COMMISSION DECISION (EU) 2016/288

of 27 March 2015

on the aid scheme SA.34775 (13/C) (ex 12/NN) implemented by the United Kingdom — Aggregates levy

(notified under document number C(2015) 2141)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions ([1]), and having regard to their comments,

Whereas:

1. PROCEDURE

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

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

(3) After the submission of additional information on 21 February 2002, the Commission adopted, on 24 April 2002, a no objections decision with respect to the AGL ([2]). It considered that the different exemptions provided for in the Finance Act 2001 were justified by the logic of the tax and that the Finance Act 2001 did not entail any State aid. The Commission further considered that the staged introduction of the AGL in Northern Ireland constituted aid that was compatible with the internal market.

(4) On 12 July 2002, the BAA brought an action for annulment of the Commission's decision of 24 April 2002, registered as Case T-210/02. On 13 September 2006, the General Court dismissed the action in its entirety. On 27 November 2006, the BAA appealed the judgment of the General Court. By judgment of 22 December 2008 in Case C-487/06 P, the Court of Justice set aside the appealed judgment and referred the case back to the General Court.

([1]) OJ C 348, 28.11.2013, p. 162.
([2]) OJ C 133, 5.6.2002, p. 11.

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

(6) Following the annulment of the Commission Decision of 24 April 2002, the Commission was required to reassess whether the exemptions, exclusions and tax reliefs provided for in the 2001 Finance Act, as amended by the Finance Act 2002 and Finance Act 2007, constituted State aid. The Commission registered the file under an NN reference, since the AGL has been in force since 1 April 2002. The issue of the compatibility of the staged introduction of the AGL in Northern Ireland has been examined in the context of another procedure (see SA.18859 (11/C) — United Kingdom — Relief from Aggregates levy in Northern Ireland).

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

(8) By letter dated 31 July 2013, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the tax exemptions, tax exclusions and tax reliefs established in Sections 17(3)(e), 17(3)(f)(i) and (ii), Section 17(4)(a) (in so far as the exempted material consists wholly of coal, lignite, shale, slate that is used as aggregate or consists mainly of coal, lignite, shale and slate), Section 17(4)(c)(i) and (ii) (when it consists mainly of the spoil), 17(4)(f) (as far as clay is concerned), 18(2)(b) (in so far as it relates to an exempt process that provides for materials that are used as aggregates) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are used as aggregates) of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007. The Commission raised no objections to the tax exemptions, tax exclusions and tax reliefs established in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d) and 17(3)(da), 17(4)(d)) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consists wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are not used as aggregates) and Section 30(1)(c) of the Finance Act 2001, as amended by the Finance Act 2002 and Finance Act 2007, on the ground that they do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

(9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([3]) (the 'Opening Decision'). The Commission invited interested parties to submit their comments on the aid.

(10) The Commission received extensive comments from 16 interested parties between 20 December 2013 and 17 January 2014, supplementary information from a British Aggregates Association member on 10 February 2014 and from the British Aggregates Association on 5 March 2014. They were forwarded on 27 May 2014 and 13 June 2014 to the United Kingdom, which was then given the opportunity to reply. The United Kingdom submitted its reply by letter dated 30 June 2014. In addition, it submitted observations on the Opening Decision on 1 October 2013, 31 October 2013 and 28 February 2014.

([3]) Idem 1.

(11) The Commission requested further information from the United Kingdom on 14 July 2014, 1 September 2014, 8 September 2014, and 28 November 2014. The United Kingdom provided such information on 29 August 2014, 9 September 2014, 18 September 2014 and 8 and 9 December 2014.

(12) Following a tripartite meeting on 15 July 2014, the Commission requested further information to be submitted jointly by the United Kingdom and the BAA on 18 July 2014. Such information was submitted to the Commission on 8 September 2014. The BAA submitted additional information in response to the questions of the Commission on 15 September 2014. The information submitted was subsequently forwarded to the United Kingdom authorities on 17 October 2014, who responded on 12 November 2014, 14 November 2014 and 17 November 2014.

(13) The Commission requested further information from the BAA on 10 July 2014 and 16 October 2014. The BAA provided such information on 6 November 2014 and 21 November 2014. The information was forwarded to the United Kingdom authorities on 2 December 2014 who responded on 18 December 2014.

2. **DETAILED DESCRIPTION OF THE MEASURE**

2.1. *NOTION OF AGGREGATES*

(14) Aggregates are used in the construction sector. They can generally ([4]) be described as corresponding to granular or particulate material which because of its physical and chemically inert properties is suitable for use on its own or with the addition of cement, lime or bituminous material in construction as concrete ([5]), roadstone, asphalt or drainage courses ([6]), or for use as construction fill ([7]). Aggregate may be natural, manufactured or recycled ([8]). The Opening Decision describes in detail the notion of aggregates and aggregates use in recitals 8 to 13.

(15) The definition of aggregates is intrinsically linked to the possible uses of certain granular or particulate quarried materials in construction sector, as explained above in recital 14, as this is what primarily differentiates the notion of aggregates from the notion of minerals.

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

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

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

([4]) Wikipedia: https://en.wikipedia.org/wiki/Construction_aggregate (29 May 2013); FAO term: http://termportal.fao.org/faoterm/search/pages/termUrl.do?id=204 (29 May 2013); European Standard BSEN 12620:2002; *Dictionary of Building*, James H. Maclean and John S. Scott, Penguin Books, fourth edition; *Oxford Dictionary of Construction, Surveying & Civil Engineering*, Christopher Gorse, David Johnston and Martin Pritchard, Oxford University Press 2012; *Glossary of Building and Civil Engineering Terms*, British Standards Institution, Blackwell Scientific Publications, 1993, 100-4403; http://www.uepg.eu/what-are-aggregates See also Case T-210/02 RENV of 7 March 2012, *British Aggregates Association* v *Commission*, ECLI:EU:T:2012:110, paragraph 1.

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

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

([7]) Aggregates are used as base material under foundations, roads, and railroads. In that case, they help in filling voids and protecting pipes (pipes laid to convey treated water, or as conduits for cables, need to be protected from sharp objects in the ground and are therefore laid on, and surrounded by, fine aggregate before trenches are backfilled). Aggregates also help in providing hard surfaces (they prevent differential settling under the road or building or railway — unpaved roads and parking areas are covered in a surface layer of aggregate to provide a more solid surface for vehicles, from cycles to lorries. This prevents the vehicles from sinking into the soil, particularly during wet weather. Wikipedia: https://en.wikipedia.org/wiki/Construction_aggregate (29 May 2013); http://sustainableaggregates.com/overview/uses.htm (29 May 2013).

([8]) European Standard BSEN 12620:2002.

([9]) UEPG, http://www.uepg.eu/what-are-aggregates, visited on 28 March 2013. See also, http://www.bgs.ac.uk/planning4minerals/assets/downloads/86210_P4M_A_Guide_On_Aggregates.pdf p. 6.

([10]) http://www.bgs.ac.uk/planning4minerals/Resources_1.htm (29 May 2013); http://sustainableaggregates.com/sourcesofaggregates/recycled/rib_introduction.htm (29 May 2013); http://www.uepg.eu/what-are-aggregates (29 May 2013).

([11]) *Glossary of Building and Civil Engineering Terms*, British Standard Institutions, Blackwell Scientific Publications, 1993, 630- 3.

(19) Materials that are suitable for use as aggregates can also be used to manufacture other products. In that sense, the industry distinguishes between aggregate uses of sand, gravel and crushed rock materials and non-aggregate uses ([12]) of sand, gravel and crushed rock materials. Non-aggregate uses of rock, sand and gravel are, for instance, the production of cement, glass, and other industrial ([13]) or agricultural uses ([14]).

2.2. *BACKGROUND TO THE AGL AND ITS OBJECTIVE*

(20) Aggregate is a constrained natural resource, in terms of the sites at which it can be acceptably extracted ([15]). The quarrying of aggregate takes up land in the medium to long-term and causes environmental damage and pollution.

(21) Following a series of actions aimed at tackling the environmental concerns of the quarrying of aggregates that are described in recitals 15 to 18 of the Opening Decision, the AGL was introduced in April 2002 with the aim of encouraging the more efficient use of aggregates in the construction industry by:

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

— Encouraging a shift in demand away from deliberately extracted aggregates towards alternatives like:

  — recycled aggregates,

  — wastes and by-products from other processes, including the extraction of other minerals (clay and coal extraction wastes, glass and tyre wastes) ([16]).

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

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

(24) In addition to encouraging the use of recycled aggregates as an alternative to newly-quarried material, the AGL's structure also seeks to reduce the extraction of sand, gravel and rock specifically for use as aggregates, by incentivising the use of other materials that would otherwise be discarded. By-products, spoil and waste of other extraction processes or of industrial processes are usually considered to be of lower quality and specification than materials specifically extracted and exploited for use as aggregates. They may have slightly different uses and

([12]) http://sustainableaggregates.com/overview/uses.htm (29 May 2013); HM Customs & Excises — Consultation on a Potential Aggregates Tax — Summary of Replies, April 1999, paragraph 18.

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

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

([15]) MPG6 — Guidelines for aggregates provision in England 1994, paragraph 6-123 (23).

([16]) Budget announcement March 2000 — Prudent for a purpose: working for a stronger and fairer Britain — Chapter 6: Protecting the environment — Regenerating our cities/protecting our countryside — Waste; Aggregates, paragraph 6.91; Pre-Budget Report — November 2001 — Chapter 7: Protecting the environment — Protecting Britain's countryside — Aggregates quarrying — The aggregates levy, paragraph 7.71; Budget announcement March 2001 — Chapter 6: Protecting the environment, paragraph 6.91.

applications. For example, due to their lower density or uneven size they may not be safe to use in the construction of certain road surfaces or in other situations where the aggregates need to withstand high pressure and wear and tear. However, by-products, waste and spoil can still present a viable alternative to the highest quality aggregates in many situations. The by-products, waste and spoil from processes specified in the Finance Act 2001 would be discarded without the existence of the AGL. As they are, however, an unavoidable by-product of a number of processes which deliver important materials for the construction industry (such as roof tiles from slate) or other industries (such as feldspar for the glass-making industry), the UK authorities considered it environmentally more efficient to encourage a use as aggregates for these materials, instead of depositing them as waste. This avoids additional environmental costs by using an already quarried product that would otherwise be left as waste, as opposed to the (additional) extraction of fresh aggregates with unnecessary additional environmental costs (disturbance of new land). In addition, this assists in the rehabilitation of land already defaced by large waste and spoil tips. The UK authorities had added that the application of the AGL to such materials could have the undesired effect of discouraging what little use for those materials already exists, thus increasing rather than reducing tipping. Recital 23 of the Opening Decision contains a detailed account of the estimates of available amounts of alternatives.

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

(26) The UK authorities had indicated that given the aim of inducing a more efficient extraction and a more efficient use of virgin aggregates, 'the levy falls on those who undertake quarrying for the purposes of commercially exploiting aggregate' ([17]). In this connection, the UK authorities had explained that while quarrying of high-specification materials to be used in the construction sector also produces materials of lesser quality and hence price, it is not in practice possible to relieve these materials in a similar manner as by-products of industrial processes or other extraction activities. First, the proportion of high quality and low quality aggregates will vary from quarry to quarry because of geological factors, but is not an immutable figure for any given quarry as more efficient practices can help reduce the proportion of low quality aggregates. In addition, the term low quality aggregate is, to some extent, a subjective term. What one quarry operator would consider as low quality could be part of another's primary product range. Exempting low quality aggregates could thus lead to unequal treatment of operators and lead to tax avoidance or evasion. Extensive public consultation with the industry on this issue around the time of the introduction of the AGL did not yield a workable definition of how to distinguish between high quality materials — which should be taxed — and lower quality by-products of the process of extracting high value aggregates. The UK authorities had further noted that taxing low quality aggregates also reflects the desire to address the environmental costs of aggregate extraction, regardless of whether the extracted product is ultimately deemed to be of high or low quality.

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

2.3. *FINANCE ACT 2001, ENTRY INTO FORCE, AMENDMENTS AND DURATION*

(28) The primary legislation governing the AGL is set out in the Finance Act 2001, Sections 16 to 49 and Schedules 4 to 10. The Finance Act 2001 was adopted on 11 May 2001 and has been subject to several amendments as described in recitals 28 and 29 of the Opening Decision. This Decision references the Finance Act 2001 as subsequently amended. The AGL came into effect on 1 April 2002 and remains applicable. The law does not limit the application of the AGL in time.

