JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

13 September 2006 *

In Case T-210/02,

British Aggregates Association, established in Lanark (United Kingdom), represented by C. Pouncey, Solicitor, and L. Van Den Hende, lawyer,

applicant,

v

Commission of the European Communities, represented by J. Flett and S. Meany, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by P. Ormond, and subsequently by T. Harris and R. Caudwell, acting as Agents, assisted initially by J. Stratford and M. Hall, Barristers, and subsequently by M. Hall,

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 COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2005,

gives the following

Judgment

Facts

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 complaint ('the first complaint') on behalf of two undertakings which had no connection with the applicant and which requested that their identity be withheld from the Member State concerned, pursuant to Article 6(2) of Council Regulation (EC) No 659/1999

of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1). The complainants essentially took the view that the exclusion of certain materials from the scope of the AGL, the exemption for exports and the derogations relating to Northern Ireland constituted State aid.

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

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

16 On 11 February 2002, the applicant brought an action for judicial review before the High Court of Justice 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 Court of First Instance of the European Communities.

17 By letter of 15 April 2002, the applicant had meanwhile submitted a complaint to the Commission against the AGL ('the applicant's complaint'). 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 a decision not to raise objections against the AGL ('the contested decision').

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

26 By application lodged at the Registry of the Court of First Instance on 12 July 2002, the applicant brought the present action.

27 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicant requested that the case be dealt with under the expedited procedure provided for by Article 76a of the Rules of Procedure of the Court. On 30 July 2002, the Court refused that request.

28 By document lodged at the Registry of the Court of First Instance on 29 October 2002, the United Kingdom authorities applied for leave to intervene in these proceedings in support of the forms of order sought by the defendant. By order of 28 November 2002, the President of the Second Chamber of the Court granted leave to intervene. The intervener lodged its statement in intervention and the other parties lodged their observations on the statement within the prescribed periods.

29 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. The parties replied to the written questions put by the Court and produced the documents requested within the prescribed periods.

30 The parties presented oral argument and answered questions put by the Court at the hearing, which took place on 13 December 2005.

Forms of order sought

31 The applicant claims that the Court should:

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

— order the Commission to pay the costs.

32 The Commission and the intervener contend that the Court should:

— dismiss the action as being inadmissible or unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

33 Without raising a formal objection of inadmissibility, the Commission challenges the admissibility of the action. It submits that the contested decision is not of direct and individual concern to the applicant for the purposes of the fourth paragraph of Article 230 EC.

34 The Commission argues that a decision, such as the contested decision, approving an aid scheme is a normative act of general application. Applying the classic test of individual concern (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677), the applicant is therefore not individually concerned by the decision not to raise objections on the conclusion of the preliminary investigation procedure instituted under Article 88(3) EC.

35 In particular, the applicant has not shown that at least one of its members was individually concerned by the contested decision.

36 In its defence, the Commission's approach is that when, as in the present case, it decides not to initiate the formal investigation procedure, it is necessary, if individual concern is to be established, to show that the competitive position of a member of the applicant is affected by the aid in question. It bases its position on Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraphs 43 and 50; Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraphs 60 to 65; and Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 41.

37 In the rejoinder, the Commission's final position is that the applicable criterion for the purposes of assessing individual concern is that the applicant's competitive position be significantly affected, both in the case of a decision of the Commission not to raise objections and in the case of a final decision adopted at the end of the formal investigation procedure (Case 169/84 *Cofaz* v *Commission* [1986] ECR 391).

38 The Commission argues in that regard that the Court of First Instance erred in its judgments in *Waterleiding Maatschappij* v *Commission* and in Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2002] ECR II-5121 in considering that the judgments of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 had created a double standard, which was dependent on whether the decision had been adopted at the end of the preliminary investigation procedure or at the end of the formal investigation procedure. On being invited at the hearing to state its views on the scope of the judgment of the Court of Justice in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, the Commission stated that, having regard to the Opinion of Advocate General Jacobs, that judgment confirmed that the criterion was that the competitive situation of the applicant be substantially affected by the aid scheme under consideration.

39 In the present case, the applicant has not provided specific information in the application regarding any of its members, so that it is impossible to establish that at least one of them has *locus standi.*

40 The Commission adds that new factual information concerning four members of the applicant, which was provided only in the reply, is inadmissible.

41 In any event, that new information does not show that the competitive position of the undertakings concerned was significantly affected by the contested decision. In that regard, the Commission maintains that the figures which the applicant has provided indicate that the greater part of the businesses of two of the applicant's members, Torrington Stone Co Ltd and Cloburn Quarry Company Ltd, is not subject to the levy. Nor is it sufficient that the undertaking is required to place some of its secondary material on the tip as waste.

42 The Commission submits lastly that even if the Court were to hold that the applicant had *locus standi*, on the basis that the contested decision was adopted at the end of the preliminary investigation procedure, the only admissible ground of annulment would be that there had been a failure to initiate the formal investigation procedure. Any such procedural irregularity could then be rectified by initiating the formal investigation procedure. However, the applicant would have no *locus standi* to bring proceedings against the final decision.

43 The applicant contends that the contested decision concerns it directly and individually, in the light of both its *locus standi* to bring proceedings on behalf of its members and its position as complainant. A principal objective of the AGL, which is designed primarily to encourage the use of recycled aggregates and other alternatives to the materials subject to the levy, is to affect the structure of the market. The levy thus has a negative impact on the competitive position of each of the applicant's members, all of which produce material that is subject to the AGL. In the reply, the applicant described, for illustrative purposes, the competitive situation of a number of those members.

44 The applicant adds that the distinction made by the Commission as to the admissibility of the different pleas is artificial. If an applicant can show that the Commission has made a manifest error of assessment, that necessarily implies that the Commission encountered difficulties which required that the formal investigation procedure be initiated.

Findings of the Court

45 Case-law provides that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thus distinguishes them individually just as in the case of the person to whom the decision is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; *Cook* v *Commission*, paragraph 20; *Matra* v *Commission*, paragraph 14; and, finally, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 33).

46 In the present case, the applicant's reliance on the fact that it lodged a complaint in relation to the AGL with the Commission and expressed a desire to intervene in the procedure as a party concerned within the meaning of Article 88(2) EC is not sufficient to give it *locus standi* on its own account to bring proceedings to challenge the contested decision not to initiate the formal investigation procedure. In particular, the fact that the applicant's complaint, together with the first complaint, submitted by unconnected undertakings, led the Commission to investigate the scope of the AGL in the contested decision, does not mean that the applicant should be treated as a negotiator whose position has been affected by that decision (see, to that effect, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraphs 56 and 57).

47 By contrast, the applicant is right to point out that where an action is brought by an association acting in place of one or more of its members who would themselves have *locus standi* to seek annulment, that action is admissible (Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 50).

48 It is therefore for the Court to ascertain whether, in the present case, the members of the applicant, or at least some of them, may be considered to be individually concerned by the contested decision.

49 It should be recalled that, under the procedure for monitoring State aid laid down by Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3), which is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question, must be distinguished from the investigation stage envisaged by Article 88(2). It is only under the latter, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34).

50 Where, without initiating the formal investigation procedure laid down under Article 88(2) EC, the Commission finds, by a decision taken on the basis of Article 88(3), that an aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided under Article 88(2) may secure compliance with them only if they are able to challenge that decision by the Commission before the Court (*Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; and *Commission* v *Sytraval and Brink's France*, paragraph 40).

51 For those reasons, the Court will declare to be admissible an action for the annulment of a decision based on Article 88(3) EC, brought by a person who is concerned within the meaning of Article 88(2) EC, where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35).

52 The parties concerned, within the meaning of Article 88(2) EC, who are thus entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 41).

53 By contrast, if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. It must then demonstrate that it has a particular status within the meaning of the *Plaumann* v *Commission* case-law. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37).

54 By this action, the applicant does not merely seek to challenge the Commission's refusal to initiate the formal investigation procedure, but also calls into question the merits of the contested decision. Accordingly, it is necessary to consider whether it has explained, by reference to relevant criteria, why the AGL is liable to have a significant effect on the position of one or more of its members on the market for aggregates.

55 In the present case, as regards, in the first place, the definition of the material scope of the AGL, it is clear from the contested decision (points 12 and 13), that the purpose of the levy is to transfer some of the demand for virgin aggregates to other products, which are exempted in order to encourage their use as aggregates and to reduce the extraction of virgin aggregates. According to the projections of the United Kingdom authorities, the levy will allow demand for virgin aggregates to be reduced by an average of around 8 to 9% a year.

56 As the AGL is intended to modify generally the allocation of the market between virgin aggregates, which are subject to it, and alternative products, which are exempt, it is also necessary to determine whether that levy is liable to lead to a genuine change in the competitive position of some of the applicant's members.

57 In that regard, contrary to what the Commission contends, the information provided by the applicant in the reply concerning the particular position of a number of its members cannot be considered to be out of time by virtue of Article 48(1) of the Rules of Procedure. That information forms part of the continuing discussion between the parties. It does no more than supplement, in response to the Commission's arguments relating to inadmissibility, the proposition put forward in the application that the AGL has a negative effect on the competitive position of undertakings, such as the members of the applicant, which market materials subject to the levy. In any event, as the conditions governing the admissibility of an action may be examined at any time by the Community judicature of its own motion, there is nothing to prevent the Court from taking additional information provided in the reply into consideration.

58 According to the additional information provided in the reply, which, moreover, neither the Commission nor the intervener suggests is incorrect, a number of the

applicant's members, including Torrington Stone, Sherburn Stone Co. Ltd and Cloburn Quarry, are in direct competition with the producers of exempted materials, which have become competitive as a result of the introduction of the AGL.

59 In particular, the applicant has indicated that Torrington Stone, which operates a quarry in Devon, produced uncut building stone and hedging stone, sold at an average of GBP ... per tonne, ex works, and cut building stone, sold at an average price of GBP ... per tonne, ex works. Those products represent 3 to 5% of the volume of extracted rock. The remaining 95% is accounted for by secondary products, in this case general fills (sold at an average price of GBP ... per tonne, ex works) and crushed fills (sold at an average price of GBP ... per tonne, ex works). Only cut building stone is not subject to the AGL. Prior to the introduction of the levy, the fills were sold within a range of some 50 kilometres. Since its introduction, they have been in competition in that area with secondary material coming in particular from china clay quarries situated over 80 kilometres away, which are not subject to the AGL.

60 In relation to Sherburn Stone, which operates inter alia Barton Quarry in Yorkshire, the applicant has stated that it produces material with a high technical specification for the production of high-strength concrete. Those products, which account for 50 % of rock extracted and have an average selling price of GBP ... per tonne, ex works, are subject to the AGL. From the remaining 50% of rock extracted, Sherburn Stone produces particles and clayey residues, which can be used for ballast purposes and are sold at an average price of GBP ... per tonne, ex works. Since the introduction of the AGL, the sale of those by-products has become increasingly difficult and their stocks have become unmanageable.

61 As regards Cloburn Quarry, which operates a quarry in Scotland, the applicant has explained that it had oriented its production towards higher-grade aggregates which

can bear higher transport costs. All of its products are subject to the AGL. Red chippings and high-specification granite, produced by that company and used inter alia as ballast and in high-specification concrete and with asphalt, are sold at an average price of GBP ... per tonne, ex works, and are not subject to competition from untaxed materials that are by-products of china clay or slate production. By contrast, the 25% of secondary products extracted from Cloburn Quarry, which consist mainly of particles and are sold at an average price of GBP ... per tonne, ex works, for use as bulk fill, are in competition with untaxed materials.

62 In those circumstances, the Commission's reliance, for the purposes of demonstrating the lack of effect on the competitive position of the abovementioned companies, on the fact that the greater part of their activity in terms of turnover does not relate to aggregates, and is therefore not subject to the levy, is irrelevant, as the activity of those companies on the aggregates market is more than merely insignificant in relation to their principal activity. In any event, it is clear from the figures provided above that the commercial exploitation of by-products as aggregates represents a relatively important part of the activity of those companies.

63 In the light of the various factors referred to above, which the applicant has put forward, it must be held that the applicant has demonstrated not only that the national measure at issue is capable of affecting the competitive position of a number of the applicant's members, which accordingly have *locus standi* to challenge the Commission's decision not to initiate the formal investigation procedure, but also that that effect was significant.

64 It follows that the plea of inadmissibility raised by the Commission against this action, in so far as it is directed at the approval in the contested decision of the definition of the material scope of the AGL, must be rejected.

65 As regards, in the second place, the exemption for exports, the applicant argues that that exemption also has a negative impact on the competitive position of those of its members which export very little or not at all, unlike their larger competitors on the United Kingdom market. The exemption for exports confers on those competitors, and in particular the operator of the Glensanda Quarry, which is the source of over 90% of exported aggregates, the advantage of having no losses to recoup through the price of its products sold in the United Kingdom. By contrast, the applicant's members are led to sell their taxed aggregates at a loss and to recoup the cost of the levy across all their products.

66 The additional information provided by the applicant in response to the written questions put by the Court shows that the competitive position of at least one of the applicant's members is liable to be substantially affected by the exemption for exports. The applicant states, without, being challenged by the Commission or the intervener, that, on the market for granite with a high technical specification used inter alia as railway ballast (subject to the AGL), Cloburn Quarry is in direct competition with Glensanda Quarry, which is also located in Scotland. As the applicant observes in its reply, without being challenged by the other parties, Glensanda Quarry exports 50% of its production. The applicant is entitled to infer from that that the exemption for exports of materials of a low technical specification thus offers the company which operates that quarry a competitive advantage on the market for aggregates with a high technical specification in Scotland, in that, unlike Cloburn Quarry, which sells its aggregates with a low technical specification in the United Kingdom at a loss and recovers that loss through the prices of materials with a high technical specification, the total amount of the AGL which Glensanda Quarry has to pass on to its customers on the national market is proportionally reduced by 50% in comparison with the amount which a non-exporting competitor passes on.

67 It follows that the plea of inadmissibility raised by the Commission against the application, in so far as it is directed at the approval in the contested decision of the exemption for exports, must also be rejected.

68 For all of the above reasons, the Court must also reject the Commission's alternative argument that only the plea based on infringement of the duty to initiate the formal investigation procedure is admissible in an action for the annulment of a Commission decision not to raise objections, adopted at the end of the preliminary investigation procedure relating to State aid and concerning a State measure. In the present case, having regard to the significant effect on the competitive position of certain of its members on the market, the applicant is entitled to raise any of the pleas of illegality listed in the second paragraph of Article 230 EC (see *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37).

69 The action must therefore be declared admissible in its entirety.

Substance

70 In support of its application, the applicant pleads, first, infringement of Article 87(1) EC, secondly, a failure to state adequate reasons, thirdly, infringement by the Commission of its duty to initiate the formal investigation procedure and, fourthly, failure by the Commission to carry out its obligations in relation to the preliminary stage of the procedure. The first two pleas should be considered together.

The pleas based on infringement of Article 87(1) EC and failure to state adequate reasons

Arguments of the parties

71 The applicant points out, first, that the condition relating to selectivity of aid is satisfied when a tax scheme applies, to operators in a comparable situation in the

light of the objectives pursued by the system, a different treatment which is not justified by the nature or the general scheme of the system (Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraphs 41 and 42).

72 In particular, in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, the Court of Justice held that an exemption to an environmental tax on energy consumption for companies whose energy consumption exceeded a specified threshold gave rise to State aid, because the exemption was available only to companies manufacturing goods. The applicant points out in that regard that Adria-Wien Pipeline was a service provider, which was not in competition with the undertakings benefiting from the exemption.

73 In the present case, the classification of the AGL as an exceptional fiscal burden, rather than an exceptional fiscal benefit, is a matter of pure form and does not alter the test to be applied. The Commission's arguments based on the sectoral application of the AGL are very similar to the reasoning of Advocate General Mischo in his Opinion in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* ([2001] ECR I-8369). In its judgment, the Court of Justice rejected the Advocate General's view that there was no selectivity in the tax system concerned, on the grounds, first, that the failure to tax was not a derogation from a normal rule, secondly, that the difference in treatment concerned different sectors and, thirdly, that the scope of the tax was based on objective criteria.

74 In the present case, the Commission is alleged to have committed a manifest error of assessment by deciding that the definition of the material and geographical scope of the AGL was justified by the logic and nature of the tax scheme, and, accordingly, that the AGL did not comprise State aid within the meaning of Article 87(1) EC.

75 With respect, in the first place, to the distinction between materials which are subject to the levy and those which are exempted, the applicant first of all complains that the Commission failed to provide an objective definition of the relevant market for virgin aggregates in the contested decision.

76 The applicant next relies primarily on the distinction, in the case of virgin material, between primary material, which is the main product of an extraction site, and secondary material, a low-value by-product, which is the unavoidable result of the quarrying of primary material.

77 The applicant takes the view that the logic of the tax system required that the AGL should apply to primary material for use as an aggregate which is capable of being replaced by alternative products (secondary quarry or mine products, recycled products or other alternative material). By contrast, primary material which cannot be replaced, and secondary products arising from the extraction of that category of primary material, should be exempt. The application of the levy to the two last-mentioned types of material, in the absence of alternatives to primary materials, could not have the effect of moving demand towards less environmentally damaging alternatives.

78 The applicant acknowledges that the Act, which sets out a list of materials subject to the levy and those which are exempt, does not use the terms 'primary' and 'secondary' materials, and that the definitions set out above are not the only ones that are possible. However, it complains that the Commission used those terms in the contested decision without defining them, thereby leading to confusion.

79 Moreover, the Commission incorrectly stated in the contested decision (point 29) that the AGL 'will not be levied on aggregates extracted as a by-product or waste

from other processes (secondary aggregates)'. Some secondary aggregates, (such as products derived from limestone extracted in order to produce lime or cement, and products derived from the extraction of silica sand used in glass production) are subject to the levy. That statement therefore reflects a manifestly incorrect assessment by the Commission of the nature of the AGL. Furthermore, the contested decision was based on an assessment of the AGL in the version brought into force by the Act.

80 Furthermore, as regards the objectives of the AGL, both the Commission in the contested decision and the intervener refer only to environmental considerations linked to the extraction of materials used as aggregates.

81 Contrary to what the Commission contends, the definition of the scope of the levy does not reflect the objective pursued and seeks essentially to internalise the environmental costs of aggregate production and to encourage the use of recycled materials or other alternative materials, in order to reduce the damage to the environment caused by quarrying. Seen from that perspective, the Act treats similar situations in a different way.

82 First, a large number of primary products, in particular clay, slate, china clay, ball clay and shale, and their secondary products, are not subject to the AGL. Quarrying of those materials has the same impact on the environment as the quarrying of the materials which are subject to the levy, such as limestone and granite. Some of those primary materials, such as ball clay used in the production of tiles and shale used to produce bricks, could be replaced by materials quarried in less environmentally sensitive areas or by secondary materials, in order to produce other types of tile, and concrete building blocks which are an alternative to brick.

83 Furthermore, materials such as low-quality shale and slate, together with clay, china clay and ball clay, which are extracted in a large number of quarries in the United Kingdom and used for aggregate as a primary product, are exempt notwithstanding that they can be replaced by alternative products. The applicant challenges the contention of the Commission and the intervener that those materials are exempt because they are not aggregates. It states that the term 'aggregate' refers to the purpose for which a material is used and not to a specific group of materials. The exempted materials referred to above were rarely used as aggregates in the United Kingdom in the past, principally because of the cost of transport. However, their exemption encourages the use of those primary materials as aggregates.

84 The exclusion of those materials from the scope of the AGL therefore cannot be justified by either the nature or the general scheme of the AGL. The applicant refers in that regard to *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (paragraphs 52 and 53) and Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 62.

85 Secondly, other primary materials are subject to the AGL, although they cannot be replaced by alternative materials. The applicant refers to red chippings, which are used for their particular colour in road surfaces such as footpaths and cycle paths; aggregates with a high technical specification, such as material used in road surfacing and granite with a high technical specification used as ballast for railway lines; and aggregate used for low-shrinkage or high-strength concrete. Because of the technical characteristics of those materials, it is not realistically possible to replace them by alternative products. As they are expensive, they are not used for ballast.

86 Thirdly, the AGL extends to secondary products of a large group of primary materials which are themselves exempt, such as limestone used to produce cement

or lime, freestone and materials such as silica sand and limestone used in certain industrial applications (such as glass production). Those primary materials cannot be replaced by alternative products.

87 Those inconsistencies in the logic and nature of the tax system on which the Commission relies show that the scope of the AGL in fact reflects a desire to exclude some sectors from the levy in order to protect their competitiveness. That is confirmed by various statements of the United Kingdom authorities, in particular in a regulatory impact assessment of the taxation of aggregates, annexed to the application, which states that 'some of the [exempted] materials form significant constituents of products that are traded internationally, whose [United Kingdom] producers would be put at a competitive disadvantage against importers and in export markets', and by a study on environmental taxes in the European Union, which is also annexed to the application.

88 In the second place, the applicant argues that the exemption for exports of aggregates is also inconsistent with the environmental aims allegedly pursued by the AGL. That exemption is directed only at preserving the competitiveness of United Kingdom producers on export markets. In the case of environmental taxes, the 'polluter-pays' principle constitutes an essential criterion for identifying aid (Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769, at I-13772). In that regard, the applicant challenges the justification put forward by the Commission in the defence that the AGL is a tax on consumption. That reasoning does not appear in the contested decision and is, moreover, incorrect. Furthermore, it does not render the exemption for exports lawful, as is shown, for example, by the tax on aggregates imposed in Sweden, where exports are not exempted. Since taxes on aggregates seek to address environmental concerns related to production, there should not normally be a risk of double taxation. The reasoning of the contested decision based on the lack of control by the United

Kingdom authorities over the use to which exported aggregates are put is incorrect. Their chemical properties mean that it is a straightforward matter to distinguish between aggregates intended to be used in exempt processes from aggregates that are subject to the levy.

89 Lastly, the applicant submits that the contested decision is vitiated by a lack of reasoning. The Commission is required to state its views on the differences in treatment referred to above, which are incompatible with the purported aims of the AGL, in that they cannot be dismissed as being 'manifestly irrelevant or insignificant or plainly of secondary importance' (*Commission* v *Sytraval and Brink's France*, paragraph 64).

90 The Commission does not accept those arguments. It submits that, in the case of a sectoral measure, the criterion of selectivity is satisfied where that measure confers an exceptional advantage (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, *'Maribel'*, paragraphs 32 and 33, and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 48). By contrast, a scheme which imposes an exceptional burden in a specific sector could not constitute State aid. It poses no threat to the internal market, which the rules relating to State aid exist to protect.

91 In the case of an exceptional tax, there is accordingly no State aid, provided that it applies to a defined sector or that its provisions reflect the nature or the general scheme of the system.

92 In the present case, the AGL constitutes an exceptional fiscal burden which applies to a defined and circumscribed sector, namely that of the commercial exploitation of virgin aggregates. It confers no selective advantages and accordingly does not attract investment or job creation in the United Kingdom, does not exclude aggregates

from other Member States from the United Kingdom market and does not subsidise exports. The AGL is therefore not subject to the provisions of Article 87(1) EC, which define State aid, but to the Treaty provisions relating to taxation. *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, on which the applicant relies, is therefore irrelevant in the present case.

93 As regards the amendment to the Act made subsequent to the notification of the proposed aid scheme in question, to which the applicant refers, the Commission states that it was informed in writing and then orally of the proposed amendments to the Act before the adoption of the contested decision.

94 The AGL comprises no element of aid, inasmuch as the specified derogations in respect of exempted materials fall within the nature or general scheme of the system.

95 In the first place, the Commission rejects the inconsistencies complained of by the applicant in relation to the scope of the AGL. It contends that only virgin aggregates are subject to the AGL.

96 Furthermore, certain materials that may be used as aggregates, by reason in particular of their lower price, benefit from an exemption which is inherent in the nature and general scheme of the system, in that they can be a substitute for virgin aggregates.

97 By contrast, limestone and sand intended, as products incidental to the first extraction, for aggregate are capable of being replaced by recycled aggregates or other alternatives, which means that they should be subject to the AGL. Furthermore, their taxation also reflects the desire to address the environmental costs of their extraction.

98 In so far as the exemption of certain materials can, according to the Commission, be justified by the nature or the general scheme of the system, the applicant's reliance on the fact that those materials are in competition with aggregates which are subject to the levy does not show that the levy involves elements of State aid.

99 In the second place, the exemption for exports also reflects the logic of the AGL.

100 Lastly, the contested decision is adequately reasoned.

101 The intervener concurs with the Commission's observations. It points out that the AGL was designed to ensure that the environmental impact of the extraction of virgin aggregates are reflected in prices. The primary objective of the levy is to encourage the use of alternative products such as recycled aggregates and other materials which can be used in substitution for virgin aggregate, and to encourage the efficient use of aggregates and the development of alternative products. A subsidiary objective is to maintain the competitiveness of the United Kingdom by taxing imported products and exempting exports.

102 The structure and the scope of the AGL are consistent with the general scheme and nature of the tax system, as the High Court of Justice confirmed in its judgment of 19 April 2002. Consistently with its objectives, the levy applies to all virgin aggregates. It does not apply to materials used for purposes other than as aggregate, nor does it apply to waste materials that arise as products from other processes.

103 In particular, china clay and ball clay are not subject to the levy, as they are not aggregates. Their spoil, waste and other by-products are also exempt, in order to encourage their use as alternatives to virgin aggregate. Slate, coal, lignite and shale are not virgin aggregates, used as such. Their waste is composed of the same materials and is accordingly also exempt. Limestone is taxable as virgin aggregate. Its by-products, which are identical in mineralogical terms, are therefore also taxed. Only limestone used for the production of lime or cement is an exempt process.

Findings of the Court

104 In this case, the dispute relates to the application of the criterion of selectivity by the Commission in the contested decision, when it rejected a classification of State aid on the ground that 'the scope of the AGL is justified by the logic and nature of the tax system' (point 43).

105 In order to constitute State aid for the purposes of Article 87(1) EC, a measure must, in particular, be capable of conferring a selective advantage, to the exclusive benefit

of certain undertakings or certain sectors of activity. That article applies to aid which distorts or threatens to distort competition 'by favouring certain undertakings or the production of certain goods'.

106 It is settled case-law that Article 87(1) EC does not distinguish between the reasons for or the objectives of a measure which reduces the burdens normally imposed on an undertaking, but defines that measure by reference to its effects. It follows that neither the fiscal nature nor the economic or social aim or the objectives of protection of the environment or of human safety can suffice to remove it completely from the outset from the scope of the article (see, as regards selective exemptions from social security charges, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 27 and 28, and *Maribel*, paragraph 25; as regards a selective interest subsidy scheme made available to small- and medium-sized enterprises (SMEs) aimed at modernising commercial vehicles on the road in the interest of environmental protection and improving road safety, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 46, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 53).

107 When reviewing the selective nature of a measure, it is the task of the Community Court to determine whether the Commission was right to consider that the differentiation between undertakings, as regards advantages or burdens, introduced by the measure in question, arises from the nature or the general system of the overall scheme which applies. Where such a differentiation is based on objectives other than those pursued by the overall scheme, the measure in question will, in principle, be considered as satisfying the condition of selectivity laid down under Article 87(1) EC (see, to that effect, Case 173/73 *Italy* v *Commission*, paragraph 33, *Maribel*, paragraphs 33 and 39, and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 49). It is for the applicant to adduce sufficient evidence (see, to that effect, *Spain* v *Commission*, paragraph 53, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275).

108 Furthermore, that case-law was adopted by the Commission in its Notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3).

109 In the present case, it is necessary to examine whether, having regard to its nature and characteristics, the levy in question is selective according to the criteria established by the case-law referred to above. In order to show that those criteria are satisfied, the applicant invokes a lack of consistency in relation to the environmental objectives put forward, first, of the definition of the material scope of the AGL and, secondly, of the exemption for exports.

— Material scope of the AGL

110 It is necessary at the outset to consider the applicant's objection that the Commission, which did no more than refer to the list of materials subject to the levy set out in the Act, in fact based its approach on an incorrect definition of the material scope of the AGL, which gave rise to an obviously incorrect assessment of the nature of the levy in the contested decision.

111 First of all, the applicant does not put forward any serious grounds to indicate that the contested decision is based on a consideration of the AGL in the form introduced by the original version of the Act. While it is true that when the AGL was notified, by letter of 20 December 2001, the relevant provisions of the Act imposing the levy had not yet been amended, it is however plain that the letter of notification clearly informed the Commission that amendments were to be introduced by the Finance Act 2002 and that the amendments proposed, which, according to that letter, would form part of the Finance Act 2002, had not yet been drafted. Furthermore, the contested decision, together with the material which is on the file, confirm that the Commission subsequently took those amendments into account when adopting the contested decision, in particular in so far as they introduced an

exemption for waste arising from the extraction of coal, lignite, slate and shale, together with the materials listed in section 18(3) of the Act. In their letter to the Commission of 19 February 2002, the United Kingdom authorities explained, in reply to a question from that institution, that the exemption of some of those materials was intended to allow them to be used as alternatives to virgin aggregates. Furthermore, it is clear from the contested decision (in particular points 11 and 29) that the Commission took the exemption of that waste into account.

112 Next, the applicant's claim that the contested decision, in particular in point 29, shows that the Commission made the mistake of considering that all secondary products or waste arising from the extraction of rock, sand and gravel were exempt, must also be rejected. The interpretation of the disputed wording in point 29, which states that the AGL 'will not be levied on aggregates extracted as a by-product or waste from other processes (secondary aggregates)', proposed by the applicant is based on a definition of 'secondary aggregates' which is different from that adopted by the Commission throughout the contested decision. The replies given by the defendant to the written questions put by the Court show that the Commission used the expression 'primary aggregates' essentially in order to designate aggregates subject to the AGL, and the expression 'secondary aggregates' essentially in order to refer to the exempted aggregates specifically listed in the Act. By contrast, those expressions, which the parties accept may carry different definitions, are used by the applicant in order to differentiate between products which represent the principal activity of a quarry (primary materials), on the one hand, and secondary products, arising from the extraction of primary materials (secondary materials). That being the case, in the general scheme of the contested decision and in the light of the explanations put forward by the Commission, the disputed wording of point 29 of the contested decision does no more than state that the AGL will not be levied on secondary products or waste arising from primary extraction, when they are exempted by the Act, as amended. That interpretation of point 29 is supported by the fact that, in their letter of 19 February 2002 to the Commission, the United Kingdom authorities had clearly and precisely set out the reasons why the AGL was imposed on aggregates of a lower quality than by-products of certain exempt materials (see paragraph 137 below).

113 In those circumstances, the applicant's contention that the contested decision is based on an incorrect definition of the material scope of the AGL must be rejected.

114 As regards the alleged inconsistency of the scope of the AGL with its environmental objectives, it should be held as a preliminary point that a levy may be described as an environmental levy where 'the taxable base of the levy has a clear negative effect on the environment', as the Commission stated in its Notice of 26 March 1997 on environmental taxes and charges in the single market (COM(97) 9 final, point 11). An environmental levy is thus an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base. It seeks to tax certain goods or services so that the environmental costs may be included in their price and/or so that recycled products are rendered more competitive and producers and consumers are oriented towards activities which better respect the environment.

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

116 In particular, the fact that an environmental levy imposed on certain specific products does not apply to those similar activities does not put it in the same

position as a measure of tax relief in those sectors of activity, similar to those at issue inter alia in *Spain* v *Commission*, *CETM* v *Commission* and *Diputación Foral de Álava and Others* v *Commission*. Unlike an environmental levy, which can be distinguished precisely by its particular scope and purpose (see paragraph 114 above), and thus cannot in principle be related to any overall system, the measures of tax relief referred to above were an exception to the system of burdens normally imposed on undertakings. The first two judgments referred to above involved relief, in the form of interest subsidies, from burdens arising, under normal trading conditions, from the requirement for undertakings to renew their commercial vehicles. Under that system of burdens, the fact that those interest subsidies, which, moreover, were made available only to SMEs, sought to favour the renewal of commercial vehicles in the Member State concerned in the interests of environmental protection and improving road safety was not sufficient to show that that advantage formed part of a self-contained system, which, moreover, the applicant did not even identify (*CETM* v *Commission*, paragraphs 53 and 54). In the third judgment mentioned above, the Court of Justice held that the tax credit under consideration, which was for the benefit only of undertakings with significant financial resources, infringed the principles which formed an integral part of the tax system of the Member State concerned (paragraph 166 of the judgment).

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

118 Moreover, it must be noted that, when reviewing a decision of the Commission not to initiate the formal investigation procedure provided for under Article 88(2) EC, the role of the Court must be limited, having regard to the broad discretion which the Commission has in the application of Article 88(3) EC, to checking that the rules

on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers (*Matra* v *Commission*, paragraph 25, and *Skibsværftsforeningen and Others* v *Commission*, paragraphs 169 and 170).

119 In the present case, it is in the light of all of those considerations that the Court should consider whether the Commission did not exceed the limits on its power of assessment in finding, in the contested decision, that the definition of the scope of the AGL could be justified by the pursuit of the environmental objectives put forward.

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

121 In that judgment, the distinction at issue thus did not relate to the type of product subject to the environmental levy in question, but to industrial consumers, depending on whether or not they carried on their activity in the primary and secondary sectors of the national economy. The Court of Justice held that the granting of advantages to undertakings whose main activity was the manufacture of goods was not justified by the nature or general system of the tax scheme imposed under the Strukturanpassungsgesetz. It essentially held that, since energy consumption by the sector of undertakings which manufacture goods and by that of undertakings supplying services was equally damaging to the environment, the ecological considerations underlying the Strukturanpassungsgesetz did not justify

each of those sectors being treated differently. It was in those circumstances that the Court of Justice rejected the argument of the Austrian Government, based on the philosophy that the competitiveness of undertakings manufacturing goods required to be maintained, that the partial reimbursement of the environmental taxes at issue to those undertakings alone was justified by the fact that they were proportionately more affected than the other undertakings by those taxes (paragraphs 44, 49 and 52 of the judgment).

122 In the present case, the applicant contends in support of its application that the definition of the materials subject to the AGL fails to reflect the environmental objectives put forward, but in fact reflects an intention to exempt particular sectors from the levy and to protect their competitiveness.

123 It is therefore necessary to consider the lack of consistency alleged by the applicant in the material scope of the AGL.

124 In the present case, it is clear from the terms of the letter of notification and the contested decision (points 5, 16 and 31) that the AGL is intended in principle to maximise the use of recycled aggregates and other alternative materials to virgin aggregate and to promote the efficient use of virgin aggregate, which is a non-renewable natural resource. Secondly, the letter of notification and the contested decision also refer, even more plainly, to the internalisation of environmental costs in accordance with the 'polluter-pays' principle, by stating when determining the objectives of the AGL that 'the environmental costs of aggregate extraction that the United Kingdom seeks to address through the AGL include noise, dust, damage to biodiversity and visual amenity'. Those objectives are expressly referred to in the letter from the United Kingdom authorities to the Commission of 19 February 2002.

125 In the contested decision (point 8), virgin aggregate is defined as 'granular or particulate material produced from naturally occurring mineral deposits on its first extraction' and as 'fragments of rock, sand and gravel that may be used in their natural state or after mechanical processing such as crushing, washing and sizing'.

126 It is undisputed between the parties that the term 'aggregate' does not refer to a particular group of materials defined only by their physico-chemical properties. The use of a material (rock, sand or gravel) as an aggregate also depends on the price of that material and the costs of transport. It is also undisputed that some of the materials exempted from payment of the levy, such as shale, low-quality slate, clay, china clay and ball clay are, in some cases, first used, after extraction, as aggregates.

127 The AGL thus constitutes an environmental tax which is, in principle, a burden on the commercial exploitation of virgin aggregates, that is to say granular material on first extraction used in the construction sector, with the exception of certain materials referred to in the Act. It is necessary to consider the consistency of that field of application in relation to the environmental objectives pursued (see paragraph 124 above).

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

international competitiveness of certain sectors, does not therefore undermine the AGL's consistency with the environmental objectives pursued (see paragraph 115 above).

129 In that context, the applicant's arguments concerning the exemption of materials such as, inter alia, slate and high-quality shale, ball clay, china clay, coal and lignite, which cannot in principle be used as aggregates by reason of their physical properties, are irrelevant to this case.

130 In the second place, it was open to the Member State concerned, as part of its environmental policy, freely to determine the materials used as aggregates which it considered appropriate to tax and to exclude, having regard to the environmental objectives pursued, certain materials from the scope of the AGL, including shale and low-quality slate, clay waste and ball clay, even though they are used as aggregates after they are extracted. In that regard, the explanation put forward by the intervener and the Commission that the exemption of those materials, until now rarely used as aggregates by reason of their high transport costs, allows their use as alternatives for those virgin aggregates subject to the environmental levy and may, as a result, contribute to a rationalisation of the extraction and use of the latter, is acceptable in the light of the environmental objectives pursued.

131 The scope of the AGL and the letter from the United Kingdom authorities to the Commission of 19 February 2002 show that the purpose of introducing the AGL was precisely to reduce and to rationalise the extraction of materials commonly used as aggregates, which represent 70% of the tonnage of minerals extracted in the United Kingdom, in particular by favouring their replacement by recycled products or other virgin materials not covered by the levy, such as slate spoil or waste, shale, clay, china clay or ball clay.

132 In addition, the Commission has stated, without being challenged by the applicant, that there were large and frequently old stocks of slate spoil (or low-quality slate) in slag heaps in Wales, and of china clay and ball clay in Devon and Cornwall. Those stocks are now considered to be waste and disfigure the landscape. According to the information contained in the letter from the United Kingdom authorities to the Commission of 19 February 2002, they are sometimes situated in national parks. The exemption for the commercial exploitation of those materials for use as aggregates renders them competitive by comparison with other virgin aggregates and thus allows stocks to be reduced. In addition, the Commission stated at the hearing that limestone could be extracted without significant waste being produced, unlike slate, which is fragile and the extraction of which inevitably produces substantial amounts of waste.

133 In those circumstances, the applicant's argument concerning the environmental impact of the extraction of slate, shale, clay, china clay and ball clay does not support the finding that the exemption of those materials runs counter to the environmental objectives pursued, thereby conferring a selective advantage on the sectors of activity concerned. The applicant has failed to put forward any persuasive argument which would call into question the legitimacy, in the light of the objectives put forward, of the decision of the national legislature to impose the AGL on the commercial exploitation only of aggregates the extraction of which is considered to be the primary source of damage to the environment, as the letter of 19 February 2002 referred to above states.

134 In those circumstances, it must be held that the exemption under the Act, as amended, of certain virgin materials used as aggregates does not run counter to the environmental objectives put forward and may reasonably be justified by the nature and the general scheme of the AGL.

135 It is necessary, in the third place, to consider the applicant's arguments concerning the lack of consistency of the imposition of the AGL, in particular on aggregates of a high technical specification (materials used for road surfacing, granite used as

ballast, aggregates used for low-shrinkage or high-strength concrete) and red chippings (used for surfacing footpaths or cycle paths), which cannot be replaced by alternative products. It is true, as the applicant claims, that the taxation of those materials, which are not used as fills by reason of their higher price, cannot in principle result in demand being shifted towards alternative products such as recycled aggregates, so as to reduce the extraction of virgin aggregates. However, it is clear that taxation of that kind could reasonably meet one of the objectives of the AGL, which seeks to internalise the environmental costs of the production of virgin aggregates.

136 In the present case, the amount of the levy, which is equivalent to GBP 1.60 per tonne of aggregates subject to it, corresponds approximately to the environmental costs linked to the extraction of aggregates in the United Kingdom, which are assessed at GBP 1.80 per tonne, according to the information provided in the report of April 2001 drawn up by Ecotec Research & Consulting, entitled 'Study on the Economic and Environmental Implications of the use of Environmental Taxes and Charges in the European Union and its Member States', which was lodged by the applicant. Furthermore, that report emphasises that it is important that the levy be set at a sufficiently high level. This information thus confirms that the taxation of the materials in question may be considered to be legitimate having regard to the requirements of the 'polluter-pays' principle.

137 The 'polluter-pays' principle can also justify the imposition of the levy on products arising from the extraction of materials which cannot be replaced by alternative products — in particular the application of the levy to aggregates of lower quality such as products arising from the extraction of limestone intended for the production of cement or lime, freestone and silica sand used in the production of glass — as is shown by the letter from the United Kingdom authorities of 19 February 2002. Furthermore, the imposition of the levy on those products can also be justified by the objective, also invoked by the intervener in that letter, of encouraging a more rational extraction and treatment of aggregates, so as to reduce

the proportion of low-quality aggregates. That proportion, which varies from one quarry to another, as the applicant points out, may, however, be altered in a particular quarry. The Commission has emphasised in that regard, in particular in its defence, without being challenged by the applicant, the relatively small price difference between low-quality aggregates and non-replaceable materials whose by-products they are.

138 It is clear from the above that the applicant's arguments relating to the alleged lack of consistency in the material scope of the AGL, having regard to the environmental objectives pursued, have no basis.

139 The applicant has accordingly failed to establish that the contested decision was vitiated by a manifest error of assessment in finding that the definition of the material scope of the AGL does not involve elements of State aid.

140 At this point, it is necessary to consider the plea alleging a lack of adequate reasoning in the contested decision, as regards the assessment of the material scope of the AGL. In that regard, the applicant complains that the Commission failed to set out its reasons in relation to the differences in treatment concerning liability for the AGL that have just been examined.

141 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the

relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Commission* v *Sytraval and Brink's France*, paragraph 63, and Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 94).

142 It follows that the requirement to provide reasons for a decision taken in regard to State aid cannot be determined solely on the basis of the interest which the Member State to which that decision is addressed may have (Joined Cases T-371/94 and T-393/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 92). In particular, the Commission is under a duty, when approving a measure after the preliminary investigation procedure laid down under Article 88(3) EC, to provide a summary of the principal reasons for that approval, so that interested third parties may be aware of the basis for it and be in a position to decide whether to bring an appeal against the decision, so as to avail themselves of the procedural rights conferred on them by Article 88(2) EC.

143 As regards, more particularly, a Commission decision to terminate the preliminary investigation procedure where it is found that the State aid objected to by a complainant does not exist, the Commission must at least provide the complainant with an adequate explanation of the reasons why the factual and legal material relied on in the complaint has failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (*Commission* v *Sytraval and Brink's France*, paragraph 64).

144 In the present case, it is clear in particular from points 31, 32 and 34 of the contested decision that the Commission found that the scope of the AGL was justified by the

logic and the nature of that tax scheme, on the ground that the AGL constituted a specific environmental levy, the very narrow scope of which had been set by the Member State concerned, which is free to determine its national tax system, with a view to the specific features of the relevant sector. The Commission essentially stated that the distinction made between the sectors subject to the levy and those which are exempt was justified by a concern, first, to reduce the extraction of aggregates having undesirable environmental consequences and to promote a rational use of those aggregates and, secondly, to promote the use of recycled aggregates or other substitute materials, so as to reduce the use of non-renewable resources and the negative consequences of such use on the environment.

145 The Commission thus set out in a summary, but clear, manner the reasons why it rejected the objections, very briefly described in points 14 and 15 of the contested decision, put forward by the applicant in its complaint. The applicant had complained of the distinction made between, on the one hand, materials subject to the AGL, such as certain low-quality secondary products (such as products derived from limestone extracted in order to produce lime or cement) or sandstone, which the applicant claims is subject to the levy although it is not intended for use as an aggregate and, on the other hand, certain exempted secondary products (such as slate and china clay waste, used as aggregates, mentioned in point 11 of the contested decision). It had argued that such a distinction was liable to distort competition between those various categories of materials and was not justified by the nature or the logic of the scheme.

146 In those circumstances, having regard both to the freedom of the Member States, noted in the contested decision (points 31 and 32), to determine their fiscal and environmental policy by imposing, as in the present case, a sectoral environmental levy (see paragraphs 115, 116, 128 and 130 above) and to the fact that the applicant is an association representing well-informed economic operators, the contested decision, which succinctly sets out the essential grounds on which it is based, cannot be considered to be vitiated by a failure to state adequate reasons.

— The exemption for exports

147 The applicant argues that the exemption for exports of aggregates is also inconsistent with the environmental aims allegedly pursued by the AGL. That exemption is directed only at preserving the competitiveness of United Kingdom producers on export markets.

148 As a preliminary point, it should be noted that the AGL applies to the use or commercial exploitation of virgin aggregates in the United Kingdom. Virgin aggregates are subject to a levy on importation and the exportation of those materials is exempt, according to the United Kingdom authorities, 'in order to ensure equality between virgin aggregate produced in the United Kingdom and that produced in other Member States' (point 22 of the contested decision). The Commission justifies that exemption in the contested decision (point 33) by the fact that the United Kingdom authorities have no control over the use of aggregates outside their jurisdiction.

149 Before the Court, the Commission and the intervener amplified that reasoning. The Commission emphasised in particular that the AGL constituted an indirect tax on consumption, applying in principle in the Member States in which consumption occurs, in order to avoid any double taxation of exported products. The intervener, for its part, stated that Article 91 EC permitted the exemption of exported products from a national levy, provided the amount exempted does not exceed the amount of tax paid.

150 That approach based on the nature of the AGL as an indirect tax must be taken into consideration in so far as, contrary to what the applicant contends, it reflects the reasoning set out by the Commission in the contested decision and therefore does not fall to be considered as additional reasoning put forward after the decision was

adopted. The emphasis placed on control over the materials in question as aggregates shows that the Commission referred in the contested decision to the fact that the measure under consideration constituted an indirect tax charged on the products themselves and not on undertakings.

151 In the present case, it is clear that the AGL, which, contrary to what the applicant maintains, applies to the commercial exploitation of aggregates, and is thus charged against products and not on the income of producers, does indeed constitute an indirect tax, governed by the principle of taxation in the country of destination laid down under Article 91 EC.

152 It is clear from case-law that a specific tax measure which is justified by the internal logic of the tax system is not subject to the application of Article 87(1) EC (*Diputación Foral de Álava and Others* v *Commission*, paragraph 164, and *Diputación Foral de Guipúzcoa and Others* v *Commission*, paragraph 61).

153 In the present case, the exemption for exports cannot therefore be considered to confer a selective advantage on exporters since it is justified by the nature of the AGL as an indirect tax. It was open to the Member State concerned to grant priority to considerations linked to the structure of the tax scheme concerned over the environmental objectives pursued. The applicant's assertion that other Member States take a different approach is irrelevant.

154 It follows that the Commission did not commit a manifest error of assessment in reaching the finding in the contested decision that the exemption for exports did not constitute State aid.

155 Furthermore, by basing the reasoning set out in the contested decision on the structure of the AGL, the Commission justified to the requisite legal standard its rejection of the objections put forward by the applicant in its complaint as regards the selective advantage allegedly conferred on exporters as a result of the exemption for exports.

156 On all the above grounds, the pleas based on infringement of Article 87(1) EC must be rejected.

The plea based on infringement of the duty to initiate the formal investigation procedure

Arguments of the parties

157 The applicant maintains that the alleged inconsistencies in the definition of the scope of the AGL lead inevitably to the conclusion that the classification of the AGL gave rise to serious difficulties. Both the considerable amount of attention paid to them by the High Court of Justice in its judgment of 19 April 2002 referred to above and the statements by the United Kingdom authorities that the scope of the AGL was determined with a view to protecting the international competitiveness of the exempted sectors go to show the existence of those difficulties. Furthermore, the exemptions for shale and slate and for exports also contravened the 'polluter-pays' principle. Moreover, the Commission itself acknowledged in its defence that the classification of the AGL for the purposes of Article 87(1) EC raised a large number of complex issues, particularly as regards the definition of the relevant market.

158 In addition, the consultation paper published on 9 December 2002 by the United Kingdom authorities shows that they had difficulties in relation to the consistency of the scope of the AGL with the environmental objectives pursued by it.

159 Moreover, the references in the defence to the interest of the Member State concerned in a rapid decision, and the risk that the system of State aid control might be rendered dysfunctional, show that the Commission relied on criteria other than that of 'serious difficulties'.

160 In those circumstances, even if it were to be accepted that the contested decision is not vitiated by a manifest error of assessment, which the applicant denies, that decision is none the less vitiated by an infringement of Article 88(3) EC, which required the Commission to initiate the formal investigation procedure.

161 The Commission replies that it was clear that the AGL constituted an exceptional fiscal burden which was not a matter for the State aid rules, that the exclusion of alternatives to virgin aggregate was justified by the nature or the general scheme of the system, and that the standard mechanism for indirect taxes on consumption did not involve issues of State aid.

162 The intervener states that the purpose of the consultation exercise on waste aggregates launched on 9 December 2002 was to gather information concerning aggregates, in order to determine whether they should be exempted and whether such an exemption would be of value to the industry and could be operated without undue burdens on business and risk of abuse. The consultation paper relied on by the applicant does not suggest that the treatment of waste is inconsistent with the objectives of the levy.

Findings of the Court

163 It is necessary to consider first of all the Commission's argument that, contrary to the applicant's approach, which is based on case-law decided prior to the entry into force of Regulation No 659/1999 in April 1999, the fact that there are serious difficulties in assessing an aid measure no longer requires it to initiate the formal investigation procedure. The Commission argues in particular that where aid is not notified it is entitled, without initiating the procedure under Article 88(2) EC, first of all to obtain the necessary information from the Member State concerned, by virtue of Article 10(2) of Regulation No 659/1999.

164 In this case, the State measure at issue had been notified only in so far as it laid down an exemption for Northern Ireland and not as regards the definition of the scope of the AGL, which is the only point at issue in these proceedings.

165 It should be pointed out in that regard that the Commission's duty first to examine a potentially unlawful aid with the Member State, if necessary by requesting information from it (Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraphs 29 and 30), cannot relieve that institution of its duty to initiate the formal investigation procedure in particular where, in the light of the information obtained, it continues to face serious difficulties in assessing the measure concerned. That duty arises directly from Article 88(3) EC, as interpreted by case-law, and is, moreover, expressly confirmed by the provisions of Article 4(4) in conjunction with Article 13(1) of Regulation No 659/1999, where the Commission finds, having carried out a preliminary investigation, that the unlawful measure raises doubts as to its compatibility (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 69 and 72).

166 According to settled case-law, the procedure under Article 88(2) EC is obligatory where the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary procedure under Article 88(3) EC and take a favourable decision on a State measure unless it is in a position to reach the firm view, following an initial investigation, that the measure cannot be classified as aid within the meaning of Article 87(1) EC or that the measure, whilst constituting aid, is compatible with the common market. On the other hand, if the initial analysis results in the Commission taking the contrary view of the aid's compatibility with the common market, the Commission has a duty to gather all necessary views and to that end to initiate the procedure under Article 88(2) EC (*Matra* v *Commission*, paragraph 33; *Commission* v *Sytraval and Brink's France*, paragraph 39; Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 71; and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 42).

167 That duty to initiate the formal investigation procedure applies in particular when the Commission, having analysed to the appropriate standard, on the basis of information provided by the Member State concerned, the State measure at issue, entertains doubts as to the existence of aid elements for the purposes of Article 87(1) EC, and as to their compatibility with the common market (Case C-400/99 *Italy* v *Commission*, paragraphs 47 and 48).

168 In the present case, contrary to what the applicant claims, the fact that the Commission took account of the interest of the Member State concerned in a rapid decision does not mean that the applicant is entitled to assume, without more, that the Commission took into account criteria other than that relating to the absence of serious difficulties of analysis in deciding not to initiate the formal investigation procedure.

169 The consultation paper of 9 December 2002, which was issued after the adoption of the contested decision, cannot be taken into account in determining the validity of

that decision. According to well-settled case-law, complex assessments made by the Commission must, in an action for annulment, be examined solely on the basis of the information available to the Commission at the time when those assessments were made (Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 47, and Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 48).

170 It follows that the only valid arguments relied on by the applicant in support of this plea, which relate to the purported inconsistencies in the definition of the scope of the AGL, repeat those put forward by it under the plea based on infringement of Article 87(1) EC.

171 As has already been held, the definition of the material scope of an environmental levy, such as the AGL, falls within the powers of the Member State concerned, which is free to set its priorities as regards its environmental policy (see paragraphs 115 and 116 above). That being the case, it follows from the matters referred to above (see paragraphs 138 and 139) that the Commission was entitled to take the view, without committing a manifest error of assessment, that it was clear that the definition of the material scope of the AGL did not comprise elements of State aid. Furthermore, there can be no doubt that the exemption for exports could be justified by the nature of the AGL as an indirect tax (see paragraphs 152 and 153 above). In those circumstances, neither the reasoning set out in the judgment of the High Court of Justice of 19 April 2002, nor the intervener's explanations of its decision not to impose the AGL on certain materials in order to preserve the international competitiveness of the sectors concerned, nor the purported complexity of the definition of the market concerned, on which the applicant relies, go to show the existence of serious difficulties concerning the classification of the AGL as regards the criterion of selectivity.

172 In those circumstances, it is clear that the Commission did not exceed the limits of its power of assessment by considering that the review, for the purposes of Article 87(1) EC, of both the definition of the material scope of the AGL and the exemption

for exports did not give rise to any serious difficulty which required it to initiate the formal investigation procedure.

173 It follows that the plea based on infringement of the duty to initiate the formal investigation procedure must be rejected.

The plea based on infringement by the Commission of its obligations in relation to the preliminary investigation

Arguments of the parties

174 The applicant submits that the Commission failed to conduct a diligent and impartial examination of the applicant's complaint. Moreover, the Commission admitted in its defence that it adopted the contested decision rapidly, at the intervener's request.

175 Furthermore, in the contested decision, the Commission failed to set out to the requisite standard the reasons why the applicant's complaint was rejected. It did not address the inconsistencies highlighted by the applicant in its complaint, such as the taxing of secondary material that arises in the production of untaxed limestone and the fact that shale quarried with a view to use as aggregate is not taxed. Moreover, as regards exports, the contested decision did not address the issue of the exemption for exports of low-grade materials.

176 The Commission rejects those arguments. It replies that all the matters referred to in that complaint, which, moreover, are identical to those which had been raised in the first complaint, were examined in the contested decision. Only the timing explains the absence of any mention of the applicant's complaint in point 3 of the contested decision, where reference is made to the first complaint.

Findings of the Court

177 Case-law provides that, where interested third parties submit complaints to the Commission relating to State measures which have not been notified under Article 88(3) EC, the Commission is bound, in the context of the preliminary procedure referred to in that provision, to conduct, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, a diligent and impartial examination of those complaints (*Commission* v *Sytraval and Brink's France*, paragraph 62, and *SIC* v *Commission*, paragraph 105).

178 In the present case, the applicant puts forward no valid reasons for concluding that the Commission did not undertake a sufficiently thorough analysis of the file. On the contrary, the documents in the file show that the Commission invited the United Kingdom authorities to submit their observations on the principal objections raised in the first complaint, which are substantially similar to the objections set out in the applicant's complaint, and that it asked those authorities for further information, which was provided in the letter of 19 February 2002 referred to above. That being the case, in the absence of any other indications, the mere fact that the contested decision was adopted rapidly does not mean that there was a failure to undertake a sufficiently thorough analysis.

179 Furthermore, it should be pointed out that the Commission notified the contested decision, which was addressed to the Member State concerned, to the applicant in

accordance with the principle of sound administration. That decision sets out, to the requisite standard, the reasons why the objections put forward in the applicant's complaint were rejected, as has already been held above (see paragraphs 144, 145 and 155 above).

180 It follows that the plea based on infringement by the Commission of its obligations in relation to the preliminary investigation must be rejected.

181 For all of the above reasons, the action must be dismissed in its entirety.

Costs

182 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. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the Commission.

183 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. It follows that the United Kingdom of Great Britain and Northern Ireland must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those of the Commission;**

3. **Orders the intervener to bear its own costs.**

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 13 September 2006.

E. Coulon J. Pirrung

Registrar President

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