Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

7 March 2012 *

(State aid — Environmental tax on aggregates in the United Kingdom — Commission decision not to raise objections — Advantage — Selective nature)

In Case T-210/02 RENV,

British Aggregates Association, established in Lanark (United Kingdom), represented by C. Pouncey, J. Coombes, Solicitors, and L. Van den Hende, lawyer,

applicant,

v

European Commission, represented by M. Afonso, J. Flett and B. Martenczuk, acting as Agents,

defendant,

supported by

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

intervener,

APPLICATION for partial annulment of Commission Decision C(2002) 1478 final of 24 April 2002 on State aid file N 863/01 — United Kingdom/Aggregates Levy,

THE GENERAL COURT (First Chamber, Extended Composition),

composed of J. Azizi (Rapporteur), President, I. Labucka, S. Frimodt Nielsen, J. Schwarcz and D. Gratsias, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2011,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 The facts of the dispute are set out as follows in paragraphs 1 to 25 of the judgment of the General Court in Case T-210/02 *British Aggregates* v *Commission* [2006] ECR II-2789 (the 'judgment set aside' or 'judgment of the General Court'):

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

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

Finance Act 2001

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

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

5 The Act was amended by sections 129 to 133 of and schedule 38 to the Finance Act 2002. The amended legislation lays down exemptions for spoils resulting from the extraction of certain minerals, including slate, shale, ball clay and china clay. In addition, it provides for a phased introduction of the levy in Northern Ireland.

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

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

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

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

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

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

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

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

The administrative procedure and the dispute before the national court

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

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

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

16 On 11 February 2002, the applicant brought an action for judicial review before the High Court of Justice of England and Wales, Queen's Bench Division. The grounds of the action included infringement of the Community rules relating to State aid. By judgment of 19 April 2002, the High Court of Justice dismissed the action, but gave the applicant leave to appeal before the Court of Appeal (England and Wales). On the applicant's lodging of its appeal, the Court of Appeal ordered the proceedings to be stayed, in view of the bringing of this action before the [General Court].

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

The contested decision

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

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

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

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

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

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

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

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

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

… The United Kingdom, in the exercise of its freedom to determine its national tax system, has designed the AGL in such a way as to maximise the use of recycled aggregate and other alternatives to virgin aggregate, and to promote the efficient use of virgin aggregate, which is a non-renewable natural resource. The environmental costs of aggregate extraction that the United Kingdom seeks to address through the AGL include noise, dust, damage to biodiversity and visual amenity."

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

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

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

25 In point 34, the Commission states that:

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

Procedure and forms of order sought

2 By application lodged at the Registry of the General Court on 12 July 2002, the applicant, British Aggregates Association, brought an action for partial annulment of Commission Decision C(2002) 1478 final of 24 April 2002 on State aid file N 863/01 – United Kingdom/Aggregates Levy ('the contested decision').

3 By order of the President of the Second Chamber of the General Court of 28 November 2002, the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the form of order sought by the Commission of the European Communities.

4 In support of its action, the applicant pleaded, first, infringement of Article 87(1) EC; secondly, a failure to state reasons in accordance with Article 253 EC; thirdly, infringement by the Commission of its duty to initiate the formal investigation procedure in accordance with Article 88(2) EC; and, fourthly, failure by the Commission to carry out its obligations in relation to the preliminary stage of the procedure in accordance with Article 88(3) EC.

5 The Commission challenged the admissibility of the action, arguing that the contested decision was not of individual concern to the applicant for the purposes of the fourth paragraph of Article 230 EC.

6 By the judgment set aside, the General Court declared the action to be admissible on the grounds set out in paragraphs 45 to 68 of that judgment. However, the General Court rejected the first and second pleas, which it examined together, and subsequently the third and fourth pleas, for the reasons set out respectively in paragraphs 104 to 156, 163 to 173 and 177 to 180 of the judgment set aside. Accordingly, the General Court dismissed the action in its entirety.

7 By a document lodged on 27 November 2006, the applicant brought an appeal before the Court of Justice seeking to have the judgment of the General Court set aside and the contested decision annulled, save as regards the exemption for Northern Ireland. The Commission brought a cross-appeal requesting the Court of Justice to set aside the judgment of the General Court and to declare the action inadmissible. The United Kingdom contended that the Court of Justice should dismiss the main appeal.

8 By judgment of 22 December 2008 in Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505 (the 'appeal judgment') the Court of Justice set aside the judgment of the General Court and referred the case back to the General Court.

9 The Court of Justice confirmed in its entirety the General Court's assessment of the admissibility of the action (appeal judgment, paragraphs 24 to 58).

10 On the substance, the Court of Justice found that the General Court made two errors of law.

11 According to the Court of Justice, in paragraphs 115, 117, 120, 121 and 128 of the judgment set aside, the General Court misconstrued the concept of aid, in particular the criterion of the selectivity of the advantage, which does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects. Therefore, the General Court was not entitled to take into account the environmental objective pursued in order to justify the exclusion from the scope of Article 87(1) EC of measures involving a selective advantage (appeal judgment, paragraphs 82 to 92).

12 Moreover, the Court of Justice considered that, in particular in paragraphs 118, 134, 139, 154 and 171 of the judgment set aside, the General Court made a mistake with regard to the standard of judicial review to be exercised in regard to the concept of aid — which is a legal concept that must be interpreted on the basis of objective factors — by holding that the Commission had a broad discretion in the application of Article 88(3) EC. That is why, according to the Court of Justice, the Courts of the European Union must, in principle, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC. That rule also applies to decisions adopted by the Commission at the end of the preliminary investigation procedure in accordance with Article 88(3) EC, since the Commission is under a duty, without having any discretion in that regard, to initiate the formal investigation procedure under Article 88(2) EC if the preliminary examination does not enable it to overcome all the difficulties of assessment. According to the Court of Justice, that error of law vitiates in its entirety the General Court's analysis of the substance of the contested decision (appeal judgment, paragraphs 109 to 115).

13 The Court of Justice also upheld a complaint concerning paragraph 112 of the judgment set aside. The General Court found, in essence, that the Commission had accepted throughout the contested decision, and in point 29 in particular, that the term 'primary aggregates' essentially designated aggregates 'subject to the AGL', whereas the term 'secondary aggregates' essentially referred to the 'exempted' aggregates specifically listed in the Act. The General Court inferred from this, inter alia, that the Commission had merely stated in point 29 that 'the AGL will not be levied on secondary products or waste arising from primary extraction, when they are exempted by the Act'. According to the Court of Justice, in so doing, the General Court committed an error of interpretation and substituted its own interpretation for that following directly from the contested decision, even though there was no substantive factor which justified its so doing (appeal judgment, paragraphs 140 to 145, in particular paragraph 144, and paragraph 151).