([17]) Letter dated 19 February 2002, registered on 21 February 2002 under A/31371, paragraph 4.10.

(29) Following the Opening Decision, the UK authorities amended the Finance Act 2001 by suspending the exemptions for the materials as regards to which the Commission had expressed doubts as of 1 April 2014.

(30) The UK authorities explained that in preparing the necessary legislation for the suspension, they concluded on the basis of comments received from industry that determining whether certain materials had been 'extracted for use as aggregates' would be impractical. Accordingly, they devised a new criterion, 'for construction purposes' which is consistent with the definitions used by the existing legislation. In order, however, to achieve the same result as envisaged by the Opening Decision with the application of the latter criterion, the suspension legislation additionally provides that: (i) clay (including ball clay, china clay and fireclay) and shale used to make ceramic construction products; and (ii) gypsum used to make plaster and plasterboard; are to be considered exempt processes. This is due to the fact that they could be included in material extracted 'for construction purposes', but they do not represent uses as aggregates of the respective materials.

2.4. *STRUCTURE OF THE AGL AND EVENTS TRIGGERING THE TAX*

(31) Section 16(1) of the Finance Act 2001 states that 'a levy, to be known as aggregates levy, shall be charged in accordance with this Part on aggregate subjected to commercial exploitation'. Section 16(2) reads 'The charge to the levy shall arise whenever a quantity of taxable aggregate is subjected on or after the commencement date, to commercial exploitation in the United Kingdom'.

(32) According to Section 17(1) 'aggregate' 'means (subject to Section 18 below) any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it'.

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

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

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

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

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

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

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

(a) it is removed from its originating site, or any site registered under the name of a person who is the operator of the originating site ([18]), or any other site to which the quantity of aggregate had been removed for the purpose of having an exempt process applied to it on that site but at which no such process has been applied to it.

(b) it becomes subject to an agreement to supply it to any person ([19]);

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

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

(c) it is used for construction purposes ([20]); or

(d) it is mixed, otherwise than in permitted circumstances ([21]), with any material or substance other than water.

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

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

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

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

(38) As a result of the concept of commercial exploitation, the AGL applies to both aggregates extracted in the United Kingdom and imported aggregates. Imported aggregates will be subjected to the AGL not when they are landed in the United Kingdom ([22]) but when they are the subject matter of an agreement (and the aggregate is already located in the United Kingdom) or are used for constructions purposes (in the UK) or are mixed (in the United Kingdom) with any material or substance other than water, unless in permitted circumstances ([23]).

(39) Section 19(3) of the Finance Act 2001 contains further details on the concept of commercial exploitation. It provides in letter (e) that there is no commercial exploitation taking place when — without its being subjected to any process involving its being mixed with any other substance or material (apart from water) — it again becomes part of the land at the site from which it was won ([24]).

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

2.5. *NOTION OF TAXABLE AGGREGATE — EXEMPTIONS FROM THE AGL AND TAX CREDITS*

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

(a) if it is expressly exempted;

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

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

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

(42) An aggregate is regarded as being used for construction purposes when it is used as a material or support in the construction or improvement of any structure (including roads, paths, the way on which any railway is or is to be laid, embankments, buildings and bridges) or when it is mixed with anything as part of the process of producing mortar, concrete, tarmacadam, coated road stone or any similar construction material ([25]).

([20]) See Section 48(2) of the Finance Act 2001: The 'construction purposes' mean using the aggregates as material or support in the construction or improvement of any structure (including roads and paths, the way on which any railway track is, or is to be, laid and embankments) or mixing them as part of the process of producing mortar, concrete, tarmacadam, coasted roadstone or any similar construction material.

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

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

([23]) See also Notice AGL 1: Aggregates levy, April 2011, point 8.1.

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

([25]) See Notice AGL 1.

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

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

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

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

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

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

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

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

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

'(a) coal, lignite, slate or shale;

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

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

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

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

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

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

(a) the aggregate that has been subject to the AGL is exported from the United Kingdom in the form of aggregate;

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

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

(d) the aggregate that has been subject to the AGL is disposed of in such manner not constituting its use for construction purposes as may be prescribed ([26]); or

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

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

(49) The industrial and agricultural processes that can benefit from tax relief under Section 30(1)(c) are listed in the Schedule 'Industrial and Agricultural Processes' to Regulation 13 of the Aggregates Levy (General) Regulations 2002. Notice AGL 2 ([27]) describes in more detail the type of processes that are concerned. They are the following:

Industrial processes

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

— Code 002: Alloying

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

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

— Code 005: Sewage treatment

— Code 006: Production of energy

— Code 007: Ceramic processes

— Code 008: Refractory processes

— Code 009: Manufacture of glass and glass products

— Code 010: Manufacture of fibre glass

— Code 011: Man-made fibres

— Code 012: Production and processing of food and drink

— Code 013: Manufacture of plastics, rubber and PVC

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

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

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

— Code 015: Manufacture of precipitated calcium carbonate

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

— Code 017: Aerating processes

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

— Code 019: Manufacture of pigments, varnishes and inks

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

— Code 021: Incineration

— Code 022: Manufacture of desiccant

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

— Code 024: Resin processes

— Code 025: Manufacture of lubricant additives

— Code 026: Leather tanning

— Code 027: Paper manufacture

— Code 028: Production of art materials

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

— Code 030: Clay pigeon manufacture

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

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

— Code 033: Flue gas desulphurisation and flue gas scrubbing

— Code 034: Manufacture of mine suppressant

— Code 035: Manufacture of fire extinguishers

— Code 036: Manufacture of materials used for fireproofing

— Code 037: Acid neutralisation

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

Agricultural processes

— Code 039: Manufacture of additives to soil

— Code 040: Manufacture of animal feeds

— Code 041: Production of animal bedding material

— Code 042: Production of fertiliser

— Code 043: Manufacture of pesticides and herbicides

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

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

2.6. *RATE*

(50) Originally, the AGL was levied at the rate of GBP 1,60 per tonne. The rate was increased to GBP 1,95 per tonne for aggregates subject to commercial exploitation on or after 1 April 2008. The rate currently applied is GBP 2 per tonne (since 1 April 2009).

2.7. *GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE*

(51) As explained in recital 170 of the Opening Decision, the Commission doubted whether the exemptions and exclusions mentioned in recital 139 of the Opening Decision ([28]) (the 'exemptions under investigation') were justified by the general principles and logic of the AGL. The exemptions and exclusions concerned seemed to relieve the beneficiaries from a tax that they would normally have had to pay and constituted operating aid. As it did not have enough elements to conclude whether the measure fulfils the conditions of the Community guidelines on State aid for environmental protection ([29]) ('2001 EAG') and the 2008 Community guidelines on State aid for environmental protection ([30]) ('2008 EAG'), the Commission had doubts as to the compatibility of the exemptions under investigation and exclusions with the internal market.

3. **COMMENTS FROM INTERESTED PARTIES**

(52) As mentioned in recital 10 above, the Commission received extensive comments from interested parties following the publication of the Opening Decision.

(53) The comments from interested parties concerned: (i) the Opening Decision itself; (ii) the logic of the AGL; (iii) the exemptions which had previously been found not to constitute State aid already in the Opening Decision; and (iv) the exemptions under investigation.

(54) For ease of reference, this section will outline the comments received in relation to the Opening Decision. The remaining categories of comments received are presented in the relevant sections of this decision.

3.1. *COMMENTS REGARDING THE CONTENT OF THE OPENING DECISION*

(a) *Comments received from Richard Bird, BAA, received on 20 and 23 December 2013.*

(55) Mr Bird has provided the Commission with his contribution to the UK authorities' public consultation on the approach to suspending the exemptions from the AGL in respect of which the Commission expressed doubts in the Opening Decision.

(56) Mr Bird further claims there are a number of inaccuracies in the Opening Decision, such as:

(i) various quarrying sites have been identified showing that there is no risk the United Kingdom will run out of aggregates;

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

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

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

(ii) slag aggregate, crushed slate aggregate and the silica sand from china clay production have always been a major source of aggregate;

(iii) exempted aggregates and recycled aggregates could not replace quality aggregates required in construction, which are extracted together with lesser quality aggregates (1 tonne good quality with 1 tonne of lower quality aggregates). New waste heaps have been created due to this material;

(iv) a series of abuses of the AGL are taking place;

(v) quarries have opened simply to produce aggregates that are exempt ([31]). Mr Bird claims there are slate quarries that produce simply slate rock and not any roofing slate. Mr Bird provides as example the names of two quarries;

(vi) shale aggregates quarries are producing and selling untaxed aggregates. One million tonnes of shale were used for constructing a road near Edinburgh;

(vii) the Opening Decision allegedly fails to recognise what aggregate is: smaller sizes of rocks, crushed or uncrushed, including natural sand and gravel. Armour rock for sea defences, stone for river protection, walling stone, fireplace stone, ditching stone, cobbles for roads and hearting stone for marine breakwaters are all taxed as aggregates if they are not geologically slate or shale;

(viii) the AGL is nonsensical, as sorted walling stone that is not cut is taxed;

(ix) only slate from north Wales may be used as roofing slate. Slate from other slate areas in the United Kingdom is not used as roofing slate, but as walling stone or paving stone. Sandstone, walling and paving stone is taxed. Shale is not used for roofing. Slate and shale quarries have been opened because the materials are exempt from the levy ([32]);

(x) allegedly, the AGL has in fact had a negative environmental impact as recycled aggregate operations are environmentally damaging also due to the additional transportation distances of exempted materials;

(xi) silica sand from china clay workings has always been a source of aggregate. There is little sand in Cornwall, thus the sand from china clay quarries does not reduce extraction of natural sand. It is actually an important source of sand in the area. This sand distorts the market for crushed rock fines which are a by-product of local hard rock aggregate quarries whose prime objective is to produce aggregate chippings for concrete, asphalt and construction work;

(xii) china clay by-products are exempted while limestone by-products are taxed even when the limestone is used for agriculture or for industrial processing. They produce 20 % waste by-products;

(xiii) allegedly, a number of old worked-out china clay quarries have been reopened solely for the exploitation of the exempted aggregates as the kaolin had been worked out. On the other hand, someone wanting to exploit an old granite tip would have to pay the tax;

(xiv) the by-products of the refining and smelting of metal are indeed not the same as natural aggregates, but they were never waste and have a very good market. Mr Bird claims the AGL should apply to by-products that are not waste;

(xv) Mr Bird considers that it is impossible to replace quality aggregates with aggregates from most slate, shale or china clay operations.

(57) Mr Bird supplemented this information with a submission on 10 February 2014 regarding the uses of slag aggregate, a by-product of the steel manufacturing industry. The submission aims at showing that slag is not a waste, but a first class aggregate that can be used as an alternative to cement.

([31]) Mr Bird did not provide any example or evidence in this regard.
([32]) See footnote 31.

(b) *Comments received from the BAA on 10 January 2014*

(58) The BAA considers that the concept of aggregate should not be used to determine whether or not the AGL results in State aid as there is no clear definition of aggregate which corresponds to the scope of the tax. The Commission defines aggregates in the Opening Decision as 'rock, gravel and sand extracted for the purpose of providing bulk in construction'. However, allegedly, the AGL taxes many materials that are used for different purposes than 'providing bulk in construction', such as uncut building stone used to construct walls, armour rock, rail track ballast, high polished stone value ('PSV') stone for skid-resistant asphalt, etc. The BAA mentions that the British competition authorities have assessed the aggregates market on a number of occasions and generally concluded that specialist materials such as rail track ballast and high PSV stone are in different markets from each other and from 'construction aggregate' because they are used for different applications and there is neither demand-side substitution nor supply-side substitution ([33]).

(59) The BAA maintains that three of the exemptions on which the Commission concluded positively in the Opening Decision are selective, i.e. the exemption for recycled building waste, aggregate excavated in the course of construction of roads, railways, buildings, etc., and industrial waste/by-product. The BAA claims that from the perspective of the 'shift in demand' objective these three categories of exempted materials are in the same position as the waste/by-product of, inter alia, china clay, slate and coal as regards which the Commission expressed doubts in the Opening Decision.

(c) *Comments received from Lantoom Quarry on 16 January 2014*

(60) The Lantoom Quarry claims that the Opening Decision has created uncertainty and has impacted investment and employment.

4. **COMMENTS FROM THE UNITED KINGDOM**

(61) The UK authorities provided extensive comments to the doubts raised in the Opening Decision and additional information as well as compatibility grounds for the exemptions under investigation.

(62) No comments were received from the UK authorities regarding the content of the Opening Decision itself. For ease of reference, the comments and information received are presented in the relevant sections of this decision.

