk/planning4minerals/assets/downloads/86210_P4M_A_Guide_On_Aggregates.pdf http://www.bgs.ac.uk/planning4minerals/Resources_1.htm; http://aggregain.wrap.org.uk/terminology/primary.html

[10] http://www.bgs.ac.uk/planning4minerals/assets/downloads/86210_P4M_A_Guide_On_Aggregates.pdf; http://www.uepg.eu/what-are-aggregates; http://www.bgs.ac.uk/planning4minerals/Resources_1.htm; http://aggregain.wrap.org.uk/terminology/secondary.html; MPG6 - Guidelines for Aggregates Provision in England 1994, para. 6-119 (1).

[11] See Aggregates Levy – Consultation on waste aggregate released on 9th December 2002.

[12] Colliery spoil is the solid residual material resulting from the mining of coal. It is likely to contain varying proportions of sandstone, shale, mudstone and coal fragments. The properties of colliery spoil can vary considerably both within a tip and from tip to tip. These solid wastes are also known as minestone. Burnt colliery spoil is the residue following ignition of coal mine spoil heaps which results in partial to complete combustion of coal particles in the spoil, leaving calcinated rock. Burnt colliery spoil has broader applications as an aggregate than unburnt colliery spoil, since all the combustible material has been removed (http://aggregain.wrap.org.uk/terminology/burnt_colliery.html).

sometimes also included in the category of natural aggregates while aggregates derived from industrial processes are then placed in the category of manufactured aggregates ([1]).

(13) Materials that are suitable for use as aggregates can also be used to manufacture other products. In that sense, the industry distinguishes between aggregate uses of sand, gravel and crushed rock materials and non-aggregate uses ([2]) of sand, gravel and crushed rock materials. Non-aggregate uses of rock, sand and gravel are, for instance, the production of cement, glass, and other industrial ([3]) or agricultural uses ([4]).

2.2. **Background to the AGL and objective**

(14) Aggregate is a constrained natural resource, in terms of the areas in the country where it can be acceptably extracted ([5]). The quarrying of aggregate takes up land in the medium- to long-term and causes environmental damage and pollution.

(15) Towards the end of the 1990's, the UK authorities undertook several actions aimed at tackling a series of environmental concerns (energy efficiency, climate change, improving air quality, integrated transport strategy, sustainable waste management, limitation of the impact of land use and water pollution).

(16) In July 1997, they announced that research would be carried out to assess the environmental costs attached to the extraction of aggregates and to what extent these are not captured in the price, or covered by regulations ([6]).

(17) In April 1998, initial research suggested that there are significant environmental costs associated with aggregates extraction and transportation which were not covered by regulation (transport, noise, dust, blasting, impact on water, visual intrusion, impact upon wildlife, amenity) ([7]). In mid-1998, a public consultation was held on the practicalities of an aggregates tax while, in parallel, further research into the external costs and benefits of aggregates extraction was conducted. In March 1999, this research confirmed that there are significant environmental costs linked to the extraction of aggregates that were neither covered by regulation nor integrated in the price of aggregates. Such costs included noise, vibration, dust, visual intrusion, loss of amenity and damage to biodiversity. The results of the studies established a case, in principle, for a tax on the extraction of aggregates ([8]) and draft legislation for a tax on hard rock, sand and gravel used as aggregate was published.

(18) Before making a final decision on the introduction of a tax, the UK authorities attempted to pursue, with the industry, an enhanced package of environmental improvements ([9]). In March 2000, however, they announced that the industry had failed to come forward with an acceptable improved package and that the AGL would be introduced in April 2002 ([10]).

(19) The AGL was introduced with the aim of encouraging the more efficient use of aggregates in the construction industry by:

— Internalising in the price of aggregates some of the environmental costs of the extraction of aggregates, such as noise, dust, visual intrusion and biodiversity loss. In that sense, the AGL should encourage efficient extraction of aggregates and encourage economy of use and less waste at the construction site.

— Encouraging a shift in demand away from virgin/primary aggregates towards alternatives like:

  — recycled aggregates

  — wastes and by-products from other processes, including the extraction of other minerals (clay and coal extraction wastes, glass and tyres wastes) ([11]).

(20) In this connection, the UK authorities have explained that aggregates are a relatively low value product, especially compared with the total costs of building projects for which aggregates are an input. Aggregates can be extracted from the ground relatively easily. Therefore without additional price signals, such as the one given by the AGL, there is no particular incentive to use aggregates efficiently.

([1]) http://www.bgs.ac.uk/planning4minerals/Resources_1.htm (29.05.2013); Glossary of Building and Civil Engineering Terms, British Standard Institution, Blackwell Scientific Publications, 1993, 630- 3 (manufactured aggregates).

([2]) http://sustainableaggregates.com/overview/uses.htm (29.05.2013); HM Customs & Excises – Consultation on a Potential Aggregates Tax – Summary of Replies, April 1999, para. 18.

([3]) For instance, sand, usually silica sand, is used to make moulds in a foundry. Another example is limestone, or calcium carbonate. Ground to a fine powder it is used as a whitening agent or filler in paper, adhesives, paint, plastics, PVC, toothpaste, medical tablets and cleaning products. It is also used to provide additional calcium in vitamin and mineral supplements, flour and animal feed. Silica sand is also the principal filtration medium used by the water industry to extract solids from waste water.

([4]) Lime is taken up by plants (either crops or grass) and trees but is also naturally lost from soils through leaching by rainwater and the use of fertilisers. This can result in an increase in acidity, loss of fertility in the soil and sometimes an adverse effect on soil structure. To redress the balance, 'agricultural lime' is applied to fields to maintain the necessary growing conditions for crops or grassland. Lime can be simply ground limestone or dolomite (which also contains magnesium) or burnt limestone, (or burnt dolomite) where the rock is heated in a kiln.

([5]) MPG6 - Guidelines for Aggregates Provision in England 1994, para. 6-123 (23).

([6]) Financial Statement and Budget Report 1997 – Chapter 2: The Budget Measures – Protecting the environment and health, para. 2.22.

([7]) The Environmental Costs and benefits of the supply of aggregates, phase 1 – published by DETR, April 1998.

([8]) The Environmental Costs and benefits of the supply of aggregates, phase 2 – published by DETR, July 1999.

([9]) Pre-Budget Report – November 1998 – Chapter 5: Fairness – Protecting the environment, para. 5.63.

([10]) Budget 2000 – Prudent for a Purpose: Working for a Stronger and Fairer Britain – Chapter 6: Protecting the environment – Regenerating our cities/protecting our countryside – Waste; Aggregates, para. 6.90.

([11]) Budget announcement March 2000 – Prudent for a Purpose: Working for a Stronger and Fairer Britain – Chapter 6: Protecting the environment – Regenerating our cities/protecting our countryside – Waste; Aggregates, para. 6.91; Pre-Budget Report – November 2001 – Chapter 7: Protecting the environment – Protecting Britain's countryside – Aggregates quarrying – The aggregates levy, para. 7.71; Budget announcement March 2001 – Chapter 6: Protecting the environment, para. 6.91.

(21) Also, without additional price signals, recycling of aggregates would not be economically viable. The UK authorities consider that incentivising the use of recycled aggregates, while not without its own environmental costs such as use of energy and creation of noise, is an important aspect of reducing the environmental costs associated with the extraction of materials from the ground (such as long-term biodiversity impacts). Indeed, the use of recycled materials does not require the disturbance of new land or the sea-bed.

(22) Further to encouraging the use of recycled aggregates as an alternative to newly-quarried material, the AGL's structure also seeks to reduce the extraction of sand, gravel and rock specifically for use as aggregates, by incentivising the use of other materials that would otherwise be discarded. By-products, spoil and waste of other extraction processes or of industrial processes are usually considered to be of lower quality and specification than materials specifically extracted and exploited for use as aggregates. They may have slightly different uses and applications. For example, due to their lower density or uneven size they may not be safe to use in the construction of certain road surfaces or in other situations where the aggregates need to withstand high pressure and wear and tear. However, by-products, waste and spoil can still present a viable alternative to the highest quality aggregates in many situations. The by-products, waste and spoil from processes specified in the Finance Act 2001 would be discarded without the existence of the AGL. As they are however a necessary by-product of a number of processes which deliver important materials for the construction industry (such as roof tiles from slate) or other industries (such as feldspar for the glass making industry), the UK authorities find it environmentally more efficient to find a use as aggregates for these materials, instead of depositing them as waste. This avoids additional environmental costs by using already quarried product that would otherwise be left as waste, as opposed to the (additional) extraction of virgin aggregates with unnecessary additional environmental costs (disturbance of new land). In addition, this assists in the rehabilitation of land already defaced by large waste and spoil tips. The UK authorities have added that the application of the AGL to such materials could have the undesired effect of discouraging what little use of those materials already exists, thus increasing rather than reducing tipping.

(23) The UK authorities have provided estimates about the available amount of alternatives in 2001: slate waste (370 Mt in 2001 + additional 6Mt annually, of which 275 000 t are used as aggregates), china clay waste (450 Mt + additional 20-24 Mt annually, of which 1.5 Mt used as aggregates), colliery spoil (tips: 10 - 20 Mt + annually 8.8 Mt annually, of which around 2.2 are used as aggregates), power station ash (tips: 10-20 Mt + annually 8,8 Mt of which around 2.2 Mt are already used as aggregates), blast furnace slag (around 3.65 Mt in England and Wales, 2-/3 of it is used as aggregates), basic oxygen furnace steel slag (2.5 Mt annually in England and Wales, all used, mainly as roadstone), electric arc furnace steel slag (0.2 Mt in England and Wales, all of it is used as aggregates), municipal incinerator ash (of which approx. 0.08 Mt used in road surfacing and concrete production), waste glass (minimal amount used as aggregates at present), tyre rubber crumb (of which approx. 0.05 Mt are used annually as aggregates).