14 In addition, the Court of Justice upheld a complaint in relation to paragraph 150 of the judgment set aside, relating to fulfilment of the obligation to state reasons in accordance with Article 253 EC. According to the Court of Justice, contrary to the General Court's findings in the paragraph concerned, the reasoning based on Article 91 EC cannot be regarded as reflecting the reasoning set out in the contested decision, based on the fact that the United Kingdom authorities have no means by which to supervise the use of materials as aggregates outside the United Kingdom, but represents, in fact, different reasoning supplied after that decision had been adopted. Consequently, according to the Court of Justice, the General Court failed to have regard for Article 253 EC by taking into account that reasoning in relation to the grounds set out in the contested decision (appeal judgment, paragraphs 172 to 179, in particular paragraph 178).

15 Lastly, the Court of Justice rejected the grounds of appeal alleging errors of law in relation to the failure to initiate the formal investigation procedure provided for under Article 88(2) EC (appeal judgment, paragraphs 185 to 189) and the inadequate statement of reasons for the contested decision (appeal judgment, paragraphs 192 to 194).

16 The Court of Justice ultimately decided to set aside the judgment of the General Court, to refer the case back to the General Court on account of the two errors of law referred to in paragraphs 11 and 12 above, and to reserve the costs (appeal judgment, paragraphs 195, 197 and 198).

17 Following the referral of the present case, the parties were invited to submit their observations on the conclusions to be drawn from the appeal judgment for the outcome of the proceedings. The applicant, the Commission and the United Kingdom lodged statements of observations in accordance with Article 119(1) of the Rules of Procedure of the General Court.

18 The applicant claims that the General Court should:

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

— order the Commission to pay the costs, including those incurred in the appeal.

19 The Commission, supported by the United Kingdom, contends that the General Court should:

— dismiss the action;

— order the applicant to pay the costs.

20 Upon hearing the report of the Judge-Rapporteur, the General Court (First Chamber, Extended Composition) decided to open the oral procedure.

21 The parties presented oral argument and their answers to the questions put by the General Court at the hearing on 16 May 2011.

22 At the hearing, the General Court requested the Commission and the United Kingdom, in the context of a measure of organisation of procedure under Article 64 of the Rules of Procedure, to provide to the Court within a time-limit of three weeks all documents or references to documents already in the case-file attesting to certain factual aspects of the administrative procedure launched following notification of the Aggregates Levy ('AGL' or 'the levy') in respect of the extraction of 'virgin' aggregates for commercial use. The General Court thus kept the oral procedure open, which was recorded in the Minutes of the hearing.

23 By separate document lodged at the Registry of the General Court on 30 May 2011, the applicant requested the General Court to order the Commission and the United Kingdom, in the context of measures of organisation of procedure under Article 64 of the Rules of Procedure, to submit further information on certain facts that were disputed at the hearing. The Commission and the United Kingdom submitted their observations on that request on 13 and 14 July 2011.

24 By separate documents lodged at the Registry of the General Court on 14 June 2011, the Commission and the United Kingdom complied with the General Court's request for production of documents. The applicant submitted its observations on those documents on 18 July 2011 and the oral procedure was closed.

Law

1. *Preliminary observations*

25 Since the Court of Justice has definitively confirmed the assessment of the General Court in the judgment set aside concerning the admissibility of the action (appeal judgment, paragraphs 24 to 58), which the parties have acknowledged, it must be held that the present action is admissible and the General Court's assessment must be confined to the substantive lawfulness of the contested decision.

26 To that end, following the referral of the present case on account of the errors of law identified in paragraphs 82 to 92 and 109 to 115 of the appeal judgment concerning the General Court's misconstruction of the concept of aid and the standard of judicial review of the contested decision (see paragraphs 10 to 12 and 16 above), this Court is required to re-examine all the relevant facts covered by the present dispute and to characterise them anew in the light of the prohibition laid down under Article 87(1) EC.

27 The General Court therefore considers it necessary to examine the first plea in law, alleging infringement of Article 87(1) EC.

2. *The first plea in law, alleging infringement of Article 87(1) EC*

Summary of the parties' observations following referral of the case

28 The applicant submits, in essence, that the contested decision is vitiated by a misconstruction of the concept of aid, in particular of the selective nature of the advantages flowing from the AGL. Neither the Commission nor the United Kingdom had demonstrated that, in the light of the environmental objective pursued by the AGL, the different treatment of certain aggregates and/or materials could be justified by the nature, the general scheme or the environmental logic of the Act. The inconsistency in the scope of application of the AGL thus gives rise to the selective advantages prohibited by Article 87(1) EC. According to the applicant, that inconsistency is confirmed, in particular, by the exemption from the levy of certain materials, such as slate, clay and shale, even though they are 'aggregates' within the meaning of the Act and aggregates of alternative materials are subject to the levy. However, in the absence of a clear definition of 'aggregates', such an exemption cannot be justified by the argument that the AGL is designed to encourage demand for 'virgin' aggregates to shift towards more environmentally friendly materials, in particular to promote the use of recycled aggregates and other alternative products as well as the more efficient use of those virgin aggregates, which are a non-renewable resource (point 31 of the contested decision).

29 With regard to the export exemption, the applicant invites the General Court to find fault with the reasoning in point 33 of the contested decision, according to which the United Kingdom authorities have no control over exports of aggregate, which entails a risk of unequal treatment of exported aggregate. 90% of exported and exempt aggregate comes from a single granite quarry at Glensanda in Scotland; nothing produced by that quarry would be capable of being used for exempt processes in the United Kingdom. Thus, the true justification for that exemption, which is unrelated to the nature and general scheme of an environmental tax, is to protect competitiveness. The export exemption thus confers a selective advantage for the purposes of Article 87(1) EC.

30 The Commission contends that, for the purposes of applying Article 87(1) EC, the General Court must 'begin its analysis by identifying a measure (or a "system") that does not involve State aid and does not take into account the environmental objective or the nature or general scheme of the system'.

31 According to the Commission, it must be noted first of all that an exceptional fiscal burden on a narrow sector is not a State aid, and there is no need to assess the objectives of the levy or the nature and general scheme of the system. In the present case, aggregates are subject to the levy, whereas non-aggregate substances and uses are not. Secondly, the system provides for exceptions for recycled products and alternatives to virgin aggregate, notably spoil, even if used as aggregate, but these exemptions are in the nature or general scheme of the system and effectively contribute to a further reduction in the extraction of virgin aggregate. However, the applicant persistently makes the basic error of seeking to transpose the environmental objective, which is part of the nature or general scheme of the system, from the second step to the first step of that reasoning. Contrary to the General Court's findings in the judgment set aside, that reasoning applies to all taxes constituting an exceptional fiscal burden on a narrow sector, regardless of their objectives. The appeal judgment correctly identified that error and thus confirmed the contested decision and the position of the Commission.