5. **ASSESSMENT OF THE MEASURE**

(63) The Commission has already decided with the adoption of the Opening Decision to raise no objections in respect of the exemptions, exclusions and tax reliefs laid down in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d), 17(3)(da), 17(4)(d) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consist wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2) (b) that provides for materials that are not used as aggregates), and 30(1)(c) of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007, in relation to the AGL, since the Commission considered that they do not entail State aid within the meaning of Article 107(1) of the Treaty. The Commission will therefore not assess these exemptions, exclusions and tax reliefs provided by the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007 in relation to the AGL and will confine its assessment to the exemptions under investigation.

([33]) See, for example, Competition Commission: Aggregates, cement and ready-mix concrete market investigation, Market Definition working paper of 1 November 2011, paragraph 19 and Provisional Findings Report of 21 May 2013, paragraphs 5.5(b), 5.6(b) and 5.24; OFT Decision of 2 November 2011, Proposed JV between Anglo American PLC and Lafarge SA, ME/5007/11, paragraph 72.

5.1. *ASSESSMENT OF THE COMMENTS RECEIVED REGARDING THE CONTENT OF THE OPENING DECISION*

(64) The BAA, as mentioned above in recital 59, maintains that the exemptions for recycled building waste, aggregate excavated in the course of construction of roads, railways, buildings etc., and industrial waste/by-product are not within the logic of the AGL from the perspective of the 'shift in demand' objective.

(65) The Commission concluded in the Opening Decision that recycled aggregates and freshly extracted aggregates are not in a comparable situation in the light of the objective of the AGL and the distinction made between recycled and freshly extracted aggregates results from the nature and logic of the AGL. It is clear that using recycled aggregate, even though the recycling process is less environmentally friendly than the excavation of fresh aggregate process, prevents the excavation of the same quantity of fresh aggregate. Moreover, incentivising the use of materials that are the unavoidable result of certain activities that would take place in any event clearly helps to reduce build-up of waste and prevents the excavation of the same quantity of fresh aggregate.

(66) Therefore, these three exemptions contribute to achieving a greater environmental benefit by preventing additional quarrying.

(67) Several interested parties mentioned in this regard that there have been cases of additional excavation solely with the purpose of obtaining aggregates for sale. However, these are cases of clear abuses that should be reported and dealt with under the national law of the United Kingdom and do not constitute a matter for State aid law.

(68) The reasons underlying the doubts expressed by the Commission in the Opening Decision as regards the waste/by-product of, inter alia, china clay, slate and coal do not affect the assessment of the three exemptions mentioned above, primarily the doubts raised by the Commission do not preclude the final results of the formal investigation procedure and the materials subject to the exemptions are different and result in different circumstances.

(69) Mr Bird points to the use as aggregates of a series of materials exempted from the AGL which proves that the exemptions from the AGL help to achieve its environmental purpose as they successfully replace freshly quarried aggregates.

(70) The data provided by the UK authorities, as we will show below in recital 143 shows that the number of quarries producing exempt materials has not increased following the introduction of the AGL, but has, in fact, decreased.

(71) One of the quarries that Mr Bird has listed as allegedly producing only slate rock and not roofing slate is in fact, according to its own website, producing roofing slate. As regards the other quarry, the UK authorities have committed to investigate what material it actually produces and will commence enforcement under the national legislation depending on the results of the investigation.

(72) Both the UK authorities and the BAA maintained that they have no information that former worked-out china clay quarries had been recently reopened. The UK authorities are not aware of any permission granted in this respect and the two china clay and ball clay producers are not aware of such openings.

5.2. *STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY (EX ARTICLE 87(1) EC)*

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

(74) According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also state measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect ([34]).

(75) As regards the criterion of the selectivity of the advantage, it is necessary to consider whether, under a particular statutory scheme or specific tax system, a state measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU in comparison with other undertakings in a comparable legal and factual situation in the light of the objective pursued by the scheme or tax system concerned ([35]).

(76) However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the tax system of which it is part does not satisfy that condition of selectivity ([36]). A Member State can thus show that a measure results directly from the basic or guiding principles of its tax system.

(77) For the purpose of assessing the selective nature of the advantage conferred by the measure in question, it is important to determine what constitutes the reference framework, since the existence of an advantage may be established only when compared with this reference framework ([37]).

(78) In summary, selectivity can be assessed following a three-step approach:

(i) determination of the reference system (or normal taxation system) where the normal taxation principle of the AGL and the (environmental) objective are identified;

(ii) the establishment whether the tax differentiation constitutes a derogation from the normal taxation regime inasmuch as it differentiates between economic operators who are in a comparable legal and factual situation; and

(iii) in case of comparability of legal and factual situation the tax differentiation does not constitute a derogation if it can be justified by the objective of the tax system. In absence of such justification the measure is to be considered de facto selective. When justifying the tax differentiation only the intrinsic mechanisms of the tax system necessary for the achievement of the objective pursued can be invoked. Objectives unrelated to the tax system cannot be considered in this regard.

(79) As the General Court has confirmed ([38]), the reference framework on the basis of which normal taxation and the existence of any selective advantages are to be determined consists of the AGL itself since it established a specific tax system applicable to the aggregates sector in the United Kingdom. It is thus by reference to the normal taxation and objective of the AGL that it is necessary to examine whether tax differentiations are justified.

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

5.3. *NORMAL TAXATION UNDER THE AGL AND OBJECTIVE OF THE AGL*

(81) The AGL is a levy on aggregates. Subsections (1) and (2) of Section 16 of the Finance Act 2001 establish a levy on taxable aggregates that are subjected to commercial exploitation in the United Kingdom on or after its commencement date.

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

([35]) Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; see also Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 119; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54; and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 46; Case T-210/02 RENV, *British Aggregates Association* v *Commission*, ECLI:EU:T:2012:110, paragraph 47; Case C-487/06 P, *British Aggregates Association* v *Commission* [2008] ECR I-10515, paragraph 82.

([36]) *Adria-Wien Pipeline*, cited above in footnote 35, paragraph 42, and *Portugal* v *Commission*, cited in footnote 35, paragraph 52; Case C-487/06 P, *British Aggregates Association* v *Commission* [2008] ECR I-10515, paragraph 83.

([37]) *Portugal* v *Commission*, cited in footnote 35, paragraph 56, and Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 81; Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 49.

([38]) Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 51.

(82) The AGL was introduced on 1 April 2002. What constitutes commercial exploitation is defined in Section 19. Four types of commercial exploitation are envisaged: (a) the removal of aggregate from its originating site; (b) the conclusion of an agreement to supply; (c) the use for construction purposes; or (d) the mixing with any material or substance other than water.

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

(84) This is further confirmed by the preparatory works of the AGL ([39]). Those works confirm that from the outset, the AGL was intended to be a tax on aggregates and not on any particular extracted mineral. This has also been recognised by the General Court ([40]).

(85) As indicated in recital 14 above, aggregates can generally be described as corresponding to granular or particulate materials which because of their physical and chemically inert properties are suitable for use on their own or with the addition of cement, lime or bituminous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill. Natural aggregates are sand, rock and gravel. However, materials that are used as aggregates can also serve other purposes. In other terms, for the purposes of the AGL whether a material has to be considered as an aggregate or not will depend on its use rather than its geological composition.

(86) In the course of drafting the AGL legislation, the UK authorities realised that a use-based definition of the scope of the tax would prove problematic, as the intended use for the product could change after the tax point had passed ([41]). In order to solve that difficulty, the UK authorities opted for another technique. Instead of using a precise definition of the term 'aggregate' or general taxation criteria, the Finance Act 2001 starts by subjecting sand, gravel or rock to the tax but then narrows down the application and scope of the tax through exclusions, exemptions and tax reliefs of rock, sand or gravel that have been used for certain purposes or have been subjected to certain processes.

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

(88) The Commission considered in the Opening Decision that it was necessary to determine the objective assigned to the tax system of the AGL without referring to the terminology of virgin or primary aggregates, but by reference to its content. The terminology is described in detail in recitals 64 and 65 of the Opening Decision.

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

(90) Taking into account the explanations provided by the UK authorities the Commission concluded in the Opening Decision that the normal taxation principle of the AGL is the taxation of rock, gravel and sand (freshly) extracted for being used as aggregates and subjected to commercial exploitation within the United Kingdom on or after 1 April 2002.

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

([40]) Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 66.

([41]) HM Customs & Excises — Consultation on a Potential Aggregates Tax — Summary of Replies, April 1999, paragraph 13.

(91) As regards its objective, the Commission noted that the AGL aims at making the extraction of aggregates more efficient by internalising the environmental costs of that activity. In addition, it aims at shifting demand: from deliberate extraction of rock, gravel and sand for aggregates use in the construction industry towards the use of aggregates which are the by-products of or waste from certain processes or of recycled aggregates.

(92) The Commission has received extensive comments from interested parties as regards the normal taxation principle and the objective of the AGL.

5.4. *COMMENTS RECEIVED ON NORMAL TAXATION PRINCIPLE AND OBJECTIVE OF THE AGL*

(a) *Comments received from the BAA on 15 September 2014*

(93) The BAA reiterated its statements from previous submissions that the AGL is inherently illogical. The BAA claims that there is no clear definition for aggregates that can explain the scope of the AGL. The BAA maintains that, the AGL taxes many materials that are outside the scope of the definition laid down in the Opening Decision i.e. materials that are used for different purposes than 'providing bulk in construction' or use in concrete, roadstone, asphalt, drainage courses or as construction fill. They claim that, armour rock for sea defences, which is taxed, is not used to add bulk in construction and is much larger and heavier than aggregates that are used for concrete or the other uses listed. In addition, uncut building stone is taxed by the AGL while it is used to construct walls of buildings and traditional hedges (i.e. walls separating fields) rather than any of the uses listed. The BAA argues that it cannot be claimed that these materials are 'aggregate' and that roofing slate, cut building stone or clay for the manufacturing of bricks is not 'aggregate'. All the materials are rock extracted from the ground, but used for different purposes and are not interchangeable. Furthermore, there would be, supposedly, no environmental basis to label some of these materials as 'aggregate' and others not.

(94) The BAA claims that the fact that the exemptions are based on the geology of the material is problematic as the geological terms of clay, shale and slate cover a very wide geological range of rocks that are extracted from quarries that could not produce roofing slate tiles or ceramic products. This material however still qualifies as exempt clay, shale and slate from a geological perspective. The BAA provides some statements from Dr Rachel Hardie, a specialist geologist, as regards the poor choice of geological terms for differentiating rocks. Moreover, the exemptions for material mainly consisting of certain geological groups add even more difficulties. The BAA has provided in this respect a report prepared in 2003 by the British Geological Society for the United Kingdom tax authorities to assist tax officers with the application of the exemptions for slate, shale and clay in a geologically correct manner (the 'Report'). The Report seeks to define shale, slate and clay, in terms of their characteristics and geological origin so as to assist the United Kingdom tax authorities. However it also mentions that 'the original choice of these terms for the purpose of the Act is believed to have been based on their use as economic mineral commodities rather than geological entities'. It also provides that '[c]lay, shale, mudstone and slate occur extensively in the United Kingdom', with shale often being 'interbedded with sandstones'.

(95) The BAA claims that the UK authorities have treated shale and mudstone as synonyms and that consequently the entire family of rocks has been treated as exempt. Furthermore, the BAA argues that the definitions for the three materials determined by the report are very restrictive and that other materials could still have been categorised as shale, slate or clay. For example slate rock with the required 'slaty cleavage' to produce roofing tiles is relatively rare and rocks exhibiting a weak slaty cleavage that would be unsuitable for cleaving may be much more extensive, but still be classified as slate. The BAA further argues, partially quoting from the report, that slate is also extracted for decorative architectural uses, i.e. dimension stone, wall cladding, paving, sills, fireplaces, table-tops and ornaments for home and garden, for which a slaty cleavage would be less important than cutting and polishing. The BAA presents the example of a slate quarry that produces slate that is different from roofing slate and in regard to which it is, allegedly, unclear whether the material should be classified as slate at all.

(96) The BAA argues that, in their experience, an expert geologist's opinion is commonly sought to ascertain which rock is present at a quarry for the purposes of the AGL and whether an exemption is available for its extraction.

(97) The BAA maintains that while they have no information about the evolution of slate and shale spoil heaps since the introduction of the AGL, heaps of taxed aggregates by-product have increased. The BAA puts forward examples of three quarries where heaps of by-products accumulated. One quarry had to send in excess of 1 million tonnes of by-products while another had to invest GBP 2 million in a new installation to further process their by-product so that it could be sold.