(24) Initial projections suggested that the AGL would reduce demand for virgin aggregates by an average of 20 Mt/annum.

(25) The UK authorities have indicated that given the aim of inducing a more efficient extraction and a more efficient use of virgin aggregates, "*the levy falls on those who undertake quarrying for the purposes of commercially exploiting aggregate*" ([1]). In this connection, the UK authorities have explained that while quarrying of high-specification materials to be used as aggregates also produces materials of lesser quality and hence price, it is not in practice possible to relieve these materials in a similar manner as by-products of industrial processes or other extraction activities. First the proportion of high quality and low quality aggregates will vary from quarry to quarry because of geological factors but is not an immutable figure for any given quarry as more efficient practices can help reducing the proportion of low quality aggregates. In addition, the term low quality aggregate is, to some extent, a subjective term. What one quarry operator would consider as low quality could be part of another's primary product range. Exempting low quality aggregates could thus lead to unequal treatment of operators and lead to tax avoidance or evasion. Extensive public consultation with the industry on this issue around the time of the introduction of the AGL did not yield a workable definition of how to distinguish between high quality materials which should be taxed and lower quality by-products of the process of extracting high value aggregates. The UK authorities further note that taxing low quality aggregates also reflects the desire to address the environmental costs of aggregate extraction, regardless of whether the extracted product is ultimately deemed to be of high or low quality.

(26) Finally, the UK authorities note that the AGL is not conceived as a general tax on mineral extraction but as a tax on the extraction of rock, sand and gravel used as aggregates and subject to commercial exploitation in the UK. The UK authorities have explained that while the extraction of other materials may have similar environmental impacts, not all have suitable options for lessening the intensity of extraction through the use of alternative materials such as recycled materials and spoil. In addition, aggregates' extraction was the largest UK mineral extraction activity (in 2002, it accounted for around 70%, by tonnage, of all mineral extraction) and therefore constituted the main source of environmental damage arising from mineral extraction across the UK as a whole. The scope of the tax was defined in order to achieve the greatest environmental benefit in the form of a reduction in the extraction of aggregates and in terms of the preservation of strategic resources, while at the same time not imposing a dead-weight tax burden on materials for which an alternative does not exist.

([1]) Letter dated 19.02.2002, registered on 21.02.02 under A/31371, para. 4.10.

2.3. **Finance Act 2001, entry into force, amendments and duration**

(27) The primary legislation governing the AGL is set out in the Finance Act 2001, Sections 16 to 49 and Schedules 4 to 10. The Finance Act 2001 was adopted on 11 May 2001. The AGL came into effect on 1 April 2002 and is still applicable. The law does not limit the application in time of the AGL.

(28) The original provisions were amended by the Finance Act 2002. The amendments lay down exemptions for spoils resulting from the extraction of certain minerals, including slate, shale, ball clay and china clay. In addition, the Finance Act 2002 provides for a phased introduction of the AGL in Northern Ireland. The amendments are deemed to have come into force on 1 April 2002.

(29) The scope of the AGL was further modified by the Finance Act 2007, Section 22 (laying down an exemption for aggregates removed from railways). It entered into force on 1 July 2007. Any reference to the Finance Act 2001 in this decision will refer to the Finance Act 2001 as amended by the Finance Act 2002 and by the Finance Act 2007.

2.4. **Structure of the AGL and events triggering the tax**

(30) Section 16(1) of the Finance Act 2001 states that "*a levy, to be known as aggregates levy, shall be charged in accordance with this Part on aggregate subjected to commercial exploitation*".

(31) According to Section 17(1) “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*".

Section 18(1) provides that: "*In this Part references to aggregate: (a) include references to the spoil, waste, off-cuts and other by-products resulting from the application of any exempt process to any aggregate (b) but do not include references to anything else resulting from the application of any such process to any aggregate*".

(32) According to Section 18(2) exempt processes are:

(a) the cutting of any rock to produce stone with one or more flat surfaces;

(b) any process by which a relevant substance is extracted or otherwise separated (whether as part of the process of winning it from any land or otherwise) from any aggregate;

(c) any process for the production of lime or cement from limestone or from limestone and anything else.

(33) Section 18(3) lists the relevant substances as being (a) anhydrite; (b) ball clay; (c) barytes; (e) china clay; (f) feldspar; (g) fireclay; (i) fluorspar; (j) fuller’s earth; (k) gems and semi-precious stones; (l) gypsum; (m) any metal or the ore of any metal; (n) muscovite; (o) perlite; (p) potash; (q) pumice; (r) rock phosphates; (s) sodium chloride; (t) talc; (u) vermiculite. Subsections (3)(d) and (h) of section 18 were omitted retroactively as of 1 April 2002 by changes introduced by the Finance Act 2002.

(34) Section 16(2) of the Finance Act 2001 read in conjunction with Section 19(1) and Section 19(2) determines that the AGL is triggered by any of the following four types of commercial exploitation within the UK that would occur first:

a) it is removed from its originating site, or any site registered under the name of a person who is the operator of the originating site [1], or any other site to which the quantity of aggregate had been removed for the purpose of having an exempt process applied to it on that site but at which no such process has been applied to it.

b) it becomes subject to an agreement to supply it to any person [2];

c) it is used for construction purposes; or

d) it is mixed, otherwise than in permitted circumstances [3], with any material or substance other than water.

(35) For the purpose of the AGL, the Finance Act 2001 distinguishes essentially between three types of originating sites:

a) the port or other landing site at which aggregate won from the UK seabed is first landed (Section 20 (1) (a)).

b) the site where an exempt process took place (Section 20 (1) (b)). This relates to situations where an exempt process has been applied, the exempt substance has been extracted and some aggregate is left over and exploited. The site where the extraction of the exempt substance took place becomes the originating site of the aggregate.

c) the site where the aggregate is obtained from the ground (Section 20 (1) (d)).

(36) As a result of the concept of commercial exploitation, the AGL applies to both aggregates extracted in the UK and imported aggregates. Imported aggregates will be subjected to the AGL not when they are landed in the UK [4] but when they are the subject matter of an agreement (and the aggregate is already located in the UK) or are used for constructions purposes (in the UK) or are mixed (in the UK) with any material or substance other than water, unless in permitted circumstances [5].

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[1] This provision is meant to cover the case where the aggregate is transferred from one site to the other belonging to the same operator. The transfer from site to site is normally not subjected to the AGL, see Section 19(3)(b) of Finance Act 2001.

[2] The UK authorities indicated that aggregate is subject to an agreement to supply when a contract is made or when the goods change hands and a document is raised. Section 19(6) of Finance Act 2001 indicates that an aggregate will be subjected to the agreement at the moment it is separately identifiable. Also it provides that for the purpose of the levy, the transfer of ownership of land on which aggregates are located does not automatically amount to a supply of the aggregate too.

[3] Permitted circumstances are defined at subsection (7) of section 19. It concerns the situation where the aggregate is mixed with taxable aggregates that have not previously borne the AGL and all the mixing takes place at a site which is the originating site, a site registered under the same name as the originating site or a site to which aggregate has been removed for an exempt process to be applied to it but which has not been applied to it.

[4] The landing site of aggregates corresponds to an originating site only for aggregates extracted from the UK seabed/waters.

[5] See also Notice AGL 1: Aggregates Levy, April 2011, point 8.1.

(37) Section 19 (3) of Finance Act 2001 contains further details on the concept of commercial exploitation. It provides in letter (d) that there is no commercial exploitation taking place when - without its being subjected to any process involving its being mixed with any other substance or material (apart from water) - it again becomes part of the land at the site from which it was won ([1]).

(38) Section 21 and 22 define who is the operator of a site and whether it is the operator of a site or some other person who is responsible for exploitation (and therefore liable to account for the AGL) in a given situation.

2.5. **Notion of taxable aggregate – exemptions from the AGL and tax credits**

(39) Section 17(2) of the Finance Act 2001 provides that an aggregate is not a taxable aggregate in four cases:

a) if it is expressly exempted;

b) if it has previously been used for construction purposes (whether before or after the commencement date);

c) if it is, or derives from, any aggregate that has already been subjected to the AGL;

d) if it is aggregate that was removed from its originating site before the commencement date.

(40) An aggregate is regarded as being used for construction purposes when it is used as a material or support in the construction or improvement of any structure (including roads, paths, the way on which any railway is or is to be laid, embankments, buildings and bridges) or when it is mixed with anything as part of the process of producing mortar, concrete, tarmacadam, coated road stone or any similar construction material ([2]).

(41) Section 17(3) specifies that the following aggregate is exempt from the AGL if:

(b) it consists wholly of aggregate won by being removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out: (i) in connection with the modification or erection of the building; and (ii) exclusively for the purpose of laying foundations or of laying any pipe or cable;

(c) it consists wholly of aggregate won (i) by being removed from the bed of any river, canal or watercourse (whether natural or artificial) or of any channel in or approach to any port or harbour (whether natural or artificial); and (ii) in the course of the carrying out of any dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach;

(d) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any highway or proposed highway and in the course of excavations carried out: (i) for the purpose of improving or maintaining the highway or of constructing the proposed highway; and (ii) not for the purpose of extracting that aggregate;

(da) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any railway, tramway or monorail or proposed railway, tramway or monorail and in the course of excavations carried out: (i) for the purpose of improving or maintaining the railway, tramway or monorail or of constructing the proposed railway, tramway or monorail; and (ii) not for the purpose of extracting that aggregate;

(e) it consists wholly of the spoil, waste or other by-products, not including the overburden, resulting from the extraction or other separation from any quantity of aggregate of any china clay or ball clay; or

(f) it consists wholly of the spoil from any process by which (i) coal, lignite, slate or shale or (ii) a substance listed in section 18(3) below, has been separated from other rock after being extracted or won with that other rock.

(42) Subsection (3)(da) of section 17 was inserted by Section 22(3) of the Finance Act 2007, operative from 1 August 2007.

(43) In addition, subsection (4) of section 17 exempts aggregates consisting wholly or mainly of any one or more of the following, or is part of anything so consisting, namely:

(a) coal, lignite, slate or shale;

(c) the spoil or waste from, or other by-products of (i) any industrial combustion process, or (ii) the smelting or refining of metal;

(d) the drill-cuttings resulting from any operations carried out in accordance with a licence granted under the Petroleum Act 1998 [or the Petroleum (Production) Act (Northern Ireland) 1964;

(e) anything resulting from works carried out in exercise of powers which are required to be exercised in accordance with, or are conferred by, provision made by or under the New Roads and Street Works Act 1991, the Roads (Northern Ireland) Order 1993 or the Street Works (Northern Ireland) Order 1995;

(f) clay, soil or vegetable or other organic matter.

(44) According to the Notice AGL 1, "*wholly*" means that 100 % of the material in question is one of the exempt materials. "*Mainly*" means that more than 50 % of the material is one of the exempt materials. Artificially mixing aggregate with a larger amount of exempt material will not produce an exempt mixture but will mean that the AGL is due on the aggregate at the time of mixing.

(45) Section 30 (1) of the Finance Act 2001 provides for regulations to be made establishing a person's right to a credit of tax if:

a. the aggregate that has been subject to the AGL is exported from the UK in the form of aggregate;

b. an exempt process is applied to the aggregate that has been subject to the AGL;

([1]) This latter provision relates to the situation where the aggregate is returned to the land where it was won and is still in the same state as it was won. In such situation there is no taxable supply of aggregates.

([2]) See Notice AGL 1.

c. the aggregate that has been subject to the AGL is used in a prescribed industrial or agricultural process;

d. the aggregate that has been subject to the AGL is disposed of in such manner not constituting its use for construction purposes as may be prescribed [1]; or

e. the whole or any part of a debt due to a person responsible for subjecting the aggregate to commercial exploitation is written off in his accounts as a bad debt.

(46) Section 30 (1) (b) of the Finance Act 2001 provides for a tax relief in the case an exempt process within the meaning of Section 18 (2) (a), (b) and (c) of the Financial Act 2001 has been applied to the material when the material has already been subject to the AGL. It thus mirrors the exemptions provided for in Section 18 (2).

(47) The industrial and agricultural processes that can benefit from a tax relief under Section 30 (1) (c) are listed in the Schedule "Industrial and Agricultural Processes" to regulation 13 of the Aggregates Levy (General) Regulations 2002. Notice AGL 2 [2] describes in more detail the type of processes that are concerned. They are the following:

Industrial processes

— Code 001: Iron, steel and non-ferrous metal manufacture and smelting processing including foundry processes, investment casting, sinter plants and wire drawing

— Code 002: Alloying

— Code 003: Emission abatement for air, land and water

— Code 004: Drinking water, air and oil filtration and purification

— Code 005: Sewage treatment

— Code 006: Production of energy

— Code 007: Ceramic processes

— Code 008: Refractory processes

— Code 009: Manufacture of glass and glass products

— Code 010: Manufacture of fibre glass

— Code 011: Man-made fibres

— Code 012: Production and processing of food and drink

— Code 013: Manufacture of plastics, rubber and PVC

— Code 014: Chemical manufacturing for example soda ash, sea water magnesia, alumina, silica

— Code 015: Manufacture of precipitated calcium carbonate

— Code 016: Manufacture of pharmaceuticals, bleaches, toiletries and detergents

— Code 017: Aerating processes

— Code 018: Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media

— Code 019: Manufacture of pigments, varnishes and inks

— Code 020: Production of growing media and line markings for sports pitches and other leisure facilities

— Code 021: Incineration

— Code 022: Manufacture of desiccant

— Code 023: Manufacture of carpet backing, underlay and foam

— Code 024: Resin processes

— Code 025: Manufacture of lubricant additives

— Code 026: Leather tanning

— Code 027: Paper manufacture

— Code 028: Production of art materials

— Code 029: Production of play sand e.g. for children's sand pits

— Code 030: Clay pigeon manufacture

— Code 031: Abrasive processes: specialist sand blasting, iron free grinding (pebble mills) and sandpaper manufacture

— Code 032: Use as propping agent in oil exploration (or production), for example, fracture sands and drilling fluids

— Code 033: Flue gas desulphurisation and flue gas scrubbing

— Code 034: Manufacture of mine suppressant

— Code 035: Manufacture of fire extinguishers

— Code 036: Manufacture of materials used for fire-proofing

— Code 037: Acid neutralisation

— Code 038: Manufacture of friction materials for example automotive parts

Agricultural processes

— Code 039: Manufacture of additives to soil

— Code 040: Manufacture of animal feeds

— Code 041: Production of animal bedding material

(1) The Aggregates Levy (General) Regulations 2002 (SI 2002/761) prescribe in which cases the disposal of aggregates may lead to a tax relief. According to regulation 13a person is entitled to a tax credit in respect of any AGL accounted for where the taxable aggregate in question is disposed of (by dumping or otherwise) in any of the following ways:
i. *it is returned without further processing to its originating site or any site which is not its originating site but is registered under the same name;*
ii. *it is disposed of to landfill;*
iii. *it is gravel or sand and is used for beach restoration purposes at a site which is not its originating site.*

(2) Notice AGL2 Industrial and Agricultural Processes Relief, available on the website of HM Revenue & Customs.

— Code 042: Production of fertiliser

— Code 043: Manufacture of pesticides and herbicides

— Code 044: Production of growing media, including compost, for agricultural and horticultural use only

— Code 045: Soil treatment, including mineral enrichment and reduction of acidity

2.6. **Rate**

(48) Originally, the AGL was levied at the rate of £1.60 per tonne. The rate was increased to £1.95 per tonne for aggregates subject to commercial exploitation on or after 1 April 2008. The rate currently applied is £2 per tonne (since 1 April 2009).

3. ASSESSMENT OF THE MEASURE

3.1. **Existence of aid within the meaning of Article 107 (1) of the TFEU**

(49) A measure constitutes State aid within the meaning of Article 107(1) TFEU if it fulfils four conditions. First, the measure confers an advantage to the beneficiaries. Second, the measure favours certain undertakings or economic activities (selectivity). Third, the measure is funded by the State or through State resources. And fourth, the measure has the potential to affect the trade between Member States and to distort competition in the internal market.

(50) According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect [1].

(51) As regards the criterion of the selectivity of the advantage, it is necessary to consider whether, under a particular statutory scheme or specific tax system, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU in comparison with other undertakings in a comparable legal and factual situation in the light of the objective pursued by the scheme or tax system concerned [2].

(52) However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the tax system of which it is part does not satisfy that condition of selectivity [3]. A Member State can thus show that a measure results directly from the basic or guiding principles of its tax system.

(53) For the purpose of assessing the selective nature of the advantage conferred by the measure in question, it is important to determine what constitutes the reference framework, since the existence of an advantage may be established only when compared with this reference framework [4].

(54) As the General Court has confirmed [5], the reference framework on the basis of which normal taxation and the existence of any selective advantages are to be determined consists of the AGL itself since it established a specific tax system applicable to the aggregates sector in the UK. It is thus by reference to the nature and general scheme of the AGL that it is necessary to examine whether tax differentiations are justified.

(55) The Commission has examined the Finance Act 2001 as amended retroactively by Finance Act 2002. As the AGL is an on-going scheme, the Commission has also examined the exemption laid down in Section 17(3) (da), which was introduced by the Finance Act 2007.

3.1.1. *Normal taxation under the AGL and logic of the AGL*

(56) As can be drawn from its name, the AGL is a levy on aggregates. Sections 16 (1) and (2) of the Finance Act 2001 establish a levy on aggregates that are subjected to commercial exploitation in the UK on or after its commencement date.

(57) The commencement date is 1 April 2002. What constitutes commercial exploitation is defined in Section 19. As indicated in recital 34.above, four types of commercial exploitation are envisaged: a) the removal from its originating site; b) the conclusion of an agreement to supply; c) the use for construction purposes; or d) the mixing with any material or substance other than water.

(58) As to the concept of aggregates, the UK authorities have confirmed that the AGL is not conceived as a levy on all extracted minerals or even on all rock, gravel or sand, but only on rock, gravel and sand extracted for the purpose of providing bulk in construction.

(1) see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 131; and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29 and the case-law cited.

(2) Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; see also Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 119; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54; and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 46; Case T-210/02 RENV, *British Aggregates Association v Commission*, paragraph 47; Case C-487/06 P, *British Aggregates Association v Commission* [2008] ECR I-10515, paragraph 82.

(3) *Adria-Wien Pipeline*, cited above in footnote 36, paragraph 42, and *Portugal* v *Commission*, cited in footnote 36, paragraph 52; Case C-487/06 P, *British Aggregates Association v Commission* [2008] ECR I-10515, paragraph 83.

(4) *Portugal* v *Commission*, cited in footnote 36, paragraph 56, and Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 81; Case T-210/02 RENV, *British Aggregates Association*, cited in footnote 36, paragraph 49.

(5) Case T-210/02 RENV, *British Aggregates Association*, cited in footnote 36, paragraph 51.

(59) This is further confirmed by the preparatory works of the AGL ([1]). They confirm that from the outset, the AGL was designed to be a tax on aggregates and not on any extracted mineral. This has also been recognised by the General Court ([2]).

(60) As indicated in recital 8 above, aggregates can generally be described as corresponding to granular or particulate materials which because of their physical and chemically inert properties are suitable for use on their own or with the addition of cement, lime or bitumous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill. Natural aggregates are sand, rock and gravel. However, as indicated in recital 13 above, materials that are used as aggregates can also serve other purposes. In other terms, whether a material has to be considered as an aggregate or not will depend on its use rather than its geological composition.

(61) In the course of drafting the AGL legislation, the UK authorities realized that a use-based definition of the scope of the tax would prove problematic, as the intended use for the product could change after the tax point had passed ([3]). In order to solve that difficulty, the UK authorities opted for another technique. Instead of using a precise definition of the term aggregate or general taxation criteria, the Finance Act 2001 starts by subjecting sand, gravel or rock to the tax but then narrows down the application and scope of the tax through exclusions, exemptions and tax reliefs of rock, sand or gravel that have been used for certain purposes or have been subjected to certain processes.

(62) The objective assigned to the AGL is to ensure that the environmental impact of aggregates extraction (in particular damage to biodiversity and to visual amenity) is more fully reflected in prices so as to induce a more efficient extraction and use of aggregates. It also aims at encouraging a shift in demand away from virgin/primary aggregates towards alternative aggregates such as recycled aggregates and aggregates which are the by-products of or waste from certain extraction or industrial processes. The shift in demand on its turn will reduce the need for virgin/primary aggregates and will thus limit the damage to the environment associated with the extraction activity.

(63) The Commission notes that throughout consultation documents, preparatory works and other documents that accompanied the adoption of the AGL, the terminology used is not consistent. Reference is made sometimes to virgin, sometimes to primary aggregates. The Commission notes also that these terms, in particular virgin and primary aggregates, are not used in the Finance Act 2001. It is therefore necessary to determine the objective assigned to the tax system of the AGL without referring to this terminology but by reference to its content.

(64) The Commission first notes that while those terms are frequently used in the industry, they do not seem to have a uniform definition either. However, those terms seem to have in common that in their usual meaning they refer to (freshly) extracted aggregates that have not yet been used.

(65) As is apparent from the documents surrounding the adoption of the AGL ([4]) and as results also from the explanations provided by the UK authorities ([5]) and summarized under section 2.2, the terms virgin/primary aggregates are used in opposition to recycled aggregates and alternatives such as wastes from industrial processes (slag, waste tyres and waste glass) but also to spoil from certain extraction activities (like the spoil of china clay, slate and coal extraction). Although technically the spoil from extraction activities (like the spoil of china clay and slate extraction) could qualify as virgin or even primary aggregates (if primary is understood as referring to natural aggregates), it has in common with wastes resulting from industrial processes that generally it does not constitute material that was specifically extracted in order to be used as aggregate.

(66) Irrespective of the terminology used, it thus appears that the UK authorities oppose aggregates that were (freshly) extracted for their use as aggregates to various materials that were either not freshly extracted as aggregates or that were inevitably obtained as a result of other activities that were not aimed at the extraction of aggregates but which nonetheless could serve as alternatives to freshly and specifically extracted aggregates.

(67) On the basis of the foregoing, and in particular in the light of the structure of the AGL resulting from the Sections 16(1), 16 (2), 17, 18 and 30 of the Finance Act 2001, as amended, and of the preparatory works, the Commission comes to the conclusion that the nature and logic of the AGL is the taxation of rock, gravel and sand (freshly) extracted for being used as aggregates, whenever they are used as such and are subjected to commercial exploitation within the UK on or after 1 April 2002.

([1]) See Economic and Fiscal Strategy Report and Financial Statement and Budget Report 1999 – Chapter 5: Building A Fairer Society – Tackling tax abuse; Protecting the environment p.27 "*The Government will shortly publish draft legislation for a tax on the extraction of hard rock, sand and gravel used as aggregates*". See also Budget announcement March 2000 – Prudent for a Purpose: Working for a Stronger and Fairer Britain – Chapter 6: Protecting the environment – Regenerating our cities/protecting our countryside – Waste; Aggregates, para. 6.91; Pre-Budget Report – November 2001 – Chapter 7: Protecting the environment – Protecting Britain's countryside – Aggregates quarrying – The aggregates levy, para. 7.71; Budget announcement March 2001 – Chapter 6: Protecting the environment, para. 6.91; showing that the UK authorities envisaged specifically a tax on aggregates only.

([2]) Case T-210/02 RENV, *British Aggregates Association*, cited in footnote 36, paragraph 66.

([3]) HM Customs & Excises – Consultation on a Potential Aggregates Tax – Summary of Replies, April 1999, para. 13.

([4]) See in particular MPG6 - Guidelines for Aggregates Provision in England 1994, para. 6-119 (1); Budget announcement March 2000 – Prudent for a Purpose: Working for a Stronger and Fairer Britain – Chapter 6: Protecting the environment – Regenerating our cities/protecting our countryside – Waste; Aggregates, para. 6.91; Pre-Budget Report – November 2001 – Chapter 7: Protecting the environment – Protecting Britain's countryside – Aggregates quarrying – The aggregates levy, para. 7.71; Budget announcement March 2001 – Chapter 6: Protecting the environment, para. 6.91.

([5]) Letter of 19.02.2002, registered on 21.02.2002 under reference A/ Letter dated 19.02.2002, registered on 21.02.02 under A/31371, para. 4.11; Letter of 27.09.2012, p2, reply to question 2.

(68) As regards its objective, the Commission notes that the AGL aims at making the extraction of aggregates more efficient by internalising the environmental costs of that activity. In addition, it aims at shifting demand towards alternative sources of aggregates, i.e. recycled aggregates and material that were not extracted for their commercial exploitation as aggregates but which could serve as such.

3.1.2. *Differentiations*

(69) The Finance Act 2001 starts from a very broad scope that is then narrowed down through exclusions and exemptions. In addition, the Finance Act 2001 also foresees a certain number of tax reliefs. The Commission will examine whether those exclusions, exemptions and tax reliefs are in line with the normal taxation principles guiding the AGL and whether the aggregates concerned by each exclusion or exemption are in a comparable situation with taxed materials in the light of the objective of the AGL.

3.1.2.1. Exclusion of and tax relief for cut stone with one or more flat surfaces (Section 18(2)(a) and Section 30(1)(b))

(70) Dimension stone (cut stones with one or more flat surfaces) are used for instance to erect the walls of a house. Since such stones are not used to provide bulk, they are not in a comparable situation to rock used as aggregates.

(71) The Commission therefore considers that this exclusion from the scope of the AGL is in line with the normal taxation principles underpinning the AGL.

3.1.2.2. Exclusion of and tax relief for certain minerals (Section 18(2)(b) and Section 30(1)(b))

(72) The UK authorities have indicated that neither of the substances exempted under Section 18 [1] are quarried or mined for use as aggregates.

(73) As long as those minerals are not used to provide bulk in the construction sector, the Commission believes that the exclusion of those minerals from the scope of the AGL is in line with its normal taxation principles.

(74) The complainant has argued that the AGL lacks any environmental consistency because it exempts certain minerals the extraction of which has the same environmental impact as the extraction of aggregates. The Commission notes, however, that the AGL does not constitute a tax on mineral extraction in general but a tax on the extraction of aggregates subject to commercial exploitation in the UK. As the General Court has confirmed, it is the normal taxation principles underpinning the AGL that serve as reference point to examine whether the exemptions provide for a selective advantage [2]. It must therefore be concluded that in so far as the minerals concerned are not used as aggregates, their exemption/exclusion from the AGL does not lead to a selective advantage within the meaning of Article 107 (1) TFEU.

(75) However, it would seem that some of those minerals are sometimes also extracted to serve as aggregates. For instance, it seems that vermiculite and perlite serve to produce lightweight manufactured aggregates [3]. The exclusion of these minerals, in so far as they are extracted to produce lightweight aggregates and are used as such, does not therefore seem in line with the normal taxation principles of the AGL and it is not clear to the Commission why the extraction of those minerals would not be in a comparable situation as the extraction of other taxed aggregates.

(76) However, it is not clear from the information available which minerals exactly are used as aggregates.

(77) Also, it is not clear since when those aggregates exist on the market, what they represent in terms of volume compared to the total amount of aggregates, how their sales have evolved since 2001 and whether the materials that served to produce those aggregates were extracted for use as aggregate because, for instance, they lack the quality required by the other "usual" uses of the minerals concerned.

(78) Under such circumstances, the Commission doubts whether a general exemption of those materials, which does not seem to take into account their use as aggregates, is in line with the normal taxation principles underpinning the AGL. The UK authorities are invited to explain which minerals are used as aggregates. For those materials that are also used as aggregates, the UK authorities are invited to indicate what those aggregates represent in terms of volume and value compared to the total amount of aggregates, and how their sales have evolved since 2001. Should some of the minerals concerned be used as aggregates, the UK authorities are invited to explain why the nature and logic of the AGL require that they are exempted from the scope of the AGL.

3.1.2.3. Exemption of material consisting wholly or mainly of, or being part of anything consisting of coal, lignite, slate or shale (Section 17(4)(a))

(79) The Commission notes that all those materials qualify as rock.

(80) As far as slate and shale are concerned, they are often cut with one or more flat surfaces. In such case, they would be deemed excluded from the scope of the AGL also by virtue of Section 18 (2) (a). The exclusion of materials used as "cut-stone" is in line with the normal taxation principles underpinning the AGL.

(81) The UK authorities have explained that coal, lignite, slate or shale are not primarily quarried for use as aggregates.

[1] Those substances also benefit from a tax relief when the tax was paid and the exempt process took place afterwards (Section 30(1)(b)). The assessment of the exclusion applies mutatis mutandis to the tax relief.

[2] Case T-210/02 RENV, paragraphs 51 and 66.

[3] See Glossary of Building and Civil Engineering Terms, British Standard Institution, Blackwell Scientific Publications, 1993, 630-3007 and 630-3013.

Slate is traditionally extracted for use as a specialist building material (e.g. as roofing or flooring). In some regions its use is encouraged for heritage reasons. Shale is a fissile mineral with a high clay content. As natural clay deposits become depleted, shale is increasingly used in the manufacture of bricks and tiles. It can also be an ingredient in the production of cement. Coal is a sedimentary rock composed primarily of carbon. Lignite has a much lower carbon content than coal and a very high moisture content. Both are used as energy products.

(82) Given that the AGL applies to aggregates, and therefore targets rocks, sand and gravels which are used for bulk in construction, excluding those materials when they are used for other purposes than as aggregates, seems to be in line with the normal taxation principle underpinning the AGL.

(83) However, it would appear, according to evidence produced by the British Aggregates Association in attachment to their Reply submitted to the General Court in the initial case T-210/02, that slate and shale are used as aggregates [1]. The Commission has not received any evidence suggesting that coal and lignite might also serve as aggregates. It is not entirely clear whether those materials would have the requisite qualities in terms of inertness.

(84) A general exemption of shale and slate, even when they are used as aggregates or bulk for construction purposes, does not appear to be in line with the normal taxation principles underpinning the AGL and does not seem to result from the nature and general scheme of the AGL.

(85) A general exemption can also not be accepted based on the argument that most of the time they are not used as aggregates. It is precisely because it was difficult to determine in advance to what use the materials would serve that the UK chose to grant a tax credit in case some of the materials subject to tax would be used for industrial and agricultural purposes. It is not clear why a tax relief instead of an outright exemption would not be more appropriate also in the case of shale and slate.

(86) Also, it is not clear why the exemption also extends to material that is mainly (i.e. as of 50 %) made of coal, lignite, shale or slate. It would seem that when the material is made of between 50 and 100 % coal, lignite, shale and slate, the probability is even higher that the material will serve as aggregate and an upfront exemption seems even less justified.

(87) Under such circumstances, a general exemption of those materials, in particular slate and shale, even when they are used as bulk for construction purposes does not seem to be in line with the normal taxation principles underpinning the AGL.

3.1.2.4. Exclusion of and tax relief for limestone used for the production of lime or cement (Section 18(2)(c) and Section 30(1)(b))

(88) When limestone is used to produce lime or cement, it is not used to provide bulk but as a raw material in a chemical reaction process that leads to the production of a product that is chemically different from limestone and that does not serve as aggregate.

(89) When limestone ($CaCO_3$) is calcinated at about 1 000 °C in different types of lime kiln, quicklime is produced according to the reaction: $CaCO_3$ + heat → CaO + CO_2. Quicklime can be hydrated, i.e., combined with water. Hydrated lime, known as slaked lime, is produced according to the reaction: CaO + H_2O → $Ca(OH)_2$. Lime itself does not provide bulk but constitutes a binder. Cement is made by heating limestone (calcium carbonate) with small quantities of other materials (such as clay) to 1 450 °C in a kiln, in a process known as calcination, whereby a molecule of carbon dioxide is liberated from the calcium carbonate to form calcium oxide, or quicklime, which is then blended with the other materials that have been included in the mix. The resulting hard substance, called 'clinker', is then ground with a small amount of gypsum into a powder to make 'Ordinary Portland Cement', the most commonly used type of cement (often referred to as OPC). Both lime and cement serve as binder and not as aggregate. Lime also has other uses (among others agricultural uses).

(90) The Commission therefore concludes that the exclusion of limestone used for the production of lime or cement, as well as the resulting lime or cement, is in line with the normal taxation principles of the AGL.

3.1.2.5. Exemption of aggregates that are or derive from already taxed aggregates (Section 17(2)(c))

(91) This exemption appears to be in line with the logic of the AGL. Whenever the aggregate has already been taxed, it has already been impacted by the tax and the tax has already served its purpose.

(92) In addition, the prevention of double taxation is a commonly accepted principle used in tax regimes.

3.1.2.6. Exemption of aggregate that was removed from its originating site before 1 April 2002 (Section 17(2)(d))

(93) This exemption appears to be in line with the normal taxation principles of the AGL. It covers aggregates that had already left its originating site (which would normally have been the first commercial exploitation event triggering the AGL) before the commencement date of the AGL.

3.1.2.7. Aggregates that have previously been used for construction purposes (whether before or after the commencement date) (Section 17(2)(b))

(94) This exemption concerns recycled aggregates. Recycled and freshly extracted aggregates are not in a comparable

[1] Extracts (dated 30.10.2002) from the website of Alfred McAlpine Published at: http://www.amslate.com/applications/ima/ima.sbtml; Extracts from Construction Raw Materials Policy and Supply Practices in Northwestern Europe – Facts and Figures – England, Scotland and Wales (Great Britain), British Geological Survey Commissioned Report CR/02/082N commissioned by the Road and Hydraulic Engineering Institute of the Ministry of Public Works and Water Management of the Netherlands, p. 50; Document by Geoff Topham of Aggregate Industries concerning quarrying at Holme Park Quarry, 19 June 2002.

situation in the light of the nature and logic of the AGL. Recycled aggregates are in fact one of the alternative products towards which the UK authorities wish to direct the demand by establishing the AGL. Using recycled aggregates instead of freshly extracted aggregates reduces the need to extract fresh aggregates and thus reduces the environmental impact linked to the extraction of aggregates. In addition, it reduces the dumping of waste, thereby improving visual amenity.

(95) The Commission notes that in situations where the aggregate stemming from recycling has already been subjected to the AGL, the exemption would be in any event justified pursuant to Section 17(2)(c) of the Finance Act 2001.

(96) If the recycled aggregate stems from aggregates used in construction and that left their originating site before the commencement date, the exemption would in any event justified pursuant to Section 17(2)(d) of the Finance Act 2001.

(97) The complainant contends that recycled material is also harmful for the environment because recycling may cause pollution, among others because of high energy consumption. The Commission notes however, that the AGL aims at addressing the environmental impact of aggregate extraction. In that regard, it cannot be disputed that using recycled instead of freshly extracted aggregates reduces the environmental impact associated to aggregates extraction. Therefore, the Commission concludes that recycled aggregates and freshly extracted aggregates are not in a comparable situation in the light of the objective of the AGL and the distinction made between recycled and freshly extracted aggregates results from the nature and logic of the AGL.

3.1.2.8. Exemption of aggregate excavated in the course of construction and civil engineering works arising from the footprint of a building, navigational dredging, highway construction, railway construction (Section 17(3) (b), (c), (d) and (da) and Section 17(4)(d) and (e))

(98) Those aggregates unavoidably arise in the course of the works concerned (digging the foundation of a building, ensuring that waterways remain navigable, digging in order to lay a road, constructing and maintaining railways, bring tunnels, drilling for oil or gas, laying and maintaining gas mains and electricity cables). The works concerned do not relate to the extraction of sand, rock or gravel for their use as aggregates. In fact, the excavation does not occur with the purpose of obtaining those materials but with the purpose of making the space available and suitable for the construction of the road, the highway, the railway, the canal etc.

(99) Although the works concerned also have an impact on the environment, this impact differs in several respects from the environmental costs linked to aggregates extraction (in particular quarrying). The visual damage, dust, noise linked to excavation activities will be limited compared to quarrying. Also, the excavation activities that are necessary to undertake the concerned works will be very limited in time, while specific aggregate extraction activities will extend over several decades. Finally, the environmental impact of those works arises not so much from the excavation of rock, sand and gravel but rather from the construction and civil engineering works as such (construction of a highway, existence of railway connection or a navigation channel). The AGL is not aimed at targeting the environmental impact of those works.

(100) On the basis of those elements, the Commission finds that aggregates arising in the course of the works concerned are not in the same factual and legal situation as taxed materials in the light of the logic of the AGL. Their exemption from the AGL is justified by the nature and general scheme of the AGL.

(101) In addition, by using those aggregates instead of sand, gravel and rock that was specifically extracted for use as aggregates, it is possible to reduce the need for specific aggregates extraction. It is also possible to reduce the amount of material sent to landfill for disposal.

3.1.2.9. Exemption of aggregates consisting wholly of the spoil, waste or other by-products, not including the overburden, resulting from the extraction or other separation from any quantity of aggregate of any china clay or ball clay (Section 17(3)(e) and Section 17(3)(f)(ii))

(102) The UK authorities have explained that china clay (also known as "kaolin") [1] and ball clay [2] are valuable minerals. They are normally not quarried in order to serve as aggregates. Spoil consisting of waste rock and sand is an inevitable by-product of this extraction. China clay waste can be used in the construction of embankments and as general fill, in the production of bitumen bound materials for highway construction, and may be substituted for other fine aggregate in the manufacture of concrete. Ball clay waste can also be sold as aggregate into the construction market.

(103) The UK authorities have highlighted that since the spoil resulting from ball clay and china clay extraction is available as soon as ball clay and china clay has been extracted and given that this spoil can provide an alternative to various sand, gravel and rock specifically extracted for use as aggregate, the exemption helps reducing the extraction of sand, gravel and rock that were specifically extracted for their use as aggregate and, on balance, the exemption helps reducing the environmental impact of aggregates extraction. In addition, using the spoil of china clay and ball clay extraction instead of sand, gravel and rock extracted specifically for use as aggregate, helps reducing waste hips and improves visual amenity.

[1] According to the information provided by the UK, china clays are fine-grained sedimentary clays consisting of kaolinite. They are used in the production of porcelain and gloss paper, medical and cosmetic products.

[2] Ball clays are fine-grained kaolinitic sedimentary clays, that commonly consist of 20-80 % kaolinite, 10-25 % mica, 6-65 % quartz. They are used in the production of ceramics to impart plasticity and unfired strength.

(104) The consultation paper issued prior to the AGL and the Guidelines for aggregates quarrying confirm that using the waste hips resulting from the quarrying of china clay and ball clay as bulk material for construction was perceived as one of the alternatives to the extraction of sand, gravel and rock specifically for use as aggregate.

(105) The Commission observes, first, that he exempted materials present a certain number of similarities with taxed material. They also constitute rock, sand or gravel that can serve to provide bulk in the construction sector. They can thus constitute an aggregate that should be taxed in the light of the normal taxation principles. Moreover, while the exempted material is the inevitable by-product of china clay and ball clay extraction, it is at the same time also a material that is extracted (in general in a quarry). In other words, the exempted material constitutes a freshly extracted aggregate. From that point of view, it is in a comparable situation to non-exempted aggregates. In fact, the quarrying of the exempted material involves at first sight the same environmental damages as the quarrying of non-exempted material.

(106) On the other hand, however, there may be a difference between the exempted material and non-exempted material in that the exempted materials constitute the spoil of china clay and ball clay extraction. It is an inevitable by-product of this extraction, which will occur not necessarily for the sake of aggregate extraction but in general for china clay and ball clay extraction. Indeed, both china clay and ball clay have specific properties that cannot always be replicated. On this basis, the spoil of china clay and ball clay extraction does not seem to be entirely in a comparable situation with taxed aggregates in the light of the logic of the AGL, in the sense that they would a priori not have been extracted for their own sake. It could be argued that without the china clay and ball clay extraction for other purposes, no extraction activity of spoil would have taken place.

(107) It is however unclear whether this difference is sufficient to demonstrate that the tax exemption is required by the nature and logic of the AGL.

(108) The first condition for such a differentiation to result from the logic of the AGL is that the exemption must be limited to by-products that are the inevitable spoil of china clay and ball clay extraction. The exemption seems to fulfil this condition, since the exempted product must *wholly* consist of the spoil, waste or other by-products resulting from the extraction china clay or ball clay. In addition, the exemption does not cover overburdens ([1]).

(109) The second condition is that it must be ascertained that the exemption will not lead to more china clay or ball clay being extracted in order to obtain more exempted material that may be used as aggregates. Otherwise, it cannot be excluded that extraction activities will take place with the intention of extracting sand, gravel or rocks that can be exploited as aggregates while avoiding the tax. This issue does not seem to be tackled by the exemption.

([1]) Layers of ground that have to be removed before reaching the layer containing the china clay or ball clay.

(110) In addition, while the spoil of china clay and ball clay are in a different situation compared with freshly extracted aggregates that were quarried for their use as aggregates, the difference is less striking when the exempted materials are compared, for example, with non-exempted materials that occur as the spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces. It is not clear why the spoil of those processes is taxed but not the spoil of china clay and ball clay extraction

(111) Finally, the reasoning above rests on the assumption that operators that are engaged in china clay and ball clay extraction are not willing to obtain the material that arises as spoil, waste and by-product of china clay and ball clay extraction. It is however unclear whether this assumption is correct. It also rests on the assumption that china clay and ball clay, as such, cannot serve as aggregates. However, if china clay and ball clay can be used as aggregates, it is hard to see what distinguishes the waste of those exempted materials from the waste of aggregate extraction which is taxed.

(112) The UK authorities are therefore invited to explain, in the light of the objective assigned to the AGL (i) what distinguishes the spoil/waste/by-products of china clay and ball clay extraction from the spoil resulting from the extraction of limestone extracted to produce lime or from the spoil of the extraction of rock to produce cut stone with one or more flat surfaces (ii) whether china clay and ball clay could as such serve as aggregates, (iii) if china clay and ball clay can serve as aggregates, why the exemption is not subject to the condition that china clay and ball clay are not used as aggregate or for aggregate production, (iv) under the hypothesis that the exemption is also valid when china clay and ball clay is used as aggregate, what distinguishes the exempted material from the waste of aggregate extraction, which is taxed, (v) whether the exemption will not lead to an increase in china clay and ball clay extraction activities, having regard to the respective market price (vi) whether extraction would take place at the sites concerned if they would not be suitable for china clay and ball clay extraction.

3.1.2.10. Exemption of aggregates consisting wholly of the spoil from any process by which coal, lignite, slate or shale has been separated from other rock after being extracted or won with that other rock or of the spoil from any process where the substances in section 18(3) have been separated from other rock after extraction or won with that other rock (Section 17(3)(f)(i) and (ii))

(113) Coal, lignite, slate and shale and the substances listed in Section 18(3) are normally not quarried for their use as aggregates but are quarried for other purposes. The UK has explained that the exemption is meant to encourage use rather than disposal in waste tips of the spoils. This both improves the visual landscape and reduces the need to extract other aggregates.

(114) The Commission observes, first, that there may be a difference between the exempted material and non-exempted material in that the exempted materials constitute the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3). They are an inevitable by-product of this extraction, which will normally occur not for the sake of aggregate extraction but for the sake of extracting the concerned substances which are (normally) not used as aggregates. On this basis, the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3) does not seem to be in a comparable situation with taxed aggregates in the light of the logic of the AGL.

(115) It is however unclear whether this difference is sufficient to demonstrate that the tax exemption is required by the nature and logic of the AGL.

(116) The spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3) is arguably not in a comparable situation with taxed aggregates only if the exemption is limited to the inevitable spoil of the extraction of those substances. This seems to be the case as the exemption is limited to material that constitutes at 100 % the spoil of the separation process.

(117) The Commission notes however, that while the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3) are in a different situation compared with freshly extracted aggregates that were quarried specifically for their use as aggregates, the difference is less striking when the exempted materials are compared with non-exempted materials that occur as the spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces. It is not clear why the spoil of those processes is taxed but not the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3).

(118) In addition, the Commission wonders whether the exemption can be justified in the light of the objective assigned to the AGL if, for instance, slate and shale or any of the other substances listed in Section 18(3) is extracted to serve as aggregates. In addition, if the exemption applies even when slate and shale or another substance listed in Section 18(3) is used as aggregates, the Commission does not see what distinguishes the waste of those exempted materials from the waste of aggregate extraction which is taxed.

(119) Also, it is unclear whether the exemption might not lead to more extraction of coal, lignite, shale and slate, for the purpose of obtaining exempted materials that can be used as aggregates.

(120) The UK authorities are therefore invited to explain in the light of the objective assigned to the AGL (i) what distinguishes the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3) from the spoil resulting from the extraction of limestone extracted to produce lime or from the spoil of the extraction of rock to produce cut-stone with one or more flat surfaces (ii) why the exemption is not subject to the condition that slate and shale or the other substances listed in section 18(3) is not used as aggregate or for aggregate production, (iii) under the hypothesis that the exemption is also valid when slate and shale or the other substances listed in section 18(3) are used as aggregates, what distinguishes the exempted material from the waste of aggregate extraction, which is taxed, (iv) whether the exemption will not lead to an increase in coal, lignite, shale and slate extraction for the purpose of obtaining more exempted material that can be used as aggregates, having regard to the respective market price.

3.1.2.11. Aggregates consisting wholly or mainly of, or is part of anything so consisting, the spoil or waste from, or by-products of any industrial combustion process or from the smelting or refining of metal (Section 17(4)(c) (i) and (ii))

(121) The UK authorities have indicated that the primary purpose of the concerned industrial process (e.g. coal-fired generation of electricity, smelting iron ore to produce steel)) is to produce a product which is not used as aggregate. The spoil, waste and by-products concerned are for instance industrial slag (blast furnace slag, basic oxygen furnace steel slag, electric arc furnace steel slag and combustion ash).

(122) According to the UK authorities, the purpose of the exemption is to encourage use rather than disposal in waste tips (shift in demand). This both improves the visual landscape and reduces the need to quarry virgin aggregate.

(123) The Commission wonders whether the spoil or waste from, or by-products of any industrial combustion process or from the smelting or refining of metal can still qualify as rock, sand or gravel. In any event, they do not constitute rock, gravel or sand that has been freshly extracted. They in fact constitute materials that have already been used before and come from materials that have not been extracted for their use as aggregates.

(124) The Commission therefore concludes, that the spoil or waste from, or by-products of any industrial combustion process or from the smelting or refining of metal is not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL.

(125) The Commission notes, however, that the exemption is not limited to the spoil or waste of, or by-products of any industrial combustion process or from the smelting or refining of metal only, but it also extends to materials that are mainly (i.e. as of 50%) composed of the spoil or waste of, or by-products of any industrial combustion process or from the smelting or refining of metal. It is not clear to the Commission why the exemption was not limited to the spoil or waste of, or by-products of any industrial combustion process or from the smelting or refining of metal only.

3.1.2.12. Exemption for material wholly or mainly consisting of clay, soil or vegetable or other organic matter (Section 17(4)(f))

(126) Soil is a fine-grained mixture of mineral and organic constituents. Soil, vegetable or other organic matter do not qualify as rock, sand or gravel.

(127) The UK authorities have explained that this provision was there to prevent that a cargo of soil that would punctually contain rock would qualify as aggregate.

(128) This exemption seems in line with the normal taxation principles and the logic of the AGL.

(129) Concerning clay, the UK authorities have explained that because of its plastic properties, clay is not usually considered a rock. The exemption clarifies this and avoids the need to identify and charge the AGL on any sand or stone naturally occurring together with the clay.

(130) The Commission, however, notes that, in geological terms, clay is considered a rock. Also, it would seem that clay can be used as aggregate [1]. Hence, in so far as a material wholly or mainly consisting of clay was extracted to be used as aggregate, it is not clear how the exemption can be justified on the basis of the normal taxation principles or to what extent it may be deemed in a different situation from taxed materials in the light of the logic of the AGL.

3.1.2.13. Tax credit for exported aggregates (Section 30(1)(a))

(131) Aggregates that are exported without further processing within the UK are not subject to the AGL.

(132) Such an arrangement is justified by the fact that aggregates extracted or produced in the UK may be exempted if they are used for exempt processes (for example, the manufacture of glass, plastics, paper, fertiliser and pesticides). Since the UK authorities have no control over the use of aggregates 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 aggregates that would otherwise qualify for an exemption if they were used for other purposes within the UK.

(133) The General Court has confirmed that since the AGL is designed to tax only materials that are exploited as aggregates, materials that are marketed in the UK and those that are exported overseas are in different situations because, once those materials have been exported, it is, as a rule, no longer possible for the UK authorities to check the application of the decisive criterion for taxation: commercial exploitation as an aggregate. Those authorities will be unable, or able only with difficulty, to determine whether an exported material is likely to be used and exploited as an aggregate, whether it actually is to be used as such, or whether it is to be used for other purposes, which also depends on the statutory specifications applicable in the country of destination.

(134) Also the General Court has rejected the complainant's argument that it would be particularly easy for the UK authorities to identify the physico-chemical properties of materials intended to be exported, so as to determine whether or not they are suitable for use in the processes that would ensure their exemption under the AGL. Classification as an aggregate subject to tax or as an exempt material does not depend precisely on those physical properties. The exclusion from the scope of the AGL depends on the materials meeting other criteria related, inter alia, to their use or the method through which they were obtained.

(135) On this basis, the Commission concludes that the tax credit for exported aggregates is in line with the taxation principles and logic of the AGL.

3.1.2.14. Tax credit for industrial and agricultural processes (Section 30(1)(c))

(136) To the Commission's knowledge, none of the concerned tax relief is granted when rock, sand or gravel are used as aggregates. In this respect the Notice AGL 2 states that: "*If the material under consideration is not being used as an aggregate, it may qualify for relief. In most instances it will be quite obvious whether it is being used as an aggregate or not, but in some instances it will not. For some products, such as 'synthetic' roof tiles, material will be used both as an aggregate (to provide bulk) which will not be eligible for relief and as non-aggregate (for example limestone ground down to a fine powder to act as a 'glue' or binding medium) which will be relieved from the levy.*"

(137) As the tax relief is granted only when the concerned rock, gravel or sand is used for other purposes than as aggregate, the tax relief is in line with the normal taxation principles underpinning the AGL.

3.1.3. *Conclusion*

(138) On the basis of the information provided so far, the Commission comes to the conclusion that the exemptions, exclusions and tax reliefs established in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d), 17(3)(da), 17(4)(d) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2) (b) that provides for materials that are not used as aggregates), and 30(1)(c) of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007 are in line with the taxation principles and logic of the AGL. Consequently, they do not provide a selective advantage to producers of the concerned exempted materials and do not constitute State aid within the meaning of Article 107(1) TFEU.

[1] See Glossary of Building and Civil Engineering Terms, British Standard Institution, Blackwell Scientific Publications, 1993, 630-3006; see also evidence submitted by the British Aggregates Association in its reply to the Court in case T-210-02: Construction Raw Materials Policy and Supply Practices in Northwestern Europe – Facts and Figures – England, Scotland and Wales (Great Britain), British Geological Survey Commissioned Report CR/02/082N commissioned by the Road and Hydraulic Engineering Institute of the Ministry of Public Works and Water Management of the Netherlands, p. 50.

(139) On the basis of the information that was so far submitted to it, the Commission cannot conclude without doubts that the exemptions and exclusions provided for in Sections 17(3)(e), 17(3)(f)(i) and (ii), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used as aggregate or consist mainly of coal, lignite, shale and slate), Section 17(4)(c)(i) and (ii) (when it consists mainly of the spoil), 17(4)(f) (as far as clay is concerned), 18(2)(b) (in so far as it relates to an exempt process that provides for materials that are used as aggregates) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are used as aggregates) of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007 are in line with the taxation principles and logic of the AGL. Therefore, at this juncture the Commission cannot exclude that those exclusions, exemptions and tax reliefs confer a selective advantage to the producers of the exempted aggregates concerned, in that they relieve them from a charge that they should normally pay.

(140) Given that the tax exemptions, exclusions and tax reliefs are financed from State resources and are imputable to the State; given also, that there is trade between Member States in the aggregates sector and that producers of the exempted aggregates are in competition with other aggregate producers, the Commission concludes that it cannot be excluded, at this stage, that the AGL entails State aid for the producers of certain exempted aggregates.

(141) The Commission therefore will examine below whether they could be considered as compatible with the internal market.

3.2. **Legality of the aid**

(142) Although the AGL was notified by the UK authorities before being put into effect, the recipients of the aid cannot entertain legitimate expectations as to the lawfulness of the implementation of the aid, since the Commission decision not to raise objections to the measure was challenged in due time before the General Court [1]. As the Commission decision was annulled by the General Court, that decision must be considered void with regard to all persons as from the date of its adoption. Since the annulment of the Commission decision put a stop, retroactively, to the application of the presumption of lawfulness, the implementation of the aid in question must be regarded as unlawful [2]. In addition, the Commission notes that, in any event, the AGL entered into force on 1 April 2002, before the Commission adopted its decision of 24 April 2002.

3.3. **Compatibility of the aid**

(143) Given the environmental purpose of the AGL, the Commission has examined its compatibility with the internal market in accordance with Article 107(3)(c) TFEU and in the light of Guidelines on State aid for environmental protection.

[1] See Case C-199/06 CELF [2008] ECR I-469, paragraphs 63 and 66 to 68.

[2] See Case C-199/06 CELF, cited above, paragraphs 61 and 64.

(144) As mentioned in recital 142 above, the result of the annulment of the Commission decision is that the aid must be deemed unlawful. In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid [3], paragraph 82 of the 2001 Community Guidelines on State aid for environmental protection [4] ("2001 EAG") and paragraph 205 of the 2008 Community Guidelines on State aid for environmental protection [5] ("2008 EAG") the Commission has assessed the compatibility of the tax exemptions and reliefs under the 2001 EAG in so far as they were applied between 01.04.2002 and 31.03.2008 and under the 2008 EAG as far as they were applied as from 02.04.2008.

(145) The procedure for adopting a new decision may be resumed at the very point at which the illegality occurred [6]. In the context of the State aid discipline, the Court of Justice has held that if the analysis carried out by the Commission in a previous decision has been defective, thus entailing the illegality of that decision, the procedure for replacing that decision can be resumed at that point by means of a fresh analysis of the examination already undertaken [7].

(146) In the light of the case-law mentioned above, the Commission is entitled, in principle, to readopt a decision concerning the aid measure within the preliminary investigation and based on the information available to it at the time of the adoption of the annulled decision, provided that such information is sufficient for its assessment. However, should this information be insufficient to demonstrate that the aid measure was compatible with the internal market, it is the Commission's duty to open the formal investigation in accordance with Article 108(2) TFEU.

3.3.1. *2001 EAG*

(147) Paragraph 47 provides that: "*When adopting taxes that are to be levied on certain activities for reasons of environmental protection, Member States may deem it necessary to make provision for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. In general, such exemptions constitute operating aid caught by Article 87 of the EC Treaty. In analysing these measures, it has to be ascertained among other things whether the tax is to be levied as the result of a Community decision or an autonomous decision on the part of a Member State.*"

(148) Paragraph 48 further provides that: "*If the tax is to be levied as the result of an autonomous decision on the part of*

[3] Commission notice on determination of the applicable rules for the assessment of unlawful State aid, OJ C 119 of 22.5.2002, p. 22.

[4] Community guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3.

[5] Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1.

[6] Case 34/86 *Council v Parliament* [1986] ECR 2155, paragraph 47; Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31; and Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147, paragraph 82.

[7] Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 34.

a Member State, the firms affected may have some difficulty in adapting rapidly to the new tax burden. In such circumstances there may be justification for a temporary exemption enabling certain firms to adapt to the new situation."

(149) In this connection, the Commission notes that the AGL is a tax to be levied on the extraction of aggregates for reasons of environmental protection. The Commission further notes that the AGL is to be levied as a result of an autonomous decision by the UK authorities.

(150) The complainant has contended that some of the exemptions have been granted in order to protect the international competitiveness of the producers of exempted materials. This would suggest that certain firms may have some difficulty in adapting rapidly to the new tax burden and, in that case, the exemptions from the AGL could be assessed under paragraphs 47 and 48 of the 2001 EAG.

(151) According to settled case-law, it is for the Member State to put forward any grounds of compatibility and to demonstrate that the conditions thereof are met [1].

(152) The Commission notes that, given that the UK authorities consider that the measure at hand does not constitute State aid, they have not brought forward any grounds for its compatibility.

(153) At this juncture, the Commission does not have sufficient elements to conclude whether the conditions of paragraphs 47 and 48 of the 2001 EAG are met, nor does it have sufficient elements to conclude whether the exemptions could be found compatible with the internal market based on other provisions than paragraphs 47 and 48 of the 2001 EAG. In fact, it is not yet clear what purpose or purposes are pursued through the exemptions. While the complainant contends that they aim at protecting the international competitiveness of certain companies, there are also indications in the file that they pursue an environmental objective of their own (reduction of waste hips resulting from coal, shale, slate, lignite, china clay, ball clay extraction and other materials that do not usually serve as aggregates).

3.3.2. *2008 EAG*

(154) Given the environmental purpose of the AGL, the Commission has also examined the tax exemptions and exclusions under chapter 4 of the 2008 EAG that concerns operating aid in the form of reductions of environmental taxes.

(155) Environmental taxes are defined in point 70(14) of the 2008 EAG as "*taxes whose specific tax base has a clear negative effect on the environment or which seek to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment.*"

(156) It is not contested that the extraction of aggregates has a negative impact on the environment, in particular in the form of damage to biodiversity, dust, noise, and visual amenity. This is further substantiated by the studies commissioned by the UK authorities referred to in recital 17 above. The AGL thus constitutes an environmental tax within the meaning of point 70(14) of the 2008 EAG and the tax exemptions could be assessed under Chapter 4 of the 2008 EAG in so far as they applied as of 02.04.2008.

3.3.2.1. Environmental benefit

(157) In accordance with point 151 of the 2008 EAG, aid in the form of reductions from environmental taxes will be considered compatible with the internal market provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reductions do not undermine the general objective pursued. As explained in point 57 of the 2008 EAG, reductions from environmental taxes concerning certain sectors or categories of undertakings are accepted under Chapter 4 of the 2008 EAG if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation, and to create further incentives to improve on environmental protection. The Commission considered that this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation.

(158) In this case, the possibility to grant exemptions for certain materials might have enabled the UK to introduce the AGL.

(159) Given, however, that the UK authorities consider that the measure at hand does not constitute aid, they have not brought forward information showing that the exemptions were necessary in order for the UK to adopt the AGL. Also, they have not shown that the exemptions would not undermine the purpose of the tax.

3.3.2.2. Tax reliefs above the harmonised Community minima and other reliefs

(160) Taxation of aggregates has not been harmonised at EU level and the Commission has therefore analysed the necessity and proportionality of the proposed measure in the light of points 158 and 159 of the 2008 EAG.

3.3.2.3. Necessity of the aid

Objective and transparent criteria

(161) In accordance with point 158(a) of the 2008 EAG, the choice of beneficiaries must be based on objective and transparent criteria and aid should be granted in the same way for all competitors in the same sector if they are in a similar factual situation.

(162) The tax reduction is based on criteria established in the law. They are thus transparent.

(163) Given, however, that the UK authorities consider that the measure at hand does not constitute aid, they have not yet brought forward information showing that the exemptions are based on objective criteria and are granted in the same way to all competitors in the same sector if they are in a similar factual situation.

[1] Case C-364/90 Italy v Commission [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and Others v Commission [1999] ECR II-3663, paragraph 140.

Substantial increase in production costs

(164) In line with point 158(b) of the 2008 EAG, for aid in the form of reductions or exemptions from an environmental tax to be considered necessary, the tax without reduction must lead to a substantial increase in production costs for each sector or category of individual beneficiaries. In the case of taxes related to energy, companies which fall within the definition on energy-intensity are presumed to meet these criteria, without a further test on the absolute share of additional costs on the production costs being carried out. For the purposes of energy taxation, a company is presumed to fulfil the criterion of a substantial increase in production costs, if it is energy-intensive, i.e. if it has costs for energy and electricity exceeding 3 % of its production costs.

(165) The information available in the file seems to suggest that the AGL might in some case double the price of the aggregates concerned, thus leading to a substantial increase in production costs. Given, however, that the UK authorities consider that the measure at hand does not constitute aid, they have not yet brought forward information showing that tax would lead to a substantial increase in production costs and a definitive conclusion on this point cannot yet been reached.

Impossibility to pass on the substantial increase in production costs

(166) According to point 158(c) of the 2008 EAG, compliance with the necessity criteria requires that the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions.

(167) Given, that the UK authorities consider that the measure at hand does not constitute aid, they have not yet brought forward information showing that it is impossible for each of the exempted materials concerned to pass on to costumers the substantial increase in production costs.

3.3.2.4. Proportionality of the aid

(168) With respect to proportionality, each beneficiary of a reduction or exemption must in accordance with point 159 of the 2008 EAG fulfil one of the following criteria:

(a) It must pay a proportion of the national tax which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiaries can benefit at most from a reduction corresponding to the increase in production costs from the tax, using the best performing technique and which cannot be passed on to customers.

(b) It must pay at least 20 % of the national tax unless a lower rate can be justified.

(c) It can enter into agreements with the Member State whereby they commit themselves to achieve environmental objectives with the same effect as what would be achieved under points (a) or (b) above, or if the Community minima were applied.

(169) Given, that the UK authorities consider that the measure at hand does not constitute aid, they have not yet brought forward information showing that the tax exemptions are proportionate in accordance with point 159 of the 2008 EAG.

3.4. **Commission's doubts and grounds for opening the formal investigation procedure**

(170) At this stage, based on the information that was submitted to it, the Commission has come to the preliminary conclusion that the exemptions and exclusions mentioned in recital 139 above do not seem to be justified by the general principles and logic of the AGL. The exemptions and exclusions concerned seem to relieve the beneficiaries from a tax that they would normally have to pay and constitute operating aid.

(171) According to the case-law, operating aid is in principle not compatible with the internal market because it has the effect in principle to distort competition in the sectors in which it is granted [1].

(172) According to settled case-law, it is for the Member State to put forward any grounds of compatibility and to demonstrate that the conditions thereof are met [2].

(173) The Commission notes that, given that the UK authorities consider that the measure at hand does not constitute aid, they have not brought forward any grounds for establishing its compatibility under 2001 EAG, 2008 EAG or under Article 107(3)(c) TFEU.

(174) At this stage, based on the information that was submitted to it, the Commission does not have sufficient elements to conclude whether the conditions of paragraphs 47 and 48 of the 2001 EAG and whether the conditions of chapter 4 of the 2008 EAG are met or whether the tax exemptions and exclusions could be found compatible pursuant to other provisions.

(175) The Commission has therefore, at this stage, doubts as to their compatibility with the internal market and, in accordance with Article 4(4) of Regulation (EC) No 659/1999, it has decided to open the formal investigation procedure, thereby inviting the United Kingdom to submit its comments as well as the requested information. The formal investigation procedure will also give the opportunity to third parties whose interests may be affected by the granting of the aid to comment on the measure.

(176) In the light of both the information notified by the Member State concerned and that provided by any third parties, the Commission will re-assess the measure and will take its final decision.

(1) Case T-459/93 *Siemens SA* v *Commission* [1995] ECR II-1675, paragraph 48. See also Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, 8 July 2010, ECR 2010 II-141 paragraphs 46-48; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30, with further references.

(2) Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 140.

4. DECISION

In the light of the foregoing assessment, the Commission has decided:

A. To raise no objections in respect of the exemptions, exclusions and tax reliefs laid down in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d), 17(3)(da), 17(4)(d) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2) (b) that provides for materials that are not used as aggregates), and 30(1)(c) of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007, in relation to the AGL, since the Commission considers that they do not entail State aid within the meaning of Article 107(1) of the Treaty.

B. To initiate the procedure laid down in Article 108(2) of the Treaty in respect of the tax exemptions, tax exclusions and tax reliefs laid down in Sections 17(3)(e), 17(3)(f)(i) and (ii), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used as aggregate or consist mainly of coal, lignite, shale and slate), Section 17(4)(c)(i) and (ii) (when it consists mainly of the spoil), 17(4)(f) (as far as clay is concerned), 18(2)(b) (in so far as it relates to an exempt process that provides for materials that are used as aggregates) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are used as aggregates), of the Finance Act 2001, as amended by Finance Act 2002 and Finance Act 2007 in relation with the AGL, since the Commission cannot exclude that they may entail State aid that is incompatible with the internal market.

In this connection and in the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty requests the United Kingdom to submit its comments and to provide all such information as may help to assess the measure, in particular the information and clarifications requested in recitals 78, 112, 120, 153, 159, 163, 165, 167, 169 above, within one month of the date of receipt of this letter.

The Commission invites the UK authorities to transmit immediately copy of the present decision to all potential beneficiaries of the aid, or at least to proceed to inform them with appropriate means.

The Commission wishes to remind the United Kingdom that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from its recipient.

The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.”