32 The Commission challenges the argument that there is no coherent logic to the AGL because other sectors with a comparable impact on the environment are not subject to the levy (judgment of the General Court, paragraphs 82, 86 and 87). An exceptional fiscal burden on a narrow sector — that of aggregates — does not involve a State aid to all other sectors not subject to the levy. Those other sectors were not taxed either because they were not aggregates (coal, lignite, clay, china clay, ball clay, slate and shale; judgment of the General Court, paragraph 129) or because they were not used as aggregate (limestone used for cement production and sand used for glass) (judgment of the General Court, paragraphs 90 to 92 and the first sentence of paragraph 128). In the judgment set aside, the General Court correctly rejected this argument by the applicant and held that it was in principle for the Member State to decide which goods or services to tax; this does not mean that there is a State aid to other sectors with a comparable environmental impact (paragraphs 114 to 116, 128 and 129 of the judgment of the General Court).

33 However, according to the Commission, the General Court introduced a factor that was not included in the statement of reasons for the contested decision and was not relied on by the Commission in the original proceedings, since it was inconsistent with established case-law (appeal judgment, paragraphs 84, 85 and 87): the environmental objective (judgment of the General Court, paragraphs 115 and 128). The General Court erroneously interpreted the reasoning in the contested decision as being limited to environmental taxes, whereas that reasoning applies to any tax, regardless of its objective. The Court of Justice correctly identified that error (appeal judgment, paragraphs 86 and 87). In order to correct it, the General Court should eliminate the environmental objective from that part of its reasoning and conclude that an exceptional fiscal burden on a narrow sector does not involve State aid to all the other untaxed sectors, and that there is no State aid to non-aggregate substances and aggregates intended for uses that are excluded from the scope of the AGL. The Commission makes it clear that the appeal judgment expressly rejects the applicant's various complaints that certain aggregates are subject to the levy and certain non-aggregate materials or uses are not.

34 The Commission submits that paragraph 88 of the appeal judgment confirms that assessment by pointing to the fact that the introduction in the judgment set aside of the environmental objective is obviously inconsistent with the exclusion of other environmentally damaging sectors, such as coal, and with the reliance on other objectives to justify the non-extension of the levy to such other sectors, including the desire to preserve international competitiveness. The Court of Justice rightly observed that such a contradiction cannot be resolved through recourse to reasoning based on the nature or general scheme of the system, given that 'what matters is not the objective, but the effects' (appeal judgment, paragraphs 84, 85 and 87).

35 With regard to the distinction made by the General Court in paragraphs 120 and 121 of the judgment set aside between the present case and Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365 ('*Adria-Wien Pipeline*'), the Commission recalls that the

Court of Justice held that Article 87(1) EC defines State interventions on the basis of their effects, and thus independently of the techniques used (appeal judgment, paragraph 89). As regards the effects, the Commission recalls that the AGL is a specific tax that applies to a narrow sector, namely that of aggregates (point 32 of the contested decision). It is this characteristic of an exceptional fiscal burden on a narrow sector that permits the conclusion that that tax does not in itself — regardless of its objective — constitute State aid to non-aggregate substances or non-aggregate uses (judgment of the General Court, paragraphs 90 to 92). According to the Commission, it is that characteristic which provides, moreover, the 'neutral fixed point', or 'system', or 'normality', which 'does not itself involve State aid, and which is not established by looking to or relying upon the objective of the tax or the nature or general scheme of the system', by reference to which it is possible to determine whether or not other exemptions from the levy are in the nature or general scheme of the system. However, there was no narrow sector serving as a 'fixed point' in *Adria-Wien Pipeline*, cited above, the measure at issue having affected a substantial part of the national economy, which justified a different approach.

36 The Commission thus invites the General Court to reconsider, on the basis of the requisite standard of judicial review, first, the identification of the aggregates sector (judgment of the General Court, paragraphs 75, 90, 91, 110, 138 and 139, and appeal judgment, paragraphs 96 to 101). In the present case, the Commission based its analysis on the scope of the levy as established by the United Kingdom. Non-aggregate substances such as coal, lignite, clay, china clay, ball clay, slate and shale, and non-aggregate uses such as, in particular, limestone used for cement production and sand used for glass, are not subject to the levy because they are not part of the aggregates sector. It is not correct, therefore, to assert, as the applicant does, that the substances concerned are all aggregates. The appeal judgment (paragraph 130) also confirms that some substances are not subject to the levy because they are not aggregates. Secondly, this review should relate to the taxing of aggregates with a high technical specification, such as red chippings for cycle paths, road surface and railway ballast, because they are aggregates, irrespective of whether or not there are alternatives (judgment of the General Court, paragraphs 85, 90 to 92, 135 and 136, and appeal judgment, paragraphs 125, 126, 130 and 131). Thirdly, the General Court should reconsider the taxing of 'secondary' limestone and sand on the ground that they are used as aggregates, irrespective of whether or not they are classified as 'secondary' products of particular quarries (judgment of the General Court, paragraphs 86, 90 to 92 and 137, and appeal judgment, paragraphs 146 to 151). Fourthly, this review should cover the non-taxing of non-aggregates and of spoil, such as slate, shale, clay, china clay, ball clay, coal and lignite, even where they are used as aggregate, because it is in the nature or general scheme of the system to encourage the use of alternatives to virgin aggregate (judgment of the General Court, paragraphs 83, 94 to 98 and 130 to 132, and appeal judgment, paragraphs 152 to 154 and 160 to 162). Lastly, as regards the export exemption, the Commission invites the General Court to reconsider whether that exemption is justified on the grounds set out in points 22 and 33 of the contested decision.

37 The United Kingdom challenges in particular the applicant's argument that key terms of the AGL have never been clearly defined and that they have been ascribed different meanings in different circumstances.

38 Thus, the term 'primary aggregate' is most commonly used by quarry operators to describe the primary or principal aggregate they produce at their quarry. Such operators often produce a range of different aggregates, which vary according to physical grade, technical specification and suitability for certain applications. Thus, high specification aggregates may be used for the manufacture of tarmac or concrete, whereas lower specification aggregates may be suitable for use as fill or ballast. Primary aggregates are generally considered to have the highest value, to be in high demand and to be of sufficiently high grade to make them suitable for a wide range of applications. The economic viability of extraction depends to a significant extent on the geology of the site and, to a degree, the ease with which it is possible to access, at the site, the machinery required to refine the raw material and maximise its desired qualities.