(b) *Comments received from the BAA on 17 January 2014*

(98) The BAA argues that when the UK authorities suspended the exemptions from the AGL regarding which the Commission raised doubts in the Opening Decision, those authorities have, in fact, introduced two new exemptions, i.e. for clay and shale used in ceramic construction products and gypsum used in plaster and plasterboard. They consider that these materials cannot be considered to be in a different situation from materials taxed under the AGL in light of its environmental logic. The BAA maintains that, these materials are in the same situation as rock, sand and gravel as they have been extracted for construction purposes. They claim that these additional exemptions constitute State aid that could not be found by the Commission to be compatible aid as the relevant conditions are not met.

(99) The BAA maintains that the extraction of clay and shale used for the production of ceramic construction products could be reduced by using concrete construction products that can be produced with quarry waste/by-product (which is often taxed).

(100) The BAA claims that it does not matter that clay undergoes a chemical change when used in the manufacture of bricks and other ceramic products used in construction as this is irrelevant from an environmental perspective.

(c) *Comments received from Cloburn Quarry Company Ltd on 17 January 2014*

(101) Cloburn Quarry maintains that it extracts granite and greywacke. The latter is used for polished stone value anti-skid aggregates with a PSV in excess of 70. As there is no exemption for by-products for such material, large stockpiles of greywacke dust are accumulating and will become a major problem in time.

(102) Cloburn Quarry maintains that, sales volumes of the quarry have recently decreased from 1,3 million tonnes in 2007/2008 to 0,5 million tonnes. This is allegedly due, less to the recession and more to the exempt sales from competing quarries.

(103) According to Cloburn Quarry, the AGL diminishes the chances of the quarry competing with imported aggregates, as their by-products are sold without tax somewhere else, and, externally, with quarries that do not have to pay a similar levy.

(104) Cloburn Quarry maintains that the AGL has led to a depressed market, i.e. low price for aggregates, and exempted quarries can transport their materials farther.

(105) According to Cloburn Quarry, in 2013, 50 000 tonnes of aggregates sales were lost due to the exempted quarries. There is a particular problem with shale deposits that are being used on large construction sites, especially along the Glasgow-Edinburgh corridor. Around 1 million tonnes of shale was used for roads construction. This has affected competition as other quarries could not sell their low-value by-products. Moreover, the quarry's bright red aggregates compete with the plum red decorative slate which is exempted.

(106) The quarry submits that it has faced competition and lost tenders for projects to quarries it suspects of benefiting from an exemption from the AGL. According to the quarry, one of the contracts was lost to a quarry which received planning consent to work an exempt shale deposit for aggregates' extraction. According to the quarry, at least 800 000 tonnes of shale were available that could have been forward-sold to the main contractor.

(107) The quarry also submitted a series of general comments regarding the lack of environmental scope of the AGL.

(d) *Comments received from Blinkbonny Quarry (Borders) Ltd ('Blinkbonny Quarry') on 8 January 2014*

(108) Blinkbonny Quarry reports that it has been facing competition from another quarry that, possibly, sells exempt material included in ready mix concrete and would therefore be able to offer lower prices. It considers that, had it not been for the exemption, the competing quarry would not have opened and would not have been able to compete on the market. The Quarry alleges that the exemption enables their competitor to transport its material for longer distances which creates environmental damage.

(109) Blinkbonny Quarry further provided a series of comments in response to the Opening Decision. It claims that the measure favours those with exemptions by allowing them to sell products onto an open market without the same costs as those who do not benefit from this advantage.

(110) Blinkbonny Quarry considers that the AGL has failed in its environmental objective as it has resulted in the creation of a cheaper material which is transported further and which encourages the quarrying of exempt aggregate for the sake of producing cheaper materials which are not by-products or waste. Moreover, the Quarry claims that exempt shale and slate are being sold as aggregates for construction purposes and, due to the exemption, more shale and slate are being extracted for use as aggregates.

(e) *Comments received from Kinegar Quarries Ltd ('Kinegar Quarries') on 15 January 2014*

(111) Kinegar Quarries claims that all quarries produce lower grade aggregates. In its view, it makes no difference whether the product is slate that is exported all over the world or the everyday aggregates used within 15 miles of the quarry. Kinegar Quarries maintains that as aggregates are secondary products they can be used in a variety of ways and have always been cheap. Kinegar Quarries further considers that the cost of aggregates is low because they are a by-product of a higher grade product, and in order to maintain a balance of stock, will be priced according to supply and demand. Nevertheless, it maintains that aggregates always brought in some revenue until the AGL was introduced. Thereafter, secondary aggregates were required to compete with aggregates benefiting from the exemption and in certain circumstances they could not. However, production of secondary aggregates has not diminished as there is demand for the higher quality product. They just cannot be sold to the same extent. This, allegedly, leads to increased stockpiles of secondary aggregates. Moreover, Kinegar Quarries claims that there are no environmental benefits due to the additional transportation of aggregates.

(112) Kinegar Quarries claim that the United Kingdom Government had sought to ensure that non-aggregate producers can sell their by-products as levy exempt aggregates minimising their stocks of by-products. They consider that this goal has been achieved by the exemptions granted to non-aggregate producers (and a growing number of aggregate producers) for products which should in fact be called aggregates, because they are sold for the same purpose as material from an aggregate producer. However, the stockpiles of by-products have moved from non-aggregate producers to aggregate producers who pay levy.

(113) Kinegar Quarries mention that following the introduction of the AGL their sales of secondary aggregates dropped from over 50 000 tonnes in 2007 to 9 000 tonnes in 2013 and this could not be attributed entirely to economic recession. It maintains that it is no longer able to compete with exempted aggregates as its quotations are GBP 1,5-GBP 2,0 higher than those of its competitors.

(f) *Comments received from Torrington Stone Ltd (Beam Quarry & Vyse Quarry) ('Torrington Stone') on 17 January 2014*

(114) Torrington Stone submits that if its two quarries were not under the same ownership they would not have been viable today due to the introduction of the AGL. It maintains that clients make their purchasing choice based on the descriptions of the materials, such as quality and size, and not the geology of the materials. Clients do not know if a material is taxed or not.

(115) One of the quarries produces primarily shale with mudstone by-products while the other produces primarily gritstone with shale spoil. All are sold as aggregates. The mudstone by-product cannot be sold for any profit and is therefore tipped.

(g) *Comments received from Mineral Products Association Ltd (the 'Mineral Products Association') received on 2 January 2014*

(116) The Mineral Products Association submits that the ability of some operators to extract exempt materials such as shale and slate for the purpose of supplying aggregates markets is contrary to the original principles of the design of the AGL. The Association considers that extracted materials which are used for aggregates purposes should be subject to the AGL and that the exemptions should be limited to non-aggregate uses of the materials.

(117) The Association submits that materials which arise as a result of individual combustion processes or smelting and refining of metal are genuine by-products of these processes and should be exempted as they meet the underlying objective of the AGL to encourage the use of recycled material and resource efficiency. By comparison, exemptions for shale, slate and other extracted materials lead to local market distortions as they lead to the substitution of taxed materials by untaxed materials.

(h) *Comments received from the BAA on 10 January 2014*

(118) The BAA claims that the environmental objective of the AGL is to shift demand in favour of waste/by-product material as opposed to the implementation of the 'polluter pays principle', as the Commissions allegedly states in the Opening Decision. This suggested primary objective, of polluter pays principle, if in fact applicable, would entail a selective approach to materials (to the 'aggregates sector' but not to other mineral-extraction activity), which inevitably results in State aid. Rather, the environmental objective of the AGL is intended to promote the use of aggregates which are by-products of waste from certain processes or of recycled aggregates, thereby reducing the use of quarried aggregates (shift in demand logic).

(119) The BAA submits that the effect of a would be 'shift in demand' logic of the tax would mean, in practice, that the AGL would be limited to rock, sand or gravel used to add bulk to construction and, that in view of this objective, only by-products or waste that could replace extracted minerals should benefit from the exemption. However, BAA points out that this limitation is not the guiding principle of AGL taxation which allows for materials that cannot be replaced to be taxed.

(120) The BAA considers that even if the exemptions under investigation were removed, the scope of AGL would be not consistent with its environmental logic, i.e. the 'shift in demand' logic. According to BAA, the removal of exemptions for by-product/waste materials would make the AGL less aligned with its environmental objective. By contrast, they claim that the removal of exemptions for material extracted for 'use as aggregate', such as slate and shale, would be in line with the environmental objective of the AGL.

(121) The BAA considers that the fact that the scope of the AGL does not correspond to the environmental objective of 'shift in demand' is supported by the fact that the by-product/waste of lime or cut building stone and materials such as rail track ballast and high PSV stone, for which there is no substitute, are taxed.

(122) The BAA considers that the scope of the AGL is too far removed from its environmental logic. This would be due to the fact that some of the material that is not-taxed could be replaced with by-product or waste. They provide as example clay used for bricks and ball clay used for tiles.

(i) *Comments received from the BAA on 17 January 2014*

(123) The BAA submitted a copy of the *Cornish Building Stone and Slate Guide 2007* and observed that in that publication, several granite and slate quarries advertise themselves as producing similar types of products and building stone. The BAA argues that the Guide reveals that the exemptions from the AGL are not consistent with its logic, i.e. to achieve a shift in demand between materials quarried for use as aggregate and waste being capable of being used as aggregate.

(124) The BAA claims that there is evidence that the availability of exemptions for the by-product/waste of china clay quarries has encouraged the extraction of more material than required, purely to benefit from the exemptions for the alleged by-products i.e. high quality granite ([42]). The BAA further maintains that there is also evidence that some china clay quarry operators concentrate their efforts on the extraction of these alleged by-products rather than the original china clay material ([43]). The BAA refers to an e-mail from a quarry operator to the BAA ([44]) alleging that since the introduction of the AGL they have experienced severe difficulty competing with aggregates from china clay quarries as they the aggregate they produce are cheaper and have taken over the market. As per the e-mail, the aggregates sold by china clay quarries are high grade stone and not a secondary product or a by-product. The production of the respective quarry operator has halved and they have not achieved a profit in over nine years. Their waste materials cannot be sold.

(125) The BAA maintains that the way the AGL is applied in the context of lime extraction is problematic. The extraction of lime itself is not taxed, but its waste or by-products are taxed. Moreover, the AGL applies to fines, by-product or waste of certain quarries, which can be used in the manufacturing of concrete building blocks that could be used to replace bricks manufacture with untaxed clay.

(j) *Comments received from Quarry Products Association Northern Ireland Limited ('QPANI') on 8 January 2014*

(126) QPANI maintains that it represents approximately 95 % of companies involved in the supply of quarry products to the construction industry in Northern Ireland. QPANI considers that the AGL had a flawed design from the beginning as materials should have been taxed based on their use, rather than on their geology.

(127) QPANI believes that there should not be an aggregates levy exemption for shale and slate if used for aggregates purposes. Slate and shale are used as aggregates in the United Kingdom construction markets and can have significant local market impact where they are supplied into aggregates markets. This is particularly true in Northern Ireland. While the supply of slate and shale for aggregates purposes can be materials which are, in effect, the by-products of extraction for non-aggregates purposes (e.g. the extraction of slate for the production of roofing slate), these materials are also extracted primarily for supply into aggregates markets.

(128) QPANI also questions the exemption for materials which consist 'mainly' of coal, lignite, slate or shale. According to QPANI it would be more simple and consistent if a simple distinction were made between materials used for aggregates purposes, on the one hand, and those used for non-aggregates purposes, on the other. Materials used for aggregates purposes should be subject to the AGL and materials used for non-aggregates purposes should not be subject to it.

(129) QPANI maintains that the AGL has led to environmental damage due to the possibility to transport farther exempt materials.

(130) QPANI submits that in Northern Ireland there have been hundreds of thousands of tonnes of shale imported from Donegal, in Ireland. Shale from Ireland is sold in construction markets across the whole of Northern Ireland. Construction projects along the border with the Ireland have used exempt aggregates from Ireland classified as shale.

(131) QPANI further makes reference to stone that is described as shale and, thus, unduly benefits from the exemption.

(k) *Comments from the UK authorities*

(132) The UK authorities maintain their position that the exemptions and reliefs under investigation do not give rise to State aid. In particular, they submit that the distinctions made by the levy are justified by the nature or general scheme of the tax system and therefore do not satisfy the condition of selectivity.

(133) The UK authorities acknowledge the description of aggregates as included in recital 8 of the Opening Decision. Furthermore, they agree with the logic of the AGL as described in recital 67 of the Opening Decision.

([42]) No such evidence has been submitted to the Commission.
([43]) See footnote 42.
([44]) A copy of the e-mail has been submitted to the Commission.

(134) The UK authorities mention that the General Court observed in paragraph 55 of its judgment of 7 March 2012: 'the normal taxation principle underlying the aggregates levy is based solely on the notion of the commercial exploitation in the United Kingdom of a material that is taxable as an "aggregate"'. The UK authorities maintain that since the AGL is not intended to tax rock, sand, or gravel exploited for use in industrial or agricultural processes, any levy paid on materials used for such non-aggregate purposes is recoverable as a tax credit. Following the same logic, rock, sand or gravel which is extracted, but not commercially exploited (as defined in the legislation) falls outside the scope of the levy.

(135) The United Kingdom, quoting the General Court's judgment, explained that the AGL's objective: '… essentially entails the promotion in the construction industry of the use of aggregates which are the by-products of or waste from certain processes (also known as "secondary" aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as "primary" aggregates), which are non-renewable natural resources, and thereby limiting the damage to the environment associated with that process of extraction ("the aim of shifting demand" or "the environmental objective of the AGL").'

(136) The UK authorities maintain that the logic of the tax was set out clearly from the beginning in the Regulatory Impact Assessment: 'The main objective of the Government's chosen option would be to reduce the environmental costs of quarrying that are imposed on individuals and firms in society more generally, and to encourage recycling.'

(137) The UK authorities claim that the AGL seeks to achieve its environmental objective in two distinct, but interconnected ways. First, the imposition of the levy helps to internalise some of the damage caused by the extraction and transportation of aggregate. The levy thus leads to a decrease in demand for freshly extracted aggregate as costs increase. Secondly, exemptions and reliefs are granted for waste and recycled materials in order to encourage a shift in demand from freshly extracted aggregate to such materials, while not discouraging the production of non-aggregate material. For the achievement of the environmental objective of the AGL, it was designed to ensure that there are economically attractive alternatives to freshly extracted, taxable aggregate.

(138) The UK authorities maintain that, through its exemptions, the AGL aims to encourage the use of recycled or by-product material (which arises during a process not intended to produce aggregate), so as to reduce the demand for virgin aggregate and thereby reduce the environmental damage associated with aggregates quarrying. The derogations from the scope of the tax may fall into two categories: recycled aggregate and unavoidable waste by-products. The latter can be defined as material which is commercially exploited in the United Kingdom and used as construction aggregate, but which arises as an unavoidable consequence of a process which is not carried out deliberately to produce aggregate. At their turn such products fall into two categories: (a) those materials which arise unavoidably from the extraction of a non-aggregate mineral; or (b) those which arise unavoidably from a digging or dredging process not intended to extract any material for commercial exploitation.

(139) The UK authorities maintain that those materials which are extracted for commercial exploitation as aggregate, or which arise as by-products from a process which is intended to produce aggregate for commercial exploitation, are in a different factual situation to the exempted materials.

(140) The UK authorities maintain that, in accordance with the derogations described above, the exemptions from the levy distinguish between waste materials that arise as the by-product of the extraction of a non-aggregate mineral, which are exempt, and waste materials that are the by-product of the extraction of aggregate (such as waste from limestone), which remain subject to the tax. The distinction, in their view, stems from the objective of discouraging the extraction of limestone for aggregate whilst not discouraging the production of non- aggregate material. The AGL discourages the extraction of aggregate from natural rock while encouraging the use of alternative supplies of aggregate.

(141) The UK authorities submit that the exemptions from the tax are crucial for achieving the environmental purpose of the AGL as they reduce the damage created by fresh quarrying. They maintain it is the price difference between exempt and taxed materials which shifts demand from fresh quarrying. The exemptions are consistent with the environmental objective of the AGL in so far as the use of exempt materials ultimately reduces demand for the extraction of fresh aggregate and the environmental harm associated with it.

(142) The UK authorities maintain that there are many examples of exempted materials replacing premium quality aggregates. For example, the construction of the 2012 Olympic Park required over a million tonnes of aggregate fill materials. By-products of china clay production from Cornwall were used alongside recycled aggregates in place of premium aggregates such as freshly quarried limestone or granite. Slate waste from a […] (*) slate quarry was used as pipe bedding in the […]. This crushed slate was used in place of other crushed rock aggregate. Slate by-product from the same quarry was also used in construction at […] in place of premium quality aggregate.

(143) The UK authorities show that the number of exempt quarries has not increased after the introduction of the AGL as shown in the table below which contains the number of active quarries at a certain point in time:

	2001	2002	2003	2004	2005	2006
Ball clay	20	20	22	18	18	18
China clay	17	17	17	17	15	15
Limestone	348	348	359	336	340	319
Igneous & metamorphic rock	211	211	210	204	213	199
Slate	43	43	44	43	40	35
Clay & shale	177	177	180	172	169	172

	2007	2008	2009	2010	2011	2012
Ball clay	18	18	18	18	18	18
China clay	13	12	16	17	16	15
Limestone	338	335	324	331	317	322
Igneous & metamorphic rock	208	203	207	195	204	191
Slate	36	37	32	33	33	32
Clay & shale	175	165	156	159	155	155

(144) In 2009, crushed rock accounted for 59,4 % of primary aggregate sales in the United Kingdom. The remainder of such sales concerned sand and gravel. Limestone was by far the most important source of crushed rock aggregate, accounting for 66 % of the total, followed by igneous rock such as granite (24 %) and sandstone (9 %). Limestone, igneous rock and sandstone all have other uses, e.g. as building stones, or in the case of limestone, as industrial lime.

(145) In 2012, 1 tonne of limestone aggregate would sell for GBP 7,16 to GBP 11,70 per tonne. 1 tonne of granite would sell for GBP 6,12 to GBP 12,82 per tonne. 1 tonne of slate aggregate would sell for between GBP 2 and GBP 8 per tonne.

(*) Business secret

(146) As regards decorative aggregates, the UK authorities jointly with the BAA submitted information that they are an atypical use of aggregates. Those used in landscaping are used in small quantities and chosen based on their visual properties, e.g. colour and shape, with construction properties such as strength being a minor consideration, unlike for other aggregate uses. Given the small quantities involved, decorative aggregates form a small part of the market demand for aggregates in the United Kingdom.

5.5. *ASSESSMENT OF COMMENTS RECEIVED*

(147) The Commission already concluded in the Opening Decision that the normal taxation principle of the AGL can be summarised as being the taxation of rock, gravel and sand freshly/deliberately extracted for being used as aggregates and subjected to commercial exploitation within the United Kingdom on or after 1 April 2002.

(148) In addition to the comments made by the UK authorities above as regards the tax principle underpinning the AGL, the Commission makes the following observations.

(149) Several third parties commented that the AGL does not treat materials in a consistent manner because by-products from other exempted materials (rock used to produce stone with one or more flat surfaces (hereafter referred to as 'cut stone'), lime), high PSV rock, armour rock for sea defences, walling rock and by-products/waste from extraction of primary high quality aggregates are not exempted. They would allegedly be in the same legal and factual situation as currently exempted by-products of non-aggregate materials or as materials having specialised uses that are not taxed.

(150) The Commission itself raised the question in the Opening Decision as to why it is considered justified to grant exemptions for by-products of ball clay, china clay, coal, lignite, shale and slate but not for by-products of lime for agricultural use and cut stone.

5.5.1. TAXATION OF BY-PRODUCTS OF CUT-STONE AND LIME EXTRACTION

(151) Following receipt of extensive information from third parties and from the UK authorities, the Commission notes that waste or by-products from the extraction of cut stone and lime consists of the same type of rock as the cut-stone and lime: (i) waste from the extraction of limestone used for producing lime is likely to consist also of limestone, and (ii) waste arising from the extraction of rock to produce cut stone is likely to consist largely of the chippings of the same type of rock which is being cut.

(152) The exemptions from the AGL distinguish between waste materials that arise as the by-product of the material extracted not for aggregate use (such as waste from china and ball clay, coal, lignite and slate extraction), which are exempt, and waste materials that are the by-product of the deliberate extraction of material for an aggregate use (such as waste from limestone), which remain subject to the tax.

(153) This tax distinction stems from the objective of discouraging the fresh extraction of limestone, granite, sandstone, etc., for aggregate use while not affecting the production of non-aggregate material.

(154) As described by the UK authorities, limestone, sandstone and granite are the most common materials extracted for aggregates use. An AGL exemption of by-products of cut stone or of limestone used to produce lime would in fact at least maintain the level if not encourage the fresh extraction of these materials.

(155) Moreover, there is no additional (processing) costs for obtaining cut stone and lime from the main extracted materials. This is unlike, for example, ball clay and china clay extraction where the separation of these materials from the waste is very costly.

(156) The UK authorities explained that both the stone to be cut and the limestone used for obtaining lime are deliberately extracted for use as aggregates. Also, their by-products and waste may be sold on their own even without the main material as they make good quality material for aggregates use. As proof of this, the UK authorities submitted pricing information showing that, indeed, the prices of the lime and cut-stone are in the majority of cases not much higher than the prices of their respective by-products. The cost of limestone for lime is around GBP 12,50 to GBP 19,50 per tonne, whereas the price of its by-product is GBP 7,16 to GBP 11,70 per

tonne. Igneous rock (including granite), which is also used to produce cut stone, costs around GBP 5,51 to GBP 12,91 per tonne, whereas its by-product sells for around GBP 6,12 to GBP 12,82 per tonne. This would mean that if there is no demand for the high quality specialised product, the quarry would still proceed with the fresh extraction as it makes economic sense to sell the freshly extracted product and its by product for aggregate use. It cannot be excluded that the exemption of by-products would thus encourage additional fresh quarrying and thus would undermine the AGL's environmental logic.

(157) Moreover, there is no objective way to distinguish between limestone as a by-product of agricultural lime production and limestone quarried specifically for use as aggregate. The same is applicable to granite and sandstone and to by-products of cut stone. Thus these freshly extracted materials and their by-products are interchangeable and thus the quarry operator can decide depending on the demand to sell both for the same 'aggregates use'.

(158) On the basis of the considerations set out in recitals 151 to 157 above, the Commission notes that the by-products of the extraction of lime and cut stone are not in a different factual and legal situations as the freshly extracted products. In addition, any possible exemption for the spoil arising from extraction of limestone/rock used for cut stone or for other purposes than aggregates would only serve to encourage increased extraction of fresh rock and limestone, and would not contribute to the shift of demand.

5.5.2. HIGH PSV ROCK, ARMOUR ROCK FOR SEA DEFENCES, WALLING ROCK, PRIMARY HIGH QUALITY AGGREGATES AND THEIR BY-PRODUCTS/WASTE

(159) Materials used for high PSV rock, armour rock, walling stone and primary high quality aggregates represent indeed either specialised uses of the respective materials, or uses where they cannot be replaced by recycled aggregates or by waste from materials that are not subject to the tax.

(160) However all the materials used for high PSV rock, armour rock, walling stone and primary high quality aggregates and their by-products are of the same rock. For example armour rock is produced from the same rock as the smaller aggregates chippings that result as by-products.

(161) These rocks are in general suitable for aggregates use and the quarry operators have a choice as to how to sell or exploit the given rock in accordance with demand.

(162) For the reasons explained in recitals 151 to 157 above as regards by-products of cut stone and of lime, the Commission cannot exclude that an exemption for high PSV rock, armour rock for sea defences, walling rock, primary high quality aggregates and their by-products/waste, would encourage the extraction of these materials for aggregates purposes.

(163) As regards the fact that several interested parties questioned the logic of the AGL in view of the fact that high PSV and armour rock are taxed whereas clay for flood defences or materials for other specialist uses are not taxed, the UK authorities jointly with the BAA submitted information that PSV (is a measure of the resistance of an aggregate to polishing; aggregates with a high PSV are used in a bituminous mixture laid on the surface of roads to give a high level of skid resistance. Aggregates with the highest PSV are used in locations such as bends and braking zones, and are specified for their PSV and aggregate abrasion value (AAV). These are properties that are inherent in the rock deposits and enhanced by the manufacturing process. The materials are still aggregate and this use is classified as an aggregate use for the purpose of the AGL.

(164) Armour rock is used to protect the United Kingdom shorelines from erosion. The requirements of the specification depend of the specific severity of the marine environments. Qualities that are specified include density and aggregate abrasion value. It is classified as an aggregate use for the purpose of the AGL as it is used for strength and bulk.

(165) Moreover, whether a material used for a certain purpose is interchangeable or not does not affect the logic of the AGL and the exemptions granted for other materials. Indeed, the Commission notes that there the AGL applies to a variety of different uses that are not interchangeable. However, as long as such materials can and are widely used as aggregates and their use as aggregates makes economic sense, an exemption for such materials even for certain uses would undermine the objective of the AGL.

(166) Numerous interested parties point to the fact that exempted aggregates replace secondary aggregate products and not the higher grade products. The Commission notes, firstly, that this consideration does not cast any doubt over the fact that the AGL is achieving its environmental scope as the exempted materials which are unavoidable by-products of material extracted for a non-aggregate use are replacing freshly extracted aggregates. It does not matter if they replace higher grade or lower grade aggregates as long as fresh extraction is diminished. Moreover, the Commission notes that on occasion exempted materials could even replace higher grade aggregates as described by the UK authorities in recital 142.

(167) The Commission acknowledges the problems with implementing the AGL and its exemptions based on the geology of the materials. However, the Commission also notes that it would have been more difficult to base the exemptions on the uses of the materials as this might lead to difficulties in enforcement and leave more room for abuse. Moreover, it appears that the UK authorities have obtained the Report as support for the implementation of the AGL and follow the definitions and tests for the material provided therein. The BAA themselves acknowledged that the UK authorities use an expert geologist to determine the materials produced by quarries.

(168) As regards the exclusion of clay and shale used for ceramic products from the suspension of the AGL, the Commission notes that this is an exempt industrial process which has already been considered in the Opening Decision and found not to constitute State aid.

(169) As regards the content of the *Cornish Building Stone and Slate Guide 2007*, submitted by the BAA, the Commission notes that it cannot be relied upon as an accurate source of information for a comprehensive overview of all products of a quarry. It is a guide made for promotional purposes where quarries advertise their products addressed to the construction industry. The Commission, thus, considers that the quarries appearing in the *Cornish Building Stone and Slate Guide 2007* would have presented products in line with their marketing strategy towards the construction industry. The UK authorities mentioned that they allow quarries to advertise their products as they wish regardless of the geological composition of the respective materials and do not consider such promotional descriptions as relevant for the qualification of materials for the purposes of the AGL.

(170) It follows that the taxation of high PSV rock, armour rock for sea defences, walling rock, primary high quality aggregates and their by-products/waste falls within the normal taxation principle of AGL and is justified by the objective pursued.

5.5.3. CONCLUSION ON THE NORMAL TAXATION UNDER THE AGL AND OBJECTIVE OF THE AGL

(171) The Commission considers that the comments received by all interested parties do not provide reasons to depart from its findings in the Opening Decision as regards normal taxation principle under the AGL and the objective of the AGL.

(172) The normal taxation principle of the AGL is that rock, gravel and sand defined as aggregates pursuant to Section 17(1) are to be taxed when they are subjected to commercial exploitation as defined in Section 19 within the United Kingdom on or after 1 April 2002 ([45]).

(173) In accordance with the description that had been provided by the UK authorities prior to the Opening Decision and as confirmed by the preparatory works of the AGL ([46]), the Commission found in the Opening Decision ([47]) that aggregates can generally be described as corresponding to granular or particulate materials which because of their physical and chemically inert properties are suitable for use on their own or with the addition of cement, lime or bituminous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill ('aggregates use').

([45]) The GC in its judgment T-210/12 RENV has ruled that 'the normal taxation principle underlying the AGL is based solely on the notion of the commercial exploitation in the United Kingdom of a material that is taxable as an "aggregate"'. The Commission considers that so defined normal taxation principle requires further establishment of when 'the material is "taxable" as an aggregate'. Given that Section 17(2) of Act 2001 does not provide a genuine definition of 'taxable aggregates' but defines them as aggregates which are not exempted and the aggregates described in points (b)-(d), the normal taxation principle under the AGL also as defined by the GC must inevitably depend on the determination when 'a material is used as aggregate'.

([46]) See footnote 39.

([47]) Recital 58 and 59 of the Opening Decision.

(174) All interested parties and the UK authorities acknowledged the term of 'aggregates use' in their submissions and presented their comments accordingly. The BAA has actually submitted comments aiming to show that the AGL lacks logic as certain materials that do not fulfil this definition are taxed. The Commission has addressed in detail these comments above in recitals 151-158 and 159-165.

(175) Thus, in other words, the normal taxation principle of AGL is the taxation of rock, gravel or sand when extracted for 'aggregates use'/extracted for commercial exploitation as aggregate as described above.

(176) The above description is also consistent with the objective of the AGL which is to make the extraction of aggregates more efficient by internalising the environmental costs of that activity. As also confirmed by the General Court ([48]), the objective of the AGL is to promote in the construction industry the use of aggregates which are the by-products of or waste from certain processes (also known as 'secondary' aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as 'primary' aggregates), which are non-renewables natural resources, and thereby limiting the damage to the environment associated with that process of extraction (the aim of 'shifting demand').

5.6. *TAX DIFFERENTIATIONS*

(177) The Finance Act 2001 initially establishes a broad basis for the imposition of the AGL. The scope of this imposition is then narrowed down through exclusions and exemptions. In addition, the Finance Act 2001 also provides for a certain number of tax reliefs. The Commission will examine again whether the exclusions, exemptions and tax reliefs as regards to which it raised doubts in the Opening Decision are in line with the normal taxation principles in the light of the objective of the AGL.

(178) For the purpose of assessing the tax differentiations under the AGL, the reference framework/normal taxation principle used by the Commission is the imposition of the AGL on materials that are commercially exploited in the United Kingdom as aggregates ([49]). As described above in recital 173, the 'use as aggregates' is intrinsically linked to the commercial exploitation of rock, gravel and sand for construction purposes, that is their use as material or support in the construction or improvement of any structure (including roads and paths, the way on which any railway track is or is to be laid and embankments) or mixing them as part of the process of producing mortar, concrete, tarmacadam, coasted roadstone or any similar construction material ([50]).

(179) In addition, the notion of aggregates use, as defined above, is used by the Finance Act 2001 in Section 30(1)(d) of the Finance Act 2001 which provide a right for a person to ask for a tax credit if 'the aggregate that has been subject to the AGL is disposed of in such manner not constituting its use for construction purposes as may be prescribed'.

(180) If an exempted material is extracted for aggregates use or is subjected to the commercial exploitation for construction purposes as described above it should fall within normal taxation under the AGL as it is in a comparable factual and legal situation as the taxed materials and its exemption could be justified only in light of the inherent objective pursued by the AGL.

(181) As regards the exemptions under investigation concerning by-products, waste, or spoil of other materials or processes, the Commission will maintain the assessment criteria used in the Opening Decision. The Commission will take into account in its assessment whether the respective waste, spoil or by-product unavoidably results from an activity that is unrelated to deliberate extraction of materials for aggregates use, i.e. either from the extraction of a material that is not deliberately extracted for aggregates use or from a process that is not related to the extraction of aggregates. The extraction of the main material not for aggregates use provides an indication as to whether the exemption of respective waste, spoil or by-product can contribute to the objective underlying the AGL.

(182) For by–products, waste or spoils resulting from the extraction of material for aggregates use, the Commission will assess whether their exemption may lead to a decrease of the fresh extraction of materials for aggregates use and thus contribute to the objective of AGL.

([48]) See T-210/02 RENV — *British Aggregates* v *Commission*, ECLI:EU:T:2012:110, Paragraph 64.
([49]) See T-210/02 RENV — *British Aggregates* v *Commission*, ECLI:EU:T:2012:110, Paragraph 55.
([50]) See Section 48 (2) of the Finance Act 2001.

(183) The abovementioned assessment criteria are consistent with the normal taxation principles of the AGL in determining whether the exempted materials are in the same factual and legal situation as the taxed materials and take into account the considerations made by the UK authorities that the AGL should not affect processes unrelated to the extraction for aggregates use.

5.6.1. EXCLUSION OF AND TAX RELIEF FOR CERTAIN MINERALS (SECTION 18(2)(b) ([51]) AND SECTION 30(1)(b) ([52]) IN SO FAR AS IT RELATES TO AN EXEMPT PROCESS THAT PROVIDES FOR MATERIALS THAT ARE USED AS AGGREGATES

(184) In the context of their submissions prior to the Opening Decision, the UK authorities had indicated that neither of the substances exempted under Section 18 ([53]) are quarried or mined for use as aggregates.

(185) As long as those minerals are not used to provide bulk in the construction sector, the Commission considered that the exclusion of those minerals from the scope of the AGL was in line with its normal taxation principles ([54]).

(186) The Commission concluded in recital 74 of the Opening Decision that in so far as the minerals concerned are not used as aggregates, their exemption/exclusion from the AGL does not lead to a selective advantage within the meaning of Article 107(1) TFEU.

(187) However, it found that some of those minerals are sometimes also extracted to serve as aggregates. For instance, vermiculite and perlite serve to produce lightweight manufactured aggregates ([55]). The exclusion of these minerals, in so far as they are extracted to produce lightweight aggregates and are used as such, was considered not to be in line with the normal taxation principles of the AGL. It was therefore not clear to the Commission why the extraction of those minerals would not be in a comparable situation as the extraction of other taxed aggregates.

(188) As the Commission was lacking relevant information necessary for its assessment, it expressed doubts as to whether a general exemption of those materials, which does not seem to take into account their use as aggregates, is in line with the normal taxation principles underpinning the AGL.

(189) The UK authorities provided a list of uses of each of the materials listed in Section 18(3) of the Finance Act 2001 mentioning whether they are or could be used as aggregates. In accordance with such list the only materials that are susceptible for use as aggregate of the materials listed in Section 18(3) of the Finance Act 2001 are perlite, pumice and vermiculite.

(190) As the rest of the materials listed in Section 18(3) of the Finance Act 2001 are not used as aggregates or are not susceptible for use as aggregates they are not in the same legal and factual situation as taxable aggregates.

(191) According to the UK authorities, perlite may be found in Northern Ireland, but extraction ceased before the aggregates levy was introduced. There continue to be imports into the United Kingdom of this material, which is useful for its insulating properties and its light weight after processing.

([51]) Section 18(2)(b): any process by which a relevant substance is extracted or otherwise separated (whether as part of the process of winning it from any land or otherwise) from any aggregate. Section 18(3) lists the relevant substances as being (a) anhydrite; (b) ball clay; (c) barytes; (e) china clay; (f) feldspar; (g) fireclay; (i) fluorspar; (j) fuller's earth; (k) gems and semi-precious stones; (l) gypsum; (m) any metal or the ore of any metal; (n) muscovite; (o) perlite; (p) potash; (q) pumice; (r) rock phosphates; (s) sodium chloride; (t) talc; (u) vermiculite. Subsections (3)(d) and (h) of Section 18 were omitted retroactively as of 1 April 2002 by changes introduced by the Finance Act 2002.

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

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

([54]) Recital 73 of the Opening Decision.

([55]) See *Glossary of Building and Civil Engineering Terms*, British Standards Institution, Blackwell Scientific Publications, 1993, 630-3007 and 630-3013.

(192) The UK authorities maintain that perlite may be used in the production of lightweight construction materials (plasters, mortars, insulation, ceiling tiles) and as a soil conditioner. It expands greatly when heated and is not, therefore, a natural aggregate. Perlite can be used as a lightweight aggregate, e.g. in concrete or Portland cement. However, before it can be used as such, it must be subjected to a physical transformation that goes beyond simple crushing and screening. Its particular properties would also preclude its substitution by recycled material or by-product from non-aggregate production.

(193) According to the UK authorities, pumice is not known to occur naturally in the United Kingdom, but is imported. Its cellular nature gives it a low density that enables it to float on water. It can be used as an abrasive and in the production of lightweight construction materials. It is much lighter than taxable aggregate material.

(194) The UK authorities maintain that there is some evidence that pumice is used in the United Kingdom as a lightweight aggregate in construction, lightweight concrete, precast concrete and concrete block manufacture. Its use in these circumstances results from its particularly low density. As with perlite and vermiculite, its particular properties and uses would preclude substitution by other recycled material or by-product from non-aggregate production.

(195) The Commission has considered whether pumice should be compared to high PSV rock or armour rock, which are also specialised products that cannot be substituted with exempt material. However, pumice appears different from high PSV rock and armour rock as, when it is used as aggregate, it can only be used in this specialised scope, as lightweight aggregate. On the other hand, the materials used to produce high SPV stone and armour rock can and are widely used as aggregates when they are not used in these particular specialised circumstances.

(196) Vermiculite is, according to the UK authorities, a form of mica that, like perlite, has the unusual property that it expands greatly when heated. It is not known to occur in the United Kingdom, although there are imports.

(197) The UK authorities maintain that like perlite, vermiculite may be used for insulation, as a lightweight aggregate for plaster and concrete, and as a soil conditioner. However, before it can be used as such it must be subjected to a physical transformation that goes beyond simple crushing and screening. Its particular properties would also preclude its substitution by recycled material or by-product from non-aggregate production.

(198) According to the UK authorities, imported quantities of such products are as follows, with data for perlite and vermiculite recorded together in import statistics since 2010:

	2008	2009	2010	2011	2012
Perlite (tonnes)	45 064	36 315	58 456	98 437	66 298
Vermiculite (tonnes)	29 200	25 515			
Pumice (tonnes)	2 259	1 668	2 062	2 067	1 255

(199) The UK authorities claim that imported pumice costs on average GBP 408/tonne in 2012, and vermiculite and perlite cost on average GBP 128/tonne. These high prices reflect the specialist applications of these minerals, and indicate that they would not be used as a substitute for aggregate extracted in the United Kingdom.

(200) The UK authorities maintain that perlite, pumice and vermiculite are not exploited commercially as aggregate in the United Kingdom and are not in the same legal and factual situation as taxable aggregate, in the light of the environmental objective pursued by the AGL.

(201) The Commission considers that since perlite and vermiculite undergo a physical transformation that goes beyond simple crushing and screening for them to be used as aggregates, they are not comparable to taxable materials which are not subject to such transformations.

(202) The natural properties of perlite, pumice and vermiculite differentiate them from the rest of the aggregates. Moreover, all three materials are not natural aggregates, but serve as specialised lightweight aggregates that can neither be replaced, nor replace other materials. Their price reflects their specialist use as well as the fact that they could not possibly substitute aggregates extracted in the United Kingdom.

(203) In addition, none of these materials is currently extracted in the United Kingdom as extraction of perlite ceased before the introduction of the AGL.

(204) The Commission has not received any comments from interested parties as regards to these materials.

(205) The Commission concludes that perlite, pumice and vermiculite are not in the same legal and factual situation as taxable aggregate in light of the objective of the AGL.

(206) The Commission thus finds that the exclusion of and tax relief for certain minerals as provided by Section 18(2)(b) and Section 30(1)(b) of the Finance Act 2001 does not entail a selective advantage to these materials.

5.6.2. EXEMPTION OF MATERIAL CONSISTING WHOLLY OR MAINLY OF, OR BEING PART OF ANYTHING CONSISTING OF COAL, LIGNITE, SLATE OR SHALE (SECTION 17(4)(a)) IN SO FAR AS THE EXEMPTED MATERIAL CONSIST WHOLLY OF COAL, LIGNITE, SHALE, SLATE THAT IS USED AS AGGREGATE OR CONSIST MAINLY OF COAL, LIGNITE, SHALE AND SLATE

(207) The Commission noted that all those materials qualify as rock and thus are aggregates within the meaning of Section 17(1) of the Act 2001.

(208) As far as slate and shale are concerned, they are often cut with one or more flat surfaces. In such case, they would also benefit from a relief from the AGL by virtue of Section 18(2)(a) (exempt process of cutting stone). The tax credit for materials to which an exempt process applied is in line with the normal taxation principles underpinning the AGL.

(209) In the context of their submissions prior to the Opening Decision, the UK authorities had explained, that coal, lignite, slate or shale are not primarily quarried for use as aggregates. Slate is traditionally extracted for use as a specialist building material (e.g. as roofing or flooring). In some regions its use is encouraged for heritage reasons. Shale is a fissile mineral with a high clay content. As natural clay deposits become depleted, shale is increasingly used in the manufacture of bricks and tiles. It can also be an ingredient in the production of cement. Coal is a sedimentary rock composed primarily of carbon. Lignite has a much lower carbon content than coal and a very high moisture content. Both are used as energy products.

(210) The Commission concluded that excluding those materials when they are used for other purposes than as aggregates was in line with the normal taxation principle underpinning the AGL.

(211) The Commission noted ([56]) that, according to evidence produced by the BAA and attached to its Reply submitted to the General Court in Case T-210/02, slate and shale are used as aggregates ([57]). The same did not apply for coal and lignite.

([56]) Recital 83 of the Opening Decision.

([57]) Extracts (dated 30 October 2002) from the website of Alfred McAlpine
Published at: http://www.amslate.com/applications/ima/ima.sbtml; Extracts from 'Construction Raw Materials Policy and Supply Practices in Northwestern Europe — Facts and Figures — England, Scotland and Wales (Great Britain)', British Geological Survey Commissioned Report CR/02/082N commissioned by the Road and Hydraulic Engineering Institute of the Ministry of Public Works and Water Management of the Netherlands, p. 50; Document by Geoff Topham of Aggregate Industries concerning quarrying at Holme Park Quarry, 19 June 2002.

(212) The Commission concluded in recital 84 of the Opening Decision that a general exemption of shale and slate, even when they are used as aggregates or bulk for construction purposes, did not appear to be in line with the normal taxation principles underpinning the AGL and did not seem to result from the nature and logic of the AGL.

(213) The Commission also considered in recital 85 of the Opening Decision that the argument that shale and slate would not in most instances be used as aggregates did not justify their general exemption from AGL. It is precisely because it was difficult to determine in advance to what use the materials would serve that the United Kingdom chose to grant a tax credit in case some of the materials subject to tax would be used for industrial and agricultural purposes. The Commission considered that, rather than granting an outright exemption, it would have been more appropriate to extend tax relief also to shale and slate.

(214) The Commission also expressed doubts as regards the justification for extending the exemption to material that is mainly (i.e. in excess of 50 %) made of coal, lignite, shale or slate.

(215) The Commission concluded that a general exemption of those materials, in particular slate and shale, even when they are used as aggregates, i.e. bulk for construction purposes, would not be in line with the normal taxation principles underpinning the AGL.

(216) Following the publication of the Opening Decision the Commission received numerous submissions from interested parties in this regard.

5.6.2.1. ***Slate***

(a) *Comments received by the BAA on 15 September 2014*

(217) The BAA is in agreement with the UK authorities as regards the uses of slate by-products as aggregate, including that it is an alternative to freshly extracted aggregate in the manufacture of concrete and medium-strength engineering applications.

(218) The BAA claims that slate, shale (and clay) have always (and, therefore, even before the introduction of the AGL) been used 'as aggregate' when suitable for the specific purpose and the material was available at the right price. For example, some 230 000 tonnes of slate aggregate was used to construct the A55 Bangor bypass road in 1980/1981 and 1990/1991.

(219) The BAA, referring to a statement of specialist geologist Dr Rachel Hardie, maintains that there are quarries of mixed geology where deposits of rock qualifying as clay or slate are interbedded with other rock. According to that statement, there are quarries in Scotland and in other parts of the United Kingdom where the bulk of the aggregates produced is subject to the AGL, but where rock strata contain a proportion of exempt rock types. The products of these quarries have included stockpiles of, wholly or mainly, exempt rock types such as shale or slate ([58]).

(220) The BAA maintains that there are a number of slate quarries where the material does not have enough slaty cleavage for construction tiles, but where the material still qualifies as slate. The BAA has provided a list of seven slate quarries extracted from the British Geological Survey ('BGS') *Directory of Mines and Quarries 2010* that are mentioned as extracting stone for aggregates use only, such as construction aggregate, hedging stone, uncut building stone and quarries which produce only a small amount of cut building stone. The BAA claims that these quarries are not different than granite or sandstone quarries which also produce building stone. The products of both types of quarries are of the same nature; however the slate quarries are exempt while the others are not.

(221) As regards the nature of quarries exploiting taxed rock, such as granite, the BAA maintains that rock quarries sell varying amounts of uncut block stone. They claim that, if the quarry has a stone which is naturally 'blocky' and easy to trim, such a quarry will likely sell a quantity of this product, subject to local market demands (e.g. residential, garden centres) and the colour of the block stone extracted.

([58]) No examples of quarries were provided.

(222) The BAA provided information as regards the sales of slate and the proportion in the sales of roofing tiles versus fill for other uses, i.e. aggregates uses. The BAA also provided information regarding limestone quarries. They show that sales of agricultural lime greatly outweigh sales of the by-product aggregates. In 2013, the ratio was 4,2:1. The BAA maintains that this ratio may be explained by the fact that the AGL has made the sale of by-product limestone uncompetitive. The BAA provided selling prices for agricultural lime from one quarry (the ex-works price for export varies between GBP 5,02 and GBP 5,95 per tonne) and for by-product aggregate (GBP 5 to GBP 8,5 per tonne which includes the AGL). The BAA also provided prices from another quarry for high-purity calcium carbonate powders (GBP 25 to GBP 55 per tonne ex-works and up to GBP 1 000 per tonne for certain specialised products), for class grade limestone used for glass manufacture (GBP 23 per tonne ex-works), for agricultural lime (GBP 11 per tonne) and for the waste/by-product materials (GBP 2 to GBP 7,5 per tonne excluding the AGL).

(223) The BAA maintains that the slate prices initially submitted by the UK authorities are too high and do not reflect the market value. They claim that slate by-products prices are of GBP 3 having fallen from GBP 6. The price for imported roofing slate in 2010 would have been of GBP 390 per tonne and for exported roofing slate of GBP 618 per tonne.

(b) *Comments received from Welsh Slate Ltd ('Welsh Slate') on 20 December 2013*

(224) Currently, United Kingdom produces less than 10 % roofing slate of the United Kingdom demand for natural slate.

(225) The principal activity of Welsh Slate is the manufacture and sale of roofing slate. They claim that, roofing slate represents some 65 % of their revenues while crushed slate only 30 % and the rest being made of architectural products and other products. Quarrying of crushed slate is required to access the material for roofing slate. The resulting by-products from roofing slate extraction represent a considerable per cent of the production (currently 95 % of all extracted material).

(226) According to Welsh Slate, crushed slate is produced from the following sources: quarry waste (31 %), splitters waste (12 %), historic tips (31 %) and drill and blast (27 %). They maintain that the cost of production of slate aggregates is higher than the costs of a typical aggregate quarry. The cost of production of standard aggregate products, which exclude additional costs specific for this company, amount to GBP […] to GBP […] per tonne, meaning that the levy would […] cost. The aggregates are currently sold with prices between GBP […] and GBP […] per tonne. Roofing slate is sold at an average of GBP […] per tonne, while the upper value of roofing slate amounts to more than GBP […] per tonne.

(c) *Comments received from the BAA on 10 January 2014*

(227) The BAA submitted the *Cornish Building Stone and Slate Guide 2007* put together by the Cornwall County Council. It contains information about a series of quarries producing building material including slate quarries.

(d) *Comments received from Mineral Products Association on 2 January 2014*

(228) According to the Mineral Products Association, slate and shale are used as aggregates in the United Kingdom. While slate and shale supplied for aggregates purposes can be materials which are by-products of extraction for non-aggregates purposes, for example the extraction of slate for the production of roofing slate, these materials are also extracted primarily for supply into aggregates markets.

(e) *Comments received from Lantoom Quarry on 16 January 2014*

(229) The Lantoom Quarry submits that Cornwall County has large quantities of aggregate by-products arising from the slate and china clay industries. Currently there is a large surplus of these materials even though they are exempted from AGL. The markets are very price sensitive and no increase in price could be passed on to customers.

(230) According to their submission, the type of aggregates for which the Lantoom Quarry would have to pay the levy in case the exemption is found to be incompatible State aid is currently priced at approximately GBP 2 per tonne (the ex-works price varies between GBP 1,5 and GBP 3). This means that the levy would double the price.

(231) The Quarry submits that the AGL exemption has been helpful in stimulating the market for aggregates made of the exempted materials. They claim that, waste can make up to 75 % of the mineral extracted. The slate aggregates by-products of the quarry are sold only with a 30-mile radius of the quarry.

(232) According to the Lantoom Quarry, slate is not a very good material for aggregate use as it is softer and cannot be used to make concrete or bitmac.

(f) *Comments received from Burlington Slate Limited ('BSL') on 10 January 2014*

(233) The main business of BSL is the manufacture of dimensional slate products such as roofing, cladding, flooring, paving and architectural products.

(234) BSL considers that the exemptions for slate do not constitute State aid because they are justified by and are entirely consistent with the nature and logic of the environmental objectives of the AGL. Slate is not traditionally extracted for use as aggregate; rather, it is extracted for use as a building material in roofing, cladding, flooring, paving and is often used for heritage reasons in the conservation of historic buildings in the United Kingdom.

(235) BSL claims that spoil of slate is in a different factual situation compared with freshly extracted aggregates quarried specifically for their use as aggregates because aggregates resulting from the extraction of slate are a necessary and inevitable by-product of the processes by which dimensional slate products are produced.

(236) BSL considers that the exemptions act as an incentive for slate quarries to recycle waste material as aggregates. If slate quarries ceased re-cycling waste as aggregates, more waste and spoil from slate extraction would be discarded into landfill or tipped as spoil.

(237) According to BSL, the process of slate extraction is extremely costly given the physical depths which must be quarried, the adverse geological formations which are sometimes encountered and the engineering and geotechnical aspects of quarry design needed to ensure face stability in order to maintain a safe working environment. Slate is removed from the quarry in slabs ranging in size from approximately 1 metre × 0,5 metres to 3,5 metres × 1,5 metres with typical weights in the range of 500 kg to 12 tonnes per piece. The processing that takes place will depend on the nature of the product that is being made: roofing tiles, cladding, flooring or architectural products. Processing will typically involve initial cutting followed by splitting, application of a finish, further cutting or shaping. Around 50 % of BSL's sales of architectural slate products are exported from the United Kingdom.

(238) BSL shows that at each stage of the process, waste and scrap slate is an unavoidable by-product. BSL estimates that only around 4 % of extracted material is processed into finished dimensional products (which are typically used for roofing, paving or flooring tiles) which means that 96 % is waste. The re-cycling of waste and scrap slate into aggregates reduces the amount of waste material that BSL would have to send to landfill or to tip at the quarry. Re-cycling of part of the waste and scrap slate helps to off-set some of the costs of slate extraction, but such sales are no more than ancillary to the main activity of slate extraction for the production and sale of dimensional stone slate products.

(239) According to BSL, a slate quarry has no incentive to quarry just for aggregates as the cost of extraction is far greater and far more challenging (in an engineering sense) than at a typical aggregates quarry (which is a surface quarry) and it would not make sense commercially to quarry if the only material extracted was to be used as an aggregate.

(240) As per their submission, BSL obtained planning consent on the basis that it extracts stone as a source of local 'vernacular' building materials. An application to extract aggregate alone from its quarries would be very unlikely to be approved given their location within or close to the Lake District National Park.

(241) According to BSL the exemption for aggregates for slate quarrying has not let them extract more slate aggregates.

(242) BSL also operates two limestone quarries. It submits that the spoil from the extraction of slate can be distinguished from the material resulting from the extraction of limestone to produce lime because unlike slate, limestone is primarily quarried as a raw material for use as a construction aggregate and it is not economic to do anything other than quarry limestone from the surface whereas slate is a sedimentary rock which requires deeper quarrying. Limestone is more analogous to the types of non-exempted aggregate quarried purely for use as aggregates than slate. According to BSL, there are only a very limited number of mines where the quality of limestone might be such that it is worth quarrying for 'dimensional stones' (i.e. paving stones).

(g) *Comments received from Eunomia Research and Consulting Ltd ('Eunomia') on 17 January 2014*

(243) The comments of Eunomia have been sent on behalf of a consortium of United Kingdom secondary aggregates producers (slate, colliery spoil and incinerator bottom ash).

(244) The generation of material suitable only for use as aggregate is an unavoidable part of the process of extracting slate intended for roofing or other high value processes. The price obtained when used as aggregate is much lower and would not, by itself, be sufficient incentive to undertake extraction. Welsh Slate indicates that roofing slate sells at an average of GBP […]/tonne, with an upper value of GBP […] per tonne. By contrast, secondary aggregates sell for between GBP […] per tonne and GBP […] per tonne. Accordingly, the exemption has not led to any increase in the amount of primary extraction being undertaken, nor is extraction being encouraged by the existence of the exemption.

(245) The existence of waste slate tips created before the introduction of the AGL, would preclude the need for any additional slate quarrying for aggregate.

(246) Eunomia considers that if the exemption for slate were cancelled, the AGL would […] the post-extraction production costs of slate aggregates which amount to […] GBP to […] GBP.

(h) *Comments received from Wincilate Ltd ('Wincilate') received on 7 January 2014*

(247) Wincilate is a slate quarry that supports the exemption of slate from AGL. The quarry specifies that, in addition to their regular business, they crush slate from slate tips that have formed over 100 years ago. They consider the exemption remains necessary for the diminishing of waste tips and for replacing quarrying of primary aggregates.

(i) *Comments received from Torrington Stone on 17 January 2014*

(248) According to Torrington Stone, one of its quarries, having as primary product taxed gritstone, offers natural stone products such as walling stone, hedging stone, gambion stone. This taxed gritstone competes directly with slate quarries which offer exactly the same products. The walling stone is hand-picked and is uncut at the quarry, hence cannot benefit from an exemption from the AGL. The stone is cut on site by the stonemason, but the AGL would have already been paid.

(249) Torrington Stone maintain that, on the other hand, slate is naturally irregular in shape and has to be cut (sawn) to make good if only for bed width.

(j) *Comments received from Berwyn Slate on 9 January 2014*

(250) Berwyn Stale quarry produces finished slate slabs which create waste material as a by-product. Historically, since slate quarrying began 200 to 300 years ago, this waste was tipped near the quarry. According to its submission, the quarry is planning to process the waste into saleable aggregates. A cancellation of the AGL would prevent such plans from being put into practice.

(k) *Mineral Products Association Ltd received on 2 January 2014*

(251) The Association claims that the exemption should not apply to materials which consist mainly of coal, lignite, slate and shale in such materials are used in aggregates markets or for aggregates purposes.

(l) *Comments from the UK authorities*

(252) The UK authorities pointed to the fact that the General Court held in its judgment of 7 March 2012 in T-210/02 RENV that materials such as clay, slate, and shale satisfy, in principle, the normal taxation principle of the levy in that they constitute 'aggregates' within the meaning of the Finance Act 2001 (Section 71) and 'in so far as they are used and exploited commercially as such', are in a situation comparable to other taxed alternative aggregates (Section 72). According to the UK authorities, the General Court made it clear that the 'potential' inclusion of those materials within the scope of the levy 'depends only on their actual and established exploitation as aggregates'.

(253) The UK authorities maintain that there is no clear evidence, including the submissions of the BAA during the court proceedings, which shows that slate, shale, coal or lignite are being deliberately extracted for use as aggregate in the United Kingdom.

(254) As regards slate, the UK authorities submit that slate is a rock that can be split into thin sheets. It is used mainly for roofing, but also for decorative cladding and as monumental stone. It is produced in North Wales, the Lake District, Devon and Cornwall.

(255) According to the UK authorities, slate is exempt from AGL because high quality slate is quarried for use as roofing and flooring and for its decorative properties rather than for use as aggregate. These can include roofing slate, furnishings, architectural products (window sills and copings, kitchen and bathroom worktops, counters, fire surrounds, hearths, cladding, house signs, memorials and floor tiles) and ornaments (hereinafter referred to also collectively as 'specialised architectural products'). However, the slate chippings and trimmings that result from the extraction and shaping of high quality slate can be substituted for freshly extracted aggregates. The exemptions therefore also encourage the use of waste slate chippings, and any other associated by-product, providing a net environmental gain by reducing the environmental harms which would have resulted from additional aggregate quarrying.

(256) According to the UK authorities, the quarries offering slate aggregates, slate chippings, for sale for use as aggregate emphasize in their advertising their high quality slate products, such as roofing slate, worktops, hearths, flooring and memorial plaques, which are plainly the focus of the extraction activities ([59]).

(257) The UK authorities claim that slate is not well suited for aggregate use because it tends to form flat 'slabby' and uneven shapes rather than the cuboid shapes which are preferred in most aggregate applications. High quality slate is not used as aggregate because its physical and/or chemical properties make it unsuitable and it is sold for higher value purposes.

(258) The UK authorities estimated that each tonne of slate quarried produces 95 % waste chippings and about 5 % of slate suitable for high quality uses such as roofing tiles or cladding ([60]). Much of the rock in which high quality slate occurs possesses less perfect cleavage, making it unsuitable for cleaving into thin slates. The production of identical cut and cleaved slates from the higher quality material also generates large amounts of trimmings. As a result, large tips of slate waste made up of slate chippings are historically associated with sites where slate working has occurred. The UK authorities provide information from studies in this regard. They point to the fact that, the production of slate waste still exceeds the market for the mineral as aggregate and slate waste heaps are still formed. The production of slate has decreased since 2000 as roofing slate production has declined. Since the suspension of the AGL in April 2014, slate producers observed a decrease in demand for slate waste and more material was added to waste heaps.

([59]) See, for example, http://www.honister.com/; http://www.callywithquarry.co.uk/quarry
([60]) 'Survey of Arisings and Use of Secondary Materials as Aggregates in England and Wales in 2001' Symonds Group, November 2002

(259) According to the UK authorities, slate by-product can be used as a low-grade aggregate for engineering fill and as decorative aggregates, and with careful selection and crushing can comply with the base requirements for road construction ([61]). Although slate waste is not as strong as other aggregates it has been found to perform adequately in this basic role and is therefore suitable as an alternative to freshly extracted aggregate in the manufacture of concrete and medium-strength engineering applications. Some slate waste is also crushed into powder and granules for industrial use in the manufacture of roofing felt and bituminous paints. Through the exemption for slate, the levy encourages the use of these waste slate chippings, thereby reducing the damage to natural habitats and the visual damage caused by the spoil heaps. This would encourage projects such as the A55 Bangor bypass which the BAA cited.

(260) According to the UK authorities, since the suspension of certain levy exemptions in April 2014, […] have been forced to sell their waste slate at a loss of 3 % showing that without the exemption there would not be a market for slate waste.

(261) The UK authorities claim that, although only 5 % of the material extracted from slate quarrying is high-quality material, the relative value of suitably sized sheets of slate to be sold as roofing or floor tiles, or for cladding and other decorative purposes, justifies its extraction. High quality slate is sold for between GBP 727 and GBP 1 076 per tonne. The UK authorities have provided price of products from one slate producer which are as follows (GBP/tonne):

Year	2007	2008	2009	2010	2011	2012	2013	2014
[…] roofing	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Architectural	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

The UK authorities claim that another slate producer sold roofing slate with around GBP 700 per tonne. And their architectural slate products sell as follows:

Year	2008	2009	2010	2011	2012	2013
GBP per square metre	[…]	[…]	[…]	[…]	[…]	[…]

(262) According to the UK authorities the cost of producing slate by-products amounts to GBP 5,7 to GBP 6,5 per tonne ([62]). However the selling prices have varied over the years from up to GBP 7,36 per tonne to, the lowest price of GBP 4,10 per tonne. Another slate producer sold slate construction aggregates in a range of GBP 4,40 to GBP 6,42. The high value of good quality slate makes it the focus of activity at those sites where slate deposits exist. It would be economically irrational for any operator to quarry slate with the intention of selling it to be used as aggregate, rather than as a means to extract high quality slate.

(263) The UK authorities provided data extracted from the financial information of slate producers showing that the revenue from architectural products makes them the companies' primary product. The ratio of roofing slate to aggregate in terms of revenue varied over the years between 2,54 to 3,52.

(264) As regards the slate pricing information submitted by the BAA where pricing data for imports were used, the UK authorities show that UK architectural slate products and imported architectural slate products are different and compete on different markets than the imported products. Therefore, import pricing data would not be accurate for a price comparison.

([61]) Slate aggregate was used in place of premium quality aggregate on the A55 Bangor bypass road (using 150 000 tonnes of waste slate), and is widely used in North Wales for general fill and embankments.

([62]) […] estimates that the cost of producing slate aggregate is GBP 6,50 per tonne, out of which crushing cost is of approximately GBP 5 per tonne. […] estimated a cost of producing a tonne of slate aggregate of GBP 5,69.

(265) The UK authorities claim that decorative slate is produced as a by-product of quarrying high quality slate. It sells for around GBP 15 per tonne. Whilst higher than the sale price for construction fill, as shown above, it is still far lower than the price for roofing slate (in excess of GBP 200 per tonne). The price of decorative slate is comparable to that for other decorative aggregates available through retailers in the United Kingdom. The environmental logic of the exemption for slate still holds as the decorative slate is an unavoidable by-product of high quality slate production, whereas the decorative market is a premium market for those producing limestone or granite.

(266) The UK authorities maintain that it is consistent with the environmental objective of the AGL that slate and slate by-products are exempt from the levy in order to encourage the use of that alternative waste by-product as a substitute for freshly extracