JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

9 September 2010 *

In Case T-359/04,

British Aggregates Association, established in Lanark (United Kingdom),

Healy Bros. Ltd, established in Middleton (Ireland),

David K. Trotter & Sons Ltd, established in Manorhamilton (Ireland),

represented by C. Pouncey, Solicitor, and L. Van den Hende, lawyer,

applicants,

* Language of the case: English.

European Commission, represented by J. Flett and T. Scharf, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by M. Bethell and subsequently by E. Jenkinson and I. Rao, and lastly by S. Ossowski, acting as Agents, assisted by M. Hall and G. Facenna, Barristers,

intervener,

APPLICATION for annulment of Commission Decision C(2004) 1614 final of 7 May 2004 not to raise objections to the modified exemption for Northern Ireland in the context of the scheme of levies on aggregates in the United Kingdom,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek and V.M. Ciucă (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 3 June 2009,

gives the following

Judgment

Facts

1 The first applicant, British Aggregates Association ('BAA'), is an association comprising small independent quarrying companies in the United Kingdom. It has 55 members, which operate over 100 quarry sites. Most of its members operate quarries in Great Britain (and thus not in Northern Ireland). In the present case, BAA is acting on behalf of its members operating quarries in Great Britain.

2 The second applicant, Healy Bros. Ltd ('Healy Bros'), and the third applicant, David K. Trotter & Sons Limited ('DK Trotter') are aggregates producers established in Ireland.

3 The present case concerns the exemption for Northern Ireland from an environmental tax, which the Commission of the European Communities declared, at the preliminary stage of the procedure for reviewing aid, to be aid compatible with the common market within the meaning of Article 87(3)(c) EC in Decision C(2004) 1614 final of 7 May 2004 ('Aid No N2/04 — Aggregates Levy — Northern Ireland') ('the contested decision'), addressed to the United Kingdom of Great Britain and Northern Ireland. A summary notification of that decision was published in the *Official Journal of the European Union* of 2 April 2005 (OJ 2005 C 81, p. 4). According to the Commission, the conditions in the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3) ('the Guidelines') were fulfilled.

General scheme of the AGL

4 The general scheme of that environmental tax, entitled 'phased introduction of the aggregates levy in Northern Ireland' ('AGL') was introduced in the United Kingdom by sections 16 to 49 of Part II of the Finance Act 2001 ('the Finance Act 2001') and schedules 4 to 10 thereto.

5 The AGL was brought into force on 1 April 2002, by statutory implementing regulations under the Finance Act 2001.

6 The Finance Act 2001 was amended by sections 129 to 133 of and schedule 38 to the Finance Act 2002. The amended legislation provided, inter alia, for a phased introduction of the levy in Northern Ireland.

7 The AGL is charged at the rate of GBP 1.60 per tonne of aggregate subject to commercial exploitation (section 16(4) of the Finance Act 2001).

8 Section 16(2) of the Finance Act 2001, as amended, states that the charge to the AGL is to arise whenever a quantity of taxable aggregate is subjected, on or after the commencement date under that act, to commercial exploitation within the United Kingdom. It therefore applies to imported aggregates in the same way as to aggregates extracted in the United Kingdom.

9 By Decision C(2002) 1478 final of 24 April 2002 (Aid No N 863/2001 — Aggregates Levy) ('the 2002 Decision'), the AGL was approved by the Commission. A summary notification of that decision was published in the *Official Journal of the European Communities* of 5 June 2002 (OJ 2002 C 133, p. 11).

10 In the 2002 Decision, the Commission had decided not to raise objections to the AGL, as it considered the scope of the AGL to be justified by the logic and nature of the tax system and that, consequently, the AGL did not qualify as State aid within the meaning of Article 87 EC.

11 The AGL is an ecotax imposed on aggregates in order to reduce and to rationalise the extraction of minerals commonly used as aggregates, by favouring their replacement by recycled products or other virgin materials not covered by the levy, thereby helping to protect the environment.

12 The AGL is levied on the commercial exploitation of rock, sand and gravel when used as aggregates, but not when they are used for other purposes. However, the AGL is levied only on virgin aggregate. It is not levied on aggregates extracted as a by-product or waste from other processes, or on recycled aggregates.

13 With regard to Northern Ireland, the Finance Act 2001 provided for a degressive scheme of relief from the AGL phased over five years. For the first year a 0 % rate of the tax payable (the AGL) was laid down. The rate of tax payable was to increase by 20 % each year until ultimately reaching the 100 % rate after five years. The cost of the measure, and thus the loss of revenue to the United Kingdom, was calculated at GBP 45 million over those five years.

14 The United Kingdom's justification for that special treatment for Northern Ireland was that it would prevent a temporary loss of international competitiveness of companies within Northern Ireland involved in the extraction and processing of virgin aggregates, resulting from the unique position of Northern Ireland within the United Kingdom, in that Northern Ireland shares a land boundary with another Member State. Importation of aggregate and processed products into, and exportation of aggregate and processed products out of, Northern Ireland is therefore much easier than is the case for other parts of the United Kingdom.

15 Consequently, the Commission, in its 2002 Decision, declared that the exemption for Northern Ireland was compatible with the common market and did not open the formal procedure provided for by Article 88(2) EC.

16 The 2002 Decision was then challenged by BAA through an action for partial annulment before the Court of First Instance (now 'the General Court') (Case T-210/02 *British Aggregates Association* v *Commission* [2006] ECR II-2789). In that case, BAA challenged not the Commission's finding that the gradual introduction of the AGL in

Northern Ireland was compatible with the common market, but the Commission's assessment that the AGL does not constitute State aid within the meaning of Article 87(1) EC.

17 By judgment of 13 September 2006, the General Court dismissed BAA's action in Case T-210/02 *British Aggregates Association* v *Commission*, paragraph 16 above. In its judgment, the General Court considered that the Commission did not commit a manifest error in the assessment of the scope of the AGL and that, therefore, the AGL did not constitute State aid within the meaning of Article 87(1) EC. On 27 November 2006, BAA brought an appeal against that judgment.

18 By judgment of 22 December 2008 in Case C-487/06 P *British Aggregates Association* v *Commission* [2008] ECR I-10505, the Court of Justice set aside the judgment of the General Court in Case T-210/02 *British Aggregates* v *Commission*, and referred the case back to the General Court.

Amendments to the AGL concerning the exemption granted for Northern Ireland

19 After observing that, with the gradual introduction of the AGL in Northern Ireland, the objectives pursued were not materialising as expected, the United Kingdom decided to replace the gradual exemption on aggregates in Northern Ireland by a new relief scheme.

20 Even after the gradual introduction of the AGL, there was an increase in undeclared imports of aggregate into Northern Ireland from Ireland, on which the AGL was not paid, giving rise to a risk of a loss of competitiveness of the aggregates industry in Northern Ireland. In addition, the expected environmental benefits were not materialising as intended in Northern Ireland. That situation was attributed to the limited availability of levy-free recycled and alternative materials in Northern Ireland and the virtual absence of infrastructure for collecting and processing such materials. Hence the gradual introduction of the AGL was found by the United Kingdom authorities not to give the processed products industry in Northern Ireland sufficient time to adapt to that change by switching to recycled or alternative materials.

21 It is for those reasons that the United Kingdom replaced the degressive relief scheme in Northern Ireland with a new relief scheme. Under that new scheme, in order effectively to achieve the intended environmental objectives, operators established in Northern Ireland who have concluded an environmental agreement with the United Kingdom authorities pay only 20 % of the AGL from 1 April 2004 to 31 March 2011, thus achieving an 80 % exemption from the AGL. That relief is subject, however, to the requirement that claimant undertakings formally enter into and comply with negotiated agreements with the United Kingdom Government, committing them to a programme of environmental performance improvements over the duration of the relief.

Procedure before the Commission

22 On 5 January 2004 the United Kingdom notified the Commission of that new relief scheme.

23 By letter of 9 February 2004, BAA lodged a complaint with the Commission against that relief scheme. BAA requested in particular that the formal investigation procedure be opened.

24 On 12 February 2004, the Commission sent a request for additional information to the intervener.

25 The United Kingdom responded to that request by letters of 11 March 2004 and 2 April 2004.

The contested decision

26 On 7 May 2004, the Commission adopted the contested decision, in which the new relief scheme was found to be State aid within the meaning of Article 87(1) EC but compatible with the common market under Article 87(3)(c) EC. The Commission rejected BAA's complaint, without opening the formal investigation procedure.

27 In the contested decision, the Commission first stated, with regard to the existing levy scheme for Northern Ireland, that in the 2002 Decision it had considered that the phased introduction of the AGL in Northern Ireland was compatible with point E.3.2 of the Guidelines. It was considered that the AGL would place the industry in Northern Ireland at a risk of loss of international competitiveness, in particular against aggregates producers in Ireland.

28 Concerning the new relief scheme, the Commission then noted that the United Kingdom authorities explained that, since the gradual introduction of the scheme in 2002, the levy had put firms in the Northern Ireland aggregates industry in a more difficult competitive position than initially anticipated. After the introduction of the levy in Northern Ireland, referred to in paragraph 20 above, there was an increase in illegal quarrying and in undeclared imports of aggregate into Northern Ireland from Ireland, without the AGL being paid in either case. Consequently, the legitimate quarries paying the levy were undercut by illegal sources operating outside the levy and therefore lost sales to those illegal sources.

29 The Commission added in the contested decision that, according to the United Kingdom, while the AGL had had an appreciable positive impact in terms of environmental protection in Great Britain, it had not worked as intended in Northern Ireland, where the availability of levy-free recycled and alternative materials was very limited and localised and the infrastructure for collecting and processing such materials was almost non-existent. According to the United Kingdom authorities, that meant that the existing relief scheme put in place by the Finance Act 2001 had not given processed products manufacturers in Northern Ireland sufficient time to adapt to the introduction of the AGL by switching to alternative or recycled materials.

30 The Commission stated that, in order effectively to achieve the intended environmental objectives, the United Kingdom Government therefore, as indicated in paragraph 21 above, made the relief conditional upon claimants formally entering into and complying with negotiated agreements with the United Kingdom Government, committing them to a programme of environmental performance improvements over the duration of the relief.

31 In order to provide additional time for the processed products industry (that is, the businesses that commercially exploit virgin aggregate) to adapt and to achieve the intended environmental effects, the existing relief scheme was to be replaced by a new relief scheme applying to all types of aggregate, set at 20 % of the level otherwise payable. It came into effect on 1 April 2004 and is to continue until 31 March 2011 (that is, nine years from the start of the levy on 1 April 2002).

32 Having noted that the notified exemption from the AGL was to be granted through State resources, in the form of tax relief, to companies situated in Northern Ireland, favouring them by reducing the costs that they would normally have to bear, the Commission concluded that it was State aid granted by a Member State. The Commission then examined the aid in the light of the Guidelines.

33 First, the Commission pointed out that, as the AGL had already been implemented throughout the United Kingdom (including Northern Ireland) since April 2002, the AGL had to be treated as an existing tax.

34 Secondly, it noted that that tax is levied for reasons of environmental protection and that its aim is to protect the environment by contributing to reductions in the extraction of virgin aggregates and encouraging the use of alternative materials. In that regard, as stated in paragraph 29 above, the Commission added that, according to the empirical information provided by the United Kingdom authorities, while the AGL had not been working as intended in Northern Ireland, it had nevertheless had an appreciable positive impact in terms of environmental protection in Great Britain. In that context, the United Kingdom authorities stated that the amount of virgin material extracted in Great Britain had fallen significantly in 2002 (- 5,7 % compared with the average of previous years); the cost of aggregates subject to the levy was significantly higher than the cost of aggregates which were not subject to it, which indicated

that the environmental costs of the supply of aggregates were being passed on to consumers (internalising the negative environmental externalities of the quarrying of aggregate into the cost of aggregate); and that sales of recycled and alternative material (for example, slate waste and china clay) had increased and new recycling facilities had been opened.

35 Thirdly, the Commission noted that the fundamental decision to exempt certain firms in Northern Ireland from the AGL had already been taken when that tax was introduced on 1 April 2002.

36 The Commission therefore concluded that the conditions set out in point 51.2 of the Guidelines were fulfilled.

37 As regards the conditions laid down in the second indent of point 51.1(b), it noted that the duration of the scheme was limited to seven years and that the reduction had to concern a domestic tax imposed in the absence of a Community tax. The Commission considered that the proportion of 20 % which the firms eligible for the reduction had nevertheless to pay constituted a significant proportion of the national tax.

38 The Commission accordingly took the view in the contested decision that the conditions set out in the Guidelines were fully met. It therefore took the view that the tax exemption scheme was compatible with the common market in accordance with Article 87(3)(c) EC.

39 The Commission therefore concluded that the modified exemption to the AGL scheme for Northern Ireland was compatible with the provisions of the EC Treaty and decided not to raise objections.

Procedure

40 By application lodged at the Registry of the Court on 30 August 2004, the applicants brought the present action.

41 By document lodged at the Registry of the Court on 5 January 2005, the United Kingdom applied for leave to intervene in the proceedings in support of the form of order sought by the Commission. By order of 4 March 2005, the President of the Second Chamber of the Court granted that application. The intervener submitted its statement in intervention and the other parties their observations thereon within the prescribed time-limits.

42 Since the composition of the Chambers of the Court had been changed, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was, accordingly, allocated.

43 Together with the application, the applicants lodged an application for measures of organisation of procedure pursuant to Article 64(4) and Articles 68 and 70 of the Rules of Procedure of the General Court, seeking to have the Commission ordered to produce the letter containing the 'empirical information' provided by the United Kingdom during the investigation procedure, referred to in the letter from the Director-General of the Directorate-General (DG) of the Commission, dated 20 July 2004, addressed to BAA's legal representative.

44 By order of 24 September 2008, the President of the Fifth Chamber of the Court, after hearing the parties, stayed proceedings in the present case in accordance with Article 77(a) of the Rules of Procedure of the General Court and Article 54(3) of the Statute of the Court of Justice, pending the decision of the Court of Justice in Case C-487/06 P.

45 On 22 December 2008, the Court of Justice delivered judgment in Case C-487/06 P *British Aggregates* v *Commission*, paragraph 18 above. Accordingly, proceedings resumed in the present case.

46 At the request of the Court, the parties lodged their observations on the implications for the present case of the judgment in Case C-487/06 P *British Aggregates* v *Commission*.

47 In its observations in that regard, the Commission stated that it was withdrawing its objection as to admissibility of the present action.

48 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing on 3 June 2009.

49 At the hearing, the applicants stated that they were withdrawing their application for measures of organisation of procedure pursuant to Article 64(4) and Articles 68 and 70 of the Rules of Procedure (see paragraph 43 above).

50 At the hearing, the intervener also stated that, following the judgment in Case C-487/06 P *British Aggregates* v *Commission*, it was withdrawing its objection to the admissibility of the present action.

Forms of order sought

51 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

52 The Commission, supported by the intervener, contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Law

Preliminary remarks

53 The applicants put forward three pleas in law in support of their action. The first plea alleges infringement of Articles 23 EC and 25 EC or Article 90 EC; the second plea alleges infringement of the Guidelines; and the third plea alleges infringement by the Commission of procedural obligations, in particular Article 88(2) EC. As part of the third plea, the applicants also complain that the Commission vitiated the contested decision by failing to give a statement of reasons, contrary to Article 253 EC, and also infringement of its obligations during the preliminary stage.

54 As part of the plea alleging infringement of Article 88(2) EC, the applicants allege, essentially, that, in approving the aid scheme in question simply at the end of the preliminary examination stage, the Commission infringed Article 88(2) EC and Article 4(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), which requires the Commission to initiate the formal investigation procedure where the notified measure raises serious doubts as to its compatibility with the common market. The arguments and evidence adduced by BAA in support of its complaint showed that there were serious doubts, first, as to whether or not the new exemption scheme was compatible with the common market, and in particular with Articles 23 EC and 25 EC or Article 90 EC

(first plea) and, secondly, as to whether or not the conditions laid down in the Guidelines had been fulfilled (second plea).

55 According to settled case-law, the formal investigation procedure under Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the common market. The Commission may therefore restrict itself to the preliminary examination under Article 88(3) EC when taking a decision in favour of aid only if it is able to satisfy itself after the preliminary examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 88(2) EC (see Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 29; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 33; Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 61; and Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58).

56 The notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (*Bouygues and Bouygues Télécom* v *Commission*, paragraph 55 above, paragraph 63, and *SIDE* v *Commission*, paragraph 55 above, paragraph 60). It follows that judicial review by the Court of the existence of serious difficulties will, by nature, go beyond consideration of whether or not there has been a manifest error of assessment (see, to that effect, *Cook* v *Commission*, paragraph 55 above,

paragraphs 31 to 38; *Matra* v *Commission*, paragraph 55 above, paragraphs 34 to 39; and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 47).

57 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see, to that effect, *Cook* v *Commission*, paragraph 37; Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraphs 46 to 49; and *Prayon-Rupel* v *Commission*, paragraph 56 above, paragraph 108).

58 Since the contested decision was adopted without initiating the formal investigation stage, the Commission could adopt it legally only if the preliminary examination did not reveal serious difficulties. If such difficulties existed, the decision could be annulled on that ground alone, because of the failure to initiate the inter partes and detailed examination laid down in the EC Treaty, even if it had not been established that the Commission's assessments as to substance were wrong in law or in fact.

59 It follows that it is appropriate to consider all the applicants' pleas in law put forward against the contested decision, in order to ascertain whether they enable any serious difficulty to be identified which should have led the Commission to open the formal investigation procedure provided for in Article 88(2) EC (see, to that effect, Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 91, and Case T-375/03 *Fachvereinigung Mineralfaserindustrie* v *Commission*, judgment of 20 September 2007, not published in the ECR, paragraphs 67 and 77). In that regard, it is appropriate to begin by examining the first plea, alleging infringement of Articles 23 EC and 25 EC or of Article 90 EC.

The first plea: infringement of Articles 23 EC and 25 EC or of Article 90 EC

Arguments of the parties

60 According to the applicants, one consequence of the new AGL relief scheme is that the aggregates imported from Ireland are taxed at the full AGL rate (GBP 1.60 per tonne), whereas identical products produced in Northern Ireland are taxed at only GBP 0.32 per tonne, or only 20% of the full AGL rate. Moreover, unlike producers established in Northern Ireland, producers established in Ireland do not have the option of undertaking environmental commitments in order to participate in the relief scheme. This gives rise to tax discrimination, contrary to Articles 23 EC and 25 EC or Article 90 EC, which pursues the same objective, namely undistorted competition in the common market.

61 In the applicants' submission, the fact that the Commission approved the new relief scheme is all the more surprising since the Commission expressly found, in the contested decision, that the purpose of that scheme was to protect the competitiveness of the industry in Northern Ireland as against producers in Ireland, despite the Court's case-law to the effect that the Commission cannot declare compatible with the common market aid which infringes other provisions of the EC Treaty, especially where those provisions, like Articles 23 EC and 25 EC or Article 90 EC in the present case, also aim to achieve the objective of undistorted competition in the market. Consequently, there are serious doubts as to the compatibility of the new relief scheme with the common market.

62 In their reply, the applicants state that the provisions of the EC Treaty prohibiting customs duties and all taxes having equivalent effect to customs duties (Articles 23 EC

and 25 EC) and discriminatory internal taxation on trade (Article 90 EC) cannot be applied cumulatively. Those provisions are, however, complementary in that the objective of Article 90 EC is, inter alia, to avoid a situation where the prohibition on customs duties and taxes having equivalent effect is circumvented through the use of internal taxation. Consequently, the specific definition of the borderline between the scopes of application of Articles 23 EC and 25 EC, on the one hand, and Article 90 EC, on the other, is not always clear. In any event, according to the criteria established by the Court in its case-law, the discriminatory nature of the AGL brings it within the scope of application of one of those provisions. At the hearing, the applicants stated that, in accordance with that case-law, they were alleging, first, infringement of Articles 23 EC and 25 EC and, next, in the alternative, infringement of Article 90 EC.

63 As regards the infringement of Articles 23 EC and 25 EC, the applicants argue that those articles prohibit any pecuniary charge on imported products, unless they form part of a general system of internal taxation applying systematically to domestic and imported products according to the same criteria, or constitute payment for a service actually provided to the importer. The Court has established that, in order for a charge levied on an imported product to form part of a general system of internal taxation, it must be imposed equally on a domestic and an identical imported product at the same marketing stage and the chargeable event giving rise to the duty must also be identical for both products.

64 Yet, in Northern Ireland, not only is the AGL applied at different rates (GBP 0.32 as compared to GBP 1.60), but also at different marketing stages and therefore does not form part of a general system of internal taxation. This gives rise to discrimination because the imported aggregates will necessarily always be taxed because of a chargeable event which is different from that which triggers the tax for the domestic aggregates. According to the applicants, the case-law is to the effect that there is an infringement of Articles 23 EC and 25 EC when different chargeable events have been

applied in respect of imported products and domestic products, even where the tax levied on the imported products is, in reality, lower than that levied on domestic products. Therefore, the AGL, in being levied specifically on imported products, is a tax having an equivalent effect to an import duty.

65 Moreover, the AGL does constitute a tax having equivalent effect to a customs duty because it is designed specifically to be charged on imported products and not on domestic products. In the United Kingdom, the AGL is charged to certain aggregate producers, who are not obliged to pass on the AGL to consumers, but may absorb it totally or partially as a business cost. As the United Kingdom cannot tax producers established outside its borders, it instead taxes imported products.

66 Should the Court find that the application of the AGL to imports into Northern Ireland does 'form part of a general system of internal taxation' and therefore does not qualify as a tax having equivalent effect to a customs duty, the applicants argue that it does infringe Article 90 EC.

67 The applicants argue in that regard that producers established outside Northern Ireland do not have the possibility of concluding environmental agreements in order to pay the 20% AGL rate. Where the products in question are identical, that difference in treatment is contrary to the first paragraph of Article 90 EC because it affords protection against competition to producers in Northern Ireland.

68 That is not in accordance with settled case-law, to the effect that Member States are allowed to establish a differentiated tax system for certain products only in so far as that differentiation is compatible with Community law. The relief scheme in question

is not in accordance with that case-law because, by definition, the criterion for charging the lower tax can be fulfilled only by domestic products.

69 The Commission submits, first, that the applicants have not clearly defined the scope of their application. It is difficult to ascertain whether the action is based on an infringement of Articles 23 EC and 25 EC, or Article 90 EC or all of them. It is not sufficient to claim that those provisions are at issue in the present case, without explaining how each of them can be.

70 In that regard, the Commission states inter alia that the articles relied on relate to different issues: Articles 23 EC and 25 EC prohibit customs duties and all taxes having equivalent effect on imports and exports between Member States, whilst Article 90 EC concerns tax discrimination to the disadvantage of products from another Member State. According to settled case-law, provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that the same charge cannot belong to both categories at the same time. Since it is for the applicants to specify which provisions it claims have been infringed, the Commission considers that such a vague and contradictory type of plea should not be put forward at the reply stage, especially not with such detailed arguments as those put forward by the applicants. The plea should be rejected as inadmissible on that ground alone, pursuant to Article 44 of the Rules of Procedure.

71 In its rejoinder, the Commission again states that the applicants' argument, to the effect that the AGL is a tax having an equivalent effect to a customs duty within the meaning of Article 25 EC, is new and, consequently, put forward contrary to Article 48(2) of the Rules of Procedure.

72 Should the Court decide not to reject the plea as inadmissible, the Commission states, first, that Articles 23 EC and 25 EC do not appear to be at issue, since the contested decision does not concern a customs duty on import of aggregates originating from Ireland. In the Commission's view, the AGL is not a pecuniary charge levied on imported products, but rather, as a tax on aggregates, a tax imposed on a sector. Since, in the present case, producers in Northern Ireland pay at least 20 % of the AGL, but receive nothing in return, the facts do not fit Articles 23 EC or 25 EC or the case-law relied on by the applicants.

73 As regards Article 90 EC, the Commission takes the view, next, that the applicants' allegation of discrimination is unfounded. It adds that there is discrimination only when different rules are applied to comparable situations. In the present case, however, there is no discrimination, either direct or indirect.

74 In the context of taxation, that means that a tax advantage which is refused to a non-resident may constitute a difference in treatment as between two categories of taxpayer and therefore discrimination within the meaning of the EC Treaty, where there is no objective difference between the situations of the two such as to justify a difference in treatment in that regard between the two categories of taxpayer. In the present case, however, there are objective reasons relating to the nature of the products in question, the local character of the industry in question and the specific situation of Northern Ireland.

75 The Commission observes, in the alternative, that a differentiation between undertakings in relation to taxes may be justified by the nature and general scheme of the system in question. Since the relief scheme has been specifically designed to remedy the difficulties faced by the aggregates industry in Northern Ireland, it is in the very nature of the system established by the relief scheme that only undertakings situated

in Northern Ireland may undertake environmental commitments with the United Kingdom authorities.

76 Consequently, the Commission states that it did not have serious difficulty but, on the contrary, was able to find, at the end of the preliminary stage, that the notified aid was compatible with the common market.

77 The intervener concurs with the Commission's observations, considering that the first plea in law is not sufficiently specific and is without foundation. The present case does not involve a customs duty or a tax having equivalent effect, or discriminatory internal taxation.

78 The intervener adds that the partial exemption of 80 % is not available to all undertakings established in Northern Ireland. It is available only to undertakings which formally enter into and comply with agreements whose objective is to achieve specific environmental objectives. Compliance with environmental agreements involves significant implementation costs, which are partially offset by the exemption, whereas operators established outside Northern Ireland are not required to incur such costs.

79 Moreover, the general system of internal dues implemented in the United Kingdom in this field apply equally to domestic and imported products. Undertakings established in Ireland are accordingly not treated differently from undertakings established in the

United Kingdom, who do not have to incur the costs associated with environmental improvements and who are not compensated through partial relief from the AGL.

Findings of the Court

— Admissibility of the first plea

80 The Commission and the intervener contend, first, that the first plea in law, which is too vague and contradictory, must be rejected as inadmissible pursuant to Article 44 of the Rules of Procedure. It is not clear on which provision the applicants are basing their action.

81 In that regard, it must be borne in mind that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, every application must state the subject-matter of the proceedings and contain a summary of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order of 25 July 2000

Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971, paragraph 23, and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64).

82 It is obvious that the use, in the application, of the term 'or' clearly means that the applicants are alleging, as alternative pleas, infringement of Articles 23 EC and 25 EC, on the one hand, and of Article 90 EC, on the other.

83 Those statements in the application were sufficiently clear and precise within the meaning of Article 44(1)(c) of the Rules of Procedure to enable the Commission to prepare its defence.

84 At the hearing, the applicants stated that, by their first plea, they were alleging, first, infringement of Articles 23 EC and 25 EC and, next, in the alternative, infringement of Article 90 EC.

85 In those circumstances, the Court finds that the first plea in law is sufficiently clear and precise within the meaning of Article 44(1)(c) of the Rules of Procedure.

86 Secondly, the Commission states that the applicants' argument that the AGL is a tax having equivalent effect to a customs duty within the meaning of Article 25 EC was put forward for the first time at the reply stage. It is therefore new and, consequently, introduced contrary to Article 48(2) of the Rules of Procedure.

87 According to the case-law, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure, as the first subparagraph of Article 48(2) of the Rules of Procedure provides (order in *RJB Mining* v *Commission*, paragraph 81 above, paragraph 24). However, a plea in law which may be regarded as amplifying a plea previously put forward, directly or by implication, in the application initiating proceedings, and is closely connected with that plea is admissible (see Case T-212/97 *Hubert* v *Commission* [1999] ECR-SC p. I-A-41 and II-185, paragraph 87 and case-law cited, and order in *RJB Mining* v *Commission*, paragraph 24).

88 In the present case, it is clear that Article 25 EC was not relied on directly in the application. The fact remains, however, that the applicants, in the application, alleged infringement of Article 23 EC, in that tax discrimination resulted from the new relief scheme. The Court further notes that, under Article 23(1) EC, the Community is to be based upon a customs union which is to cover all trade in goods. That union involves the prohibition between Member States of all customs duties on imports and exports and of all charges having equivalent effect to such duties, and also the adoption of a common customs tariff in their relations with third countries (Case C-173/05 *Commission* v *Italy* [2007] I-4917, paragraph 27).

89 Consequently, Article 23 EC, which prohibits customs duties, and Article 25 EC, which prohibits taxes having equivalent effect to customs duties, taken together, constitute necessary complements amounting to an overall prohibition (see, to that effect, Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 813; Case C-173/05 *Commission* v *Italy*, paragraph 88 above, paragraph 28 and case-law cited; and Case C-221/06 *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* [2007] ECR I-9643, paragraph 27 and case-law cited). Accordingly, that argument amplifies a plea previously put forward and is admissible under the first subparagraph of Article 48(2) of the Rules of Procedure.

— Whether the first plea is well founded

90 It is apparent from the case-law referred to in paragraph 57 above that if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties.

91 It is also settled case-law that, although the procedure provided for in Articles 87 EC and 88 EC leaves a margin of discretion to the Commission for assessing the compatibility of an aid scheme with the requirements of the common market, it is clear from the general scheme of the EC Treaty that that procedure must never produce a result which is contrary to the specific provisions of the EC Treaty (see, to that effect, Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78; and Joined Cases T-197/97 and T-198/97 *Weyl Beef Products and Others* v *Commission* [2001] ECR II-303, paragraph 75). That obligation on the part of the Commission to ensure that Articles 87 EC and 88 EC are applied consistently with other provisions of the EC Treaty is all the more necessary where those other provisions also pursue the objective of undistorted competition in the common market, as Articles 23 EC and 25 EC or Article 90 EC do in the present case in seeking to safeguard the free movement of goods and competition between domestic and imported products. When adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market (*Matra* v *Commission*, paragraph 55 above, paragraphs 42 and 43).

92 Accordingly, State aid, certain conditions of which contravene other provisions of the EC Treaty, cannot be declared by the Commission to be compatible with the common

market (Case C-156/98 *Germany* v *Commission*, paragraph 91 above, paragraph 78, and Case C-204/97 *Portugal* v *Commission*, paragraph 57 above, paragraph 41). In addition, in determining whether aid is compatible with the common market, it must take account of market conditions, including fiscal aspects (see, to that effect, Case 73/79 *Commission* v *Italy*, paragraph 91 above, paragraph 11, and Case C-204/97 *Portugal* v *Commission*, paragraph 57 above, paragraph 42). It follows that, under the EC Treaty system, aid cannot be implemented or approved in the form of tax discrimination, by a Member State, in respect of products originating from other Member States (see, to that effect, Joined Cases 142/80 and 143/80 *Essevi and Salengo* ECR [1981] 1413, paragraph 28).

93 Moreover, according to the Court of Justice's case-law, the power to use certain forms of tax relief, particularly when they are aimed at enabling the maintenance of forms of production or undertakings which, without those specific tax privileges, would not be profitable due to high production costs, is subject to the condition that the Member States using that power extend the benefit thereof in a non-discriminatory and non-protective manner to imported products in the same situation (see, to that effect, Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 16; Case 26/80 *Schneider-Import* [1980] ECR 3469, paragraph 9; and Case C-230/89 *Commission* v *Greece* [1991] ECR I-1909, paragraph 12).

94 The applicants argue, essentially, that the effects of the new relief scheme of exemption from the AGL for Northern Ireland, as approved by the Commission in the contested decision, lead to tax discrimination contrary to Articles 23 EC and 25 EC or Article 90 EC, which gives rise to serious difficulties.

95 It is then for the Court to consider whether the alleged tax discrimination is indicative of there being serious difficulties by ascertaining whether the Commission, in assessing the compatibility of the aid scheme in question, was required to initiate the procedure provided for in Article 88(2) EC in order to examine whether there was consistency of application between Articles 87 EC and 88 EC and either Articles 23 EC and 25 EC or Article 90 EC.

96 In that regard, it should be observed, first, that, as a tax exemption, the new AGL relief scheme approved by the contested decision constitutes State aid within the meaning of Article 87 EC, a point not contested by the parties.

97 It should be further noted that, in the contested decision, the Commission, on that basis, examined the exemption from the AGL in the light of the Guidelines. In that context, the Commission considered that the AGL constituted an existing tax and that the conditions, described in point 51.2 of the Guidelines, for the applicability to such a tax of the provisions set out in point 51.1 of the Guidelines, were fulfilled. Next, the Commission considered that the conditions provided for by the Guidelines, including the condition relating to the payment of a significant proportion of the tax by the undertakings eligible for the exemption, were fulfilled. The Commission found the AGL exemption to be compatible with the common market, in accordance with Article 87(3)(c) EC.

98 Lastly, on an equally uncontested point, the question of the alleged tax discrimination resulting from the alleged infringement of Articles 23 EC and 25 EC or of Article 90 EC was not discussed in the contested decision, which makes no reference to any of those provisions.

99 However, it cannot be disputed that the new exemption scheme introduced in Northern Ireland, and approved by the contested decision, has led to crude aggregates extracted in Northern Ireland by producers having entered into environmental agreements being taxed at 20% of the AGL rate (GBP 0.32 per tonne), whereas identical products imported from Ireland are taxed at the full AGL rate (GBP 1.60 per tonne). Accordingly, it results from the general AGL scheme, and from the relief scheme for Northern Ireland approved by the contested decision, that identical products are taxed differently.

100 It should also be observed that aggregates producers established in Ireland may not, under the United Kingdom legislation, enter into an environmental agreement, as pointed out by the Commission and the United Kingdom at the hearing. Aggregates producers in Ireland are not otherwise eligible to benefit from the AGL exemption scheme by showing, for example, that their activities comply with the environmental agreements which aggregates producers in Northern Ireland may conclude.

101 It should be further noted that, in its complaint, BAA had claimed that the aid scheme in question aimed solely to safeguard the competitiveness of aggregates producers in Northern Ireland. BAA had also stated that the new relief scheme was liable to distort and affect trade between Member States significantly and that it could in no way be compatible with the common market under Article 87(3)(c) EC.

102 In the light of the foregoing, the Court finds that the Commission, by failing to examine, in the contested decision, the question of possible tax discrimination between the domestic products in question and imported products originating in Ireland, was

not entitled to adopt lawfully, on the basis of Article 4(3) of Regulation No 659/1999, the decision not to raise objections to the AGL exemption notified by the United Kingdom authorities.

103 In those circumstances, the contested decision must be annulled, without its being necessary to examine the other pleas put forward by the applicants.

Costs

104 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

105 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States intervening in the dispute are to bear their own costs. The United Kingdom of Great Britain and Northern Ireland must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls Commission Decision C(2004) 1614 final of 7 May 2004 not to raise objections to the change in the exemption, in Northern Ireland, from the levy on aggregates in the United Kingdom;**

2. **Orders the Commission to bear its own costs and to pay those incurred by the British Aggregates Association, Healy Bros. Ltd and David K. Trotter & Sons Ltd;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 9 September 2010.

[Signatures]