39 By contrast, the term 'secondary aggregate' is most commonly used by quarry operators to describe the aggregates that are the by-products of primary aggregate production, which often involves physical processing such as crushing, screening, grinding and milling. At each of those processing stages the aggregate by-product created will not be of the same high grade as the primary aggregate and is therefore separated from it. Secondary aggregates may be subject to further processing at a number of stages in order to achieve their own maximum potential as aggregates. Thus, a range of different grade products of increasingly limited quality or value is produced until all that is left is a very fine granular material (known as 'fines'), which has limited use and for which there is little demand. However, these secondary aggregates are not necessarily by-products or waste. On the contrary, most secondary aggregates are of a particularly high value and quality and are in demand, so that in most circumstances, only 'fines' can be described as waste. Consequently, the fact that the grade of secondary aggregate is lower than that of primary aggregate is the key distinguishing feature between those two types of aggregate. The term 'secondary aggregate' is also sometimes used to describe the by-products of a certain number of extraction and manufacturing processes whose purpose is not to produce aggregates but which unavoidably result in the production of such materials, such as colliery spoil, china clay extraction, slate production, power station ash, and blast furnace slags. These processes should therefore be distinguished from aggregate quarrying.

40 The United Kingdom states that it wishes to minimise the disposal of such by-products as waste and therefore seeks to promote their use as a viable alternative to aggregate that is quarried for its own sake. Although the AGL does not define these materials as 'secondary aggregates', that label is commonly used within the relevant industries. The terminology used in the quarrying industry can nevertheless be misleading in so far as taxable and non-taxable materials are often described, mistakenly, as primary and secondary aggregates respectively, whereas the category of taxable aggregates includes both primary and secondary aggregates. In addition, the term 'virgin aggregate' refers to both primary and secondary aggregate that has not been used before because it has been freshly extracted. Recycled aggregate is not, therefore, virgin aggregate.

41 The United Kingdom challenges the applicant's argument that neither the Commission nor the United Kingdom has put forward a coherent environmental logic for the AGL or demonstrated that its nature and general scheme justify its scope. It is common ground that the extraction of aggregates produces a number of negative environmental impacts, including noise, dust, visual intrusion, damage to biodiversity and loss of amenity. The AGL is designed to internalise those environmental costs in the price of the aggregate and thus to reduce the quarrying of virgin aggregate, promote its efficient use and encourage the use of alternative, recycled materials and materials that would otherwise be disposed of as waste. Although the AGL is imposed directly on aggregates producers, the burden of the levy ultimately falls on end users of aggregate, since those producers pass the cost of the levy on to their consumers through their pricing. In that sense, the AGL is an indirect tax imposed on end consumers of virgin aggregate.

42 The United Kingdom denies that there are inconsistencies in the general scheme of the AGL which result in selective advantages for certain untaxed sectors or products. In its view, the General Court should not undertake a detailed re-examination of the applicant's arguments regarding the nature, logic and scope of the AGL, since the Court of Justice has largely rejected those arguments in the light of the General Court's unchallengeable findings of fact (appeal judgment, paragraphs 94 to 101). Furthermore, the nature and logic of the AGL and the underlying environmental principles are simple, coherent and logical. Thus, the non-taxing of certain materials, such as china clay, ball clay, slate and other mineral and industrial waste, flows from the nature and overall structure of the AGL; as a result, Article 87(1) EC does not apply to that exemption.

43 As regards the exemption from the levy of slate, shale and china clay, the United Kingdom claims that, in the case of slate and china clay, the production process generates a large amount of aggregate by-product. Furthermore, in certain sectors of the aggregates market, such by-products have been successfully used as a substitute for other virgin aggregates subject to the AGL. The processes for the

extraction of china clay, slate, coal and other materials are not ultimately intended to produce aggregate but unavoidably result in the production of materials suitable for such use. Although such extraction processes to some extent generate waste and are environmentally harmful, there is no more efficient means of producing materials such as slate and china clay. In the light of the AGL's objective of environmental protection, preference should be given, as far as possible, to putting the by-products of such processes to use as aggregates instead of using other virgin aggregates, particularly where the only other option would be to dispose of those by-products as waste. A substantial amount of by-product material obtained from those processes is now sold as aggregate not subject to the AGL, whereas before the levy was introduced, most of that material was tipped as waste. As regards the exemption of materials used for non-aggregate purposes, such as silica sand for the manufacture of glass, this applies where two core conditions are both satisfied: first, that there is no viable alternative material; and, secondly, that the material is not used as an aggregate.

44 According to the United Kingdom, in essence, the applicant's arguments as to whether or not the AGL is in accordance with the 'polluter pays' principle, the environmental impact of the extraction of various materials, the Commission's definition of the 'aggregates sector' and what is alleged to be the real rationale behind the exemptions of certain materials, namely the protection of international competitiveness, were all rejected by the Court of Justice (appeal judgment, paragraphs 99 to 101, 128 to 132, 149, 150, 161 and 162) and must therefore be dismissed. In any event, those arguments are clearly wrong, given the nature and logic of the AGL as set out above (judgment of the General Court, paragraphs 129, 133, 134, 138 and 153). In addition, the applicant confuses the use of the terms 'primary aggregates', 'secondary aggregates' and 'virgin aggregates', and attributes to them a meaning that is not supported by any legal definition laid down by the Act.

Conditions of application of Article 87(1) EC

The criteria governing the selective nature of the advantage

45 By its first plea in law, the applicant complains that the Commission, in essence, misconstrued the concept of aid, particularly the criteria of advantage and of selectivity for the purposes of Article 87(1) EC, and that it erred in its application of that concept.

46 As regards the criterion of an advantage, it has been recognised in settled case-law that 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 (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). With regard to tax, the Court of Justice has made clear that a measure by which the public authorities grant certain undertakings a tax exemption which places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payment of tax normally due can amount to State aid (see, to that effect, *Cassa di Risparmio di Firenze and Others*, cited above, paragraph 132).

47 As regards the criterion of the selectivity of the advantage, it is necessary to consider whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC in comparison with other undertakings in a comparable legal and factual situation in the light of the objective pursued by the measure concerned (*Adria-Wien Pipeline*, cited in paragraph 35 above, 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).

48 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 (see, to that effect, *Adria-Wien Pipeline*, cited in paragraph 35 above, paragraph 42, and *Portugal* v *Commission*, cited in paragraph 47 above, paragraph 52). The Court of Justice has made clear that the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system and that, in that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (*Portugal* v *Commission*, cited in paragraph 47 above, paragraph 81). Tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 87(1) EC.

49 Furthermore, for the purpose of assessing the selective nature of the advantage conferred by the measure in question, the determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation (see, to that effect, *Portugal* v *Commission*, cited in paragraph 47 above, paragraph 56, and Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 81). Thus, in order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation.

50 Consequently, this Court must first identify the criteria determining 'normal' taxation under the AGL.

'Normal' taxation under the AGL

51 In the present case, the parties acknowledge that 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, which established a specific tax system applicable to the aggregates sector in the United Kingdom.

52 However, contrary to the Commission's contention (see paragraphs 31 to 33 above), even if that system could be described as an exceptional fiscal burden on a narrowly defined economic sector, that in itself does not mean that that fiscal burden falls outside the prohibition laid down in Article 87(1) EC (see, to that effect, *Heiser*, cited in paragraph 47 above, paragraph 42), since the capacity of that system to differentiate within that sector may satisfy the criteria of advantage and selectivity for the purposes of the case-law referred to in paragraph 47 above. Furthermore, in accordance with the legal concept of aid, which must be interpreted on the basis of objective factors (appeal judgment, paragraph 111), the purpose of a State measure, such as, in this instance, the environmental objective or the 'ecotax' quality of a specific or sectoral tax system, is not sufficient to exclude that measure outright from classification as 'aid' for the purposes of that provision (appeal judgment, paragraph 84), since such a measure must be assessed in relation to its effects and regardless of its causes or objectives (appeal judgment, paragraphs 85 to 88). Consequently, the concept of aid within the meaning of Article 87(1) EC requires consideration to be given to whether a specific or sectoral tax system entails distinctions the

effect of which is to favour 'certain undertakings or the production of certain goods' within the sector covered by that system, which presupposes that the underlying 'normal' taxation is first determined (see paragraph 49 above).

53 As is apparent, in particular, from the written observations of the United Kingdom (see paragraphs 37 to 43 above) and the answers given by the parties to the questions put by the General Court at the hearing, the 'normal' taxation principle underlying the AGL is the principle of the taxation of the commercial exploitation in the United Kingdom of a material that is taxable as an 'aggregate' (section 16(1) and (2), and section 17(1) of the Finance Act 2001; 'the Act'), although the Act does not offer a precise definition of the term 'aggregate' or general taxation criteria explaining that term, inter alia by reference to the physico-chemical properties, composition, size or commercial value of the materials in question.

54 It must be stated in that regard that the descriptions of aggregates as 'virgin', 'primary' or 'secondary' that have been used repeatedly, both in the contested decision and by the parties during the proceedings, are not definitive as no such distinction is made in the wording of the AGL provisions. As the United Kingdom acknowledged at the hearing, the normal taxation system of the AGL is not established by reference to a generic definition of aggregate; moreover, the Act excludes from the scope of the AGL aggregates obtained from certain materials (section 17 of the Act), irrespective of their physical condition, or obtained from certain processes of extraction or production ('Exempt processes' under section 18 of the Act), or solely on the ground that they are intended for export (section 16(2) of the Act). The AGL thus includes a list of aggregates derived from materials or extraction or production processes which are exempt from the levy, irrespective of whether or not they may belong to one of the alleged categories of aggregate (section 17(2) to (4), and section 18(1) to (3) of the Act).

55 It follows from this that the normal taxation principle underlying the AGL is based solely on the notion of the commercial exploitation in the United Kingdom of a material that is taxable as an 'aggregate'.

56 Yet, in the contested decision, the Commission clearly failed to take account of that normal taxation principle in determining the selective nature of any advantages generated by the AGL. Thus, the description of the scope of the AGL contained, in particular, in the second and third sentences of point 29 of the contested decision does not correspond to that definition of normal taxation. According to the terms of that description, in essence, the AGL will be levied only on 'virgin' aggregate and not 'on aggregates extracted as a by-product or waste from other processes (secondary aggregates), nor will it be levied on recycled aggregates'. The AGL does not, however, envisage such a general rule of taxation that distinguishes between the various categories of aggregate ('virgin', 'secondary' and 'recycled').

57 That finding is unaffected by paragraph 144 of the appeal judgment, which does not relate to the determination of the normal taxation principle underlying the AGL and, in particular, does not find that the contested decision is based on an accurate definition of that principle. The Court of Justice merely found that the General Court was not entitled to interpret point 29 of the contested decision as stating that the term 'primary aggregates' essentially designated aggregates subject to the AGL and that 'secondary aggregates' essentially referred to 'the exempted aggregates specifically listed in the Act' (judgment set aside, paragraph 112). On the assumption that, in that context, the use of the definitions of 'primary' and/or 'secondary' aggregates is relevant, the normal taxation principle underlying the AGL, as recalled in paragraph 55 above, does not in any way preclude a 'secondary' aggregate from also being a 'virgin' aggregate or from being, in principle, subject to the AGL precisely because it fulfils the function of an 'aggregate'. Thus, contrary to what is categorically stated in point 29 of the contested decision, the mere fact that 'secondary aggregates' are intended to designate

'aggregates extracted as a by-product or waste from other processes' does not necessarily mean that those aggregates are exempt from the levy. The same applies to 'recycled' materials in so far as they are 'aggregates' within the meaning of the AGL (see paragraph 55 above).

58 This assessment is confirmed by the plausible explanations given by the United Kingdom and set out in paragraphs 37 to 40 above, which, as the Commission acknowledged in response to a measure of organisation of procedure of the General Court, correspond to the explanation given in point 19 of the notification of the AGL, from which, as from the Act, the definitions of 'primary' and/or 'secondary' aggregates are also absent. In essence, it is apparent from those explanations that the terminology used in the contested decision to designate the various categories of aggregates does not correspond to that adopted by the AGL but rather to that used in the quarrying industry, and that, moreover, there is a significant overlap between 'secondary' aggregates – as opposed to 'primary' aggregates – and 'virgin' aggregates. According to the United Kingdom, 'virgin' aggregates include both 'primary' aggregates and 'secondary' aggregates, whereas 'recycled' aggregates are not 'virgin' aggregates. The reason for that overlap is that the term 'secondary' aggregates often refers to aggregates which are the by-products of the production of 'primary' aggregates, that is to say, the initial extraction of certain materials from underground for the purpose of obtaining aggregates within the meaning of the AGL. The main difference between 'primary' and 'secondary' aggregates is in relation to their respective composition which determines their particular industrial use. Thus, both 'primary' aggregates and 'secondary' aggregates may be 'virgin' aggregates if they have been freshly extracted and if they have not previously been used (as aggregate). At the hearing, the relevance of the clarification provided by the United Kingdom was also acknowledged by the other parties.

59 It follows from this that, contrary to what is stated in point 29 of the contested decision, the AGL does not envisage the general exemption of 'secondary' aggregates, which would apply to all materials covered by the term 'aggregate', but merely attaches the classification as exempt aggregate to specific materials named in the Act, or to a specific process of extraction or production of one of those materials, or to exported aggregates.

60 Consequently, as the applicant submits (judgment set aside, paragraph 79), by confining itself to describing — incorrectly — the scope of the AGL in point 29 of the contested decision, the Commission displayed a poor understanding of the principle of normal taxation underpinning the Act, which was liable to vitiate the legality of its assessment of the exemptions from the levy having regard to the concept of aid and, in particular, to their possibly selective nature as referred to in the case-law cited in paragraphs 47 to 49 above.

61 This Court must therefore consider whether and to what extent, in this instance, that error on the part of the Commission has vitiated its assessment in the contested decision of the other criteria governing the selectivity of the advantage for the purposes of Article 87(1) EC. It is necessary, in that regard, to assess whether the Commission was right to rule out the existence of advantages arising from tax differentiation under the AGL solely on the ground that 'the scope of the AGL' was justified by the AGL's logic and general scheme (see points 29, 34 and 43 of the contested decision).

Tax differentiation under the AGL

– The criteria governing the comparability of the situations concerned

62 It will be recalled that, in assessing the selective nature of the advantages conferred by a tax system, the question to be determined is whether the measures based on that system are such as to favour 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (*Adria-Wien Pipeline*, cited in paragraph 35 above, paragraph 41).

63 As the parties unanimously acknowledged, including at the hearing, the principal objective underpinning the AGL is the protection of the environment, although that is not immediately apparent from the wording of the AGL.

64 That objective essentially entails the promotion in the construction industry of the use of aggregates which are the by-products of or waste from certain processes (also known as 'secondary' aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as 'primary' aggregates), which are non-renewable natural resources, and thereby limiting the damage to the environment associated with that process of extraction ('the aim of shifting demand' or 'the environmental objective of the AGL'). In that regard, the applicant merely claims, in essence, that, given the inconsistency in the scope of the Act, that objective is unlikely to be consistently achieved and that the AGL favours aggregates derived from certain materials in comparison with those derived from other materials which are nevertheless in a comparable situation in the light of that same objective. It must be made clear that, in common with the normal taxation principle governing the AGL, as described in paragraphs 53 to 55 above, that general definition of the environmental objective of the AGL — not expressed in that way in the actual text of the Act — makes no distinction between the various categories of material from which such aggregates can be derived.

65 Yet it must be noted that the statement of reasons in the contested decision is based on that definition of the environmental objective of the AGL (see points 5, 29, 31, 32 and 35 of that decision; see also the appeal judgment, paragraphs 150 and 161).

66 Moreover, there is no need in this instance to deal with the question whether the AGL is also guided by the 'polluter pays' principle, which is not apparent either from the wording of the relevant provisions of the AGL or from the statement of reasons for the contested decision (appeal judgment, paragraphs 128 to 131). That principle presupposes that the levy applies, as a rule, to any mineral-extraction activity in order to internalise the environmental costs generated. However, the applicant admitted at the hearing that that was not the case. In any event, if such an additional purpose meant that the levy had to be imposed on every mineral extracted from underground, irrespective of whether or not it was intended to be commercially exploited as aggregate, it would risk calling into question not only the normal taxation principle, as described in paragraphs 53 to 55 above, but also the coherent and effective implementation of the aim of shifting demand.

67 It is therefore necessary to determine whether the AGL provides for the more favourable tax treatment of certain undertakings or the production of certain goods in comparison with that of other undertakings or the production of other goods ('tax differentiation') which are in a comparable factual and legal situation in the light of the environmental objective of the AGL established in paragraphs 63 and 64 above.

68 Contrary to the Commission's contention following the referral of the present case back to the General Court (see paragraphs 30 to 33 above), in assessing the comparability of the situations at issue, neither the Commission nor the General Court can disregard that environmental objective of the AGL (appeal judgment, paragraph 87; *Adria-Wien Pipeline*, cited in paragraph 35 above, paragraph 41; and paragraph 49 above), since the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the act which makes the distinction in question, as well as the principles and objectives of the field to which that act relates (see, to that effect and by analogy, Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 26, and Case C-176/09 *Luxembourg* v *Parliament and Council* [2011] ECR I-3727, paragraph 32).

69 Under its first plea in law the applicant submits, inter alia, that, in the light of the environmental objective of the AGL, the effect of the exclusion of a number of materials from the scope of the AGL results in unjustified tax differentiation to the detriment of certain other materials (judgment set aside, paragraphs 81 to 86).

70 It is necessary, therefore, to consider whether it is apparent from the documents on the case-file that, in the light of the environmental objective of the AGL, those exempt materials are in a factual and legal situation comparable to that of other materials which are subject to the levy.

– The comparability of the situations regarding clay, slate, china clay, ball clay and shale aggregates with the situations regarding other aggregates

71 As regards, in particular, clay, slate, china clay, ball clay and shale aggregates, which are exempt from the levy in accordance with section 17(3) and (4) and section 18(3) of the AGL, it must be held that the applicant is right to maintain that, regardless of their classification in commercial practice, namely as 'virgin', 'primary' or 'secondary' aggregates, those aggregates satisfy, in principle, the normal taxation criterion of the AGL in that they constitute 'aggregates' within the meaning of the Act. That statement of principle was not challenged by the Commission or by the United Kingdom, which merely contended that those materials are not normally exploited for their use as aggregates.

72 Nevertheless, in so far as those aggregates are used and exploited commercially as such, for example in the construction of buildings or roads, they are in a situation that is comparable, if not identical, to other taxed alternative aggregates. In that regard, neither the Commission nor the United Kingdom has succeeded in casting doubt on the applicant's argument that, in such cases, there is at least a potential link in terms of competition or of substitutability between the various aggregates as regards their use or commercial exploitation. Accordingly, this Court must reject the argument of the Commission and of the United Kingdom that materials such as slate, ball clay, china clay and shale are excluded from the scope of the AGL because they are not part of the 'aggregates sector', are not 'generally' or 'traditionally' used as such or extracted for that purpose, or have no 'significant competitive relationship with the taxed sector' (see paragraphs 32 and 36 above), since the inclusion of those materials in the scope of the levy, under the normal taxation rule applicable (see paragraph 55 above), depends only on their actual and established exploitation as aggregates. Furthermore, the Commission and the United Kingdom did not challenge the applicant's argument that there are a number of quarries within the United Kingdom producing (primary) shale and slate aggregate.

73 Furthermore, it is common ground that the extraction of untaxed materials, particularly slate and clay, is at least equally, if not more, harmful to the environment than the extraction of other, taxed, materials, which also produce spoil, waste or other by-products capable of being used as aggregates (see paragraph 41 above). Thus, the parties have pointed to the highly inefficient nature of the extraction of slate, ball clay and china clay, and to the significant stocks of spoil and waste from those materials damaging the landscape, and thus the particularly damaging environmental impact of the extraction process concerned, which is why the United Kingdom legislator exempted those materials from the levy in order to promote their use or recycling as aggregates (see paragraph 43 above). Consequently, aggregates of those various materials are necessarily in what is at least a comparable situation in the light of the environmental objective of the AGL.

74 In that regard, it must be stated that the Commission and the United Kingdom have failed to demonstrate to the requisite legal standard that it is precisely the — environmentally — particularly harmful nature of the extraction of the untaxed materials that distinguishes their situation from that of the taxed materials, since neither the grounds of the contested decision, nor the letter from the United Kingdom of 19 February 2002, attached to the Commission's written response of 2 December 2005 to the General Court's written questions, nor the answers given by those parties to the questions put by the General Court at the hearing offer an adequate explanation in that respect.

– Tax differentiation between comparable situations

75 It follows from the foregoing considerations that the fact that aggregates from certain materials, such as slate, ball clay, china clay and shale are exempt from the levy, and that aggregates from other materials are subject to it, even though, in the light of the environmental objective of the AGL, the various aggregates are in a comparable situation as regards their use as 'aggregates', amounts to tax differentiation which could give rise to selective advantages within the meaning of the case-law referred to in paragraph 47 above.

76 Even allowing for the relevance of the differentiation between 'primary' and 'secondary' aggregates, which is not, however, apparent from the wording of the Act (see paragraph 54 above), producers of taxed aggregates that are capable of being substituted for aggregates derived from exempt materials are doubly disadvantaged. Not only are taxed aggregates subject to the AGL, but they also suffer — at least to a greater extent than exempt materials — the economic consequences of demand being steered towards exempt 'secondary' aggregates caused by the taxation of only those aggregates that are subject to the levy.

77 The arguments put forward by the Commission and the United Kingdom cannot alter that assessment.

78 On the contrary, following a specific question put by the General Court at the hearing, the Commission and the United Kingdom did not explain whether the exemption of clay, slate, china clay, ball clay and shale aggregate necessarily creates greater demand for those aggregates in the construction industry, or even an economic incentive to extract more ('primary') aggregates from those exempt materials. Yet this steering of demand towards ('primary') aggregates obtained from exempt materials would reinforce the unequal economic effects produced by the tax differentiation itself as regards the commercial exploitation of alternative taxed aggregates. In addition, it risks undermining the environmental objective of the AGL, which is precisely to discourage the extraction of ('primary') aggregates from certain materials, especially exempt materials, and to make it more efficient, and to ensure that stocks of spoil and waste from those materials are eliminated.

79 It must be concluded, therefore, that the general exemption of clay, slate, china clay, ball clay and shale aggregate has resulted in tax differentiation to the detriment of alternative aggregates derived from other materials that are subject to the AGL. Moreover, the United Kingdom acknowledged at the hearing that there were differences in treatment under the AGL, although it maintained that those differences could be justified by the nature and general scheme of the taxation system introduced.

80 Nor, furthermore, is that assessment affected by the fact that, in paragraphs 158 to 163 of the appeal judgment, the Court of Justice did not criticise paragraph 130 of the judgment set aside. In fact the Court of Justice was responding in those paragraphs to a very specific complaint by the applicant concerning, in particular, the alleged unlawful substitution of grounds by the General Court in relation to the justification for the exemption of certain materials, such as shale and low-quality slate, clay waste and ball clay, even when used as aggregate after extraction, in the light of the environmental objectives pursued. Thus the Court of Justice confined itself to concluding, in that context only, that the General Court's finding that those materials had 'until now rarely [been] used as aggregates by reason of their high transport costs' was not vitiated by an error of law since 'promotion of the use of virgin materials hitherto little used as aggregates is … consistent with the objective of rationalising the use of aggregates' and that, therefore, 'promotion of the use of those materials also does not undermine the environmental nature and general scheme of the AGL' (appeal judgment, paragraph 161; see also Opinion of Advocate General Mengozzi in that case, ECR I-10521, points 120 to 122). The Court of Justice did not, however, rule in that context on whether the steering of demand towards aggregates derived from those exempt materials could constitute tax differentiation to the detriment of aggregates derived from taxed materials.

81 In those circumstances, the applicant's main argument that the AGL has resulted in tax differentiation between materials that are exempt from the levy and alternative aggregates derived from taxed materials must be accepted, and there is no need to adjudicate on the other complaints and arguments put forward by the applicant in that regard.

82 However, that tax differentiation gives rise to selective advantages for certain undertakings or the production of certain goods only if it cannot be justified by the nature and general scheme of the tax system established by the AGL (see paragraph 48 above).

Justification on the basis of the nature or general scheme of the AGL

83 Accordingly, this Court must consider whether the Commission was justified in taking the view that the tax advantages identified as favouring certain undertakings or the production of certain goods were justified by the nature or general scheme of the AGL, which is the only relevant reference framework in the present case (see points 5, 29, 31 and 32 of the contested decision; see also paragraph 51 above).

84 It will be recalled in that regard that, for the purposes of that assessment, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives, since, as basic or guiding principles of the tax system in question, those objectives and mechanisms could support such justification, which it is for the Member State to demonstrate (see, to that effect, *Portugal* v *Commission*, cited in paragraph 47 above, paragraphs 80 and 81).

85 As stated in paragraphs 63 and 64 above, the environmental objective of the AGL is essentially designed to encourage a shift in demand for 'primary' aggregates in the construction industry towards 'secondary' aggregates, which are the by-products of or waste from other processes, as well as towards 'recycled' aggregates, although that general definition does not distinguish between the various materials from which such aggregates can be obtained. The criteria determining the 'normal' nature of the taxation provided for under the AGL (see paragraphs 53 and 54 above) and that objective are thus the basic or guiding principles of the Act, on the basis of which any justification for tax differentiation must be assessed.

86 In the light of the matters put forward by the applicant, the Commission and the United Kingdom have failed to demonstrate that the tax differentiation associated with the exemption of clay, slate, china clay, ball clay and shale aggregate is justified on the basis of the 'normal' taxation principle underpinning the AGL or on the basis of the environmental objective of the AGL.

87 That tax differentiation clearly derogates from the normal taxation rationale of the AGL, in so far as aggregates from the exempted materials all constitute, at least potentially, 'aggregates' that are subject to commercial exploitation within the meaning of the Act.

88 Moreover, that tax differentiation is likely to undermine the environmental objective of the AGL in two respects.

89 In the first place, subject to evidence to the contrary, which has not, to date, been produced by the Commission or the United Kingdom, the exemption of clay, slate, china clay, ball clay and shale aggregate risks creating even greater demand in the construction industry for 'primary' aggregates of that type rather than for 'secondary' aggregates — namely the by-products of or waste from certain processes, including those derived from other alternative but taxed materials — and thus intensifying the extraction of those 'primary' aggregates, which would be contrary to the environmental objective of the AGL, designed as it is to encourage the use of those 'secondary' aggregates alone, and to avoid

their being tipped as waste or stockpiled (see paragraph 78 above). In that regard, except for the general assertion that those materials 'traditionally' or 'generally' do not constitute aggregates, the Commission and the United Kingdom were unable to cast doubt on the applicant's argument that there are in the United Kingdom a number of quarries producing ('primary') shale and slate aggregate, which would thus be likely to profit from that exemption in the manner described above.

90 In the second place, there can, to that extent, no longer be any guarantee of an effective and consistent shift in that demand towards the use of 'secondary' aggregates of all categories of material, namely the by-products of and waste from certain processes or 'recycled' aggregates, so as to avoid those 'secondary' aggregates being tipped as waste and to encourage the more efficient extraction of 'primary' aggregates as a whole, not only those derived from certain exempt materials. Yet such an outcome would be manifestly incompatible with the environmental objective of the AGL as invoked by the United Kingdom. Furthermore, in those circumstances, the potentially beneficial impact on the environment in the light of that same objective — first to exhaust existing stocks of 'secondary' aggregates of clay, slate, china clay, ball clay and shale — is not sufficient to justify the tax differentiation established since that impact is not limited in time and thus — subject to evidence to the contrary, not produced by the United Kingdom in this instance — risks creating similar problems of stocks of aggregate waste derived from other materials subject to the levy, demand for which has since been diverted elsewhere, which would also be contrary to the environmental objective of the AGL.

91 Consequently, in the light of all the foregoing considerations, which indicate that there are selective advantages for the purposes of Article 87(1) EC, the Commission was not entitled to conclude, in points 34 and 43 of the contested decision, that 'any advantages arising for certain undertakings from the definition of the scope of the AGL are justified by the nature and [by the] general scheme of the system of taxation' at issue.

92 Thus, in the present case, the Commission misconstrued the concept of aid within the meaning of Article 87(1) EC; the first plea in law must therefore be upheld in so far as it relates to the existence of tax differentiation under the AGL and to the absence of justification in that respect on the basis of the nature and the general scheme of the tax system at issue.

93 Lastly, the General Court considers it necessary to assess the complaint alleging that the concept of aid was misconstrued with regard to the Commission's assessment of the exemption of aggregate exports, which concerns an aspect of the contested decision to which the complaint upheld in the preceding paragraph does not relate.

The exemption of aggregate exports

94 As is apparent from section 16(2) of the Act, the territorial scope of the AGL is limited to the United Kingdom, which means that any marketing of aggregates outside the United Kingdom, that is any economic transaction linked to its exportation, is exempt from the levy (see also regulation 13(2)(a) of the implementing regulations in respect of the Act). In that regard, it should be borne in mind that the applicant invites the General Court to find fault with the reasoning in point 33 of the contested decision, according to which the United Kingdom authorities have no control over exports of aggregate, which entails a risk of unequal treatment of exported aggregate (see paragraph 29 above).

95 In order to determine whether the export exemption entails a selective advantage favouring certain undertakings or the production of certain goods, it is appropriate to assess, in accordance with the principle set out in paragraph 47 above, first, whether exported aggregates and aggregates marketed within the United Kingdom are in a comparable, if not identical, situation.

96 In that regard, it will be recalled that, in its review in paragraphs 174 to 178 of the appeal judgment, the Court of Justice found that the General Court had erred in law in the application of Article 253 EC as regards the interpretation of the scope of the grounds set out in point 33 of the contested decision (judgment set aside, paragraph 150). In particular, the Court of Justice stated that those grounds 'thus refer to the unequal treatment which, were aggregate exports not to be exempted, would result from the fact that the aggregates which are marketed in the United Kingdom are exempted when used for certain purposes, whereas the aggregates used for the same purposes in the State of importation would be subject to the AGL by reason of the lack of means of control by the United Kingdom authorities [over] the use of aggregates outside the territory of the United Kingdom' (appeal judgment, paragraph 176).

97 As the Commission indicated in point 33 of the contested decision, in the light of the objective of the AGL, which is designed to tax only materials that are exploited as aggregates, it must be noted that materials which are marketed in the United Kingdom and those that are exported overseas are effectively in different situations because, once those materials have been exported, it is, as a rule, no longer possible for the (United Kingdom) 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. In that regard, this Court cannot accept the applicant's argument that it is particularly easy for the United Kingdom 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. Even if that were the case, as noted in paragraphs 53 and 54 above, classification as an 'aggregate' or exempt material does not depend precisely on those properties but, inter alia, on the case-by-case exclusion from the scope of the AGL of certain named materials or materials obtained from certain processes. Furthermore, the fact that exported materials and materials marketed in the United Kingdom are not in a comparable situation is confirmed in the light of the environmental objective of the AGL (see paragraph 63 above), in so far as, in the case of exports, the United Kingdom legislator and authorities are not in a position to steer demand for aggregates, in accordance with that objective, by means of differentiated taxation.

98 Lastly, the applicant has not established its argument that 90% of exported and thus exempt aggregate comes from a granite quarry at Glensanda in Scotland and could not be used for exempt processes in the United Kingdom. However, even if it were proved, that argument is not sufficient to call into question the considerations set out in paragraph 97 above. Even if those materials were subject to the levy in the event of their commercial exploitation as aggregate in the United Kingdom, that argument would not establish that the United Kingdom authorities are in a position to verify that the exported materials are, legally and factually, in a situation in the country of destination in which, had they been subject to the same exploitation in the United Kingdom, they would have been subject to the AGL.

99 Therefore, since the situations at issue are not comparable, the applicant has failed to demonstrate that the export exemption gives rise to tax differentiation that may amount to selective advantages for the purposes of Article 87(1) EC. Accordingly it is not necessary to consider whether that exemption is such as to encourage the exploitation of 'primary' aggregates and thus to have an effect that is contrary to the environmental objective of the AGL but that can be justified by the nature and by the scheme of the AGL.

100 Therefore, taking into account the foregoing considerations, the applicant has not demonstrated that point 33 of the contested decision is vitiated by an error in so far as it states that the United Kingdom authorities have no means of control over 'the use of aggregate outside their jurisdiction' and, moreover, that it is necessary 'to avoid imposing an unequal treatment on exports of aggregate'.

101 That complaint must therefore be rejected. However, that does not alter the unlawfulness of the operative part of the contested decision, as evidenced in point 43 of that decision, according to which the Commission raises no objections to the AGL as a whole, on the ground that its 'scope … is justified by the logic and [by the] nature of the tax system' at issue.

102 In view of the errors made by the Commission in its application of the concept of aid, as established in paragraphs 51 to 92 above, the contested decision must accordingly be annulled — save as regards the exemption for Northern Ireland, which is not the subject-matter of these proceedings — for infringement of Article 87(1) EC, and there is no need to adjudicate on the second, third and fourth pleas in law.

Costs

103 In the appeal judgment, the Court of Justice reserved the costs. It is therefore for the General Court to decide in the present judgment on all the costs relating to the various proceedings, in accordance with Article 121 of the Rules of Procedure.

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

105 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. It follows that the United Kingdom must bear its own costs incurred before the Court of Justice and the General Court.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2002) 1478 final of 24 April 2002 on State aid file N 863/01 — United Kingdom/Aggregates Levy, save as regards the exemption for Northern Ireland;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by the British Aggregates Association before the Court of Justice and the General Court;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs incurred before the Court of Justice and the General Court.**

Azizi Labucka Frimodt Nielsen

Schwarcz Gratsias

Delivered in open court in Luxembourg on 7 March 2012.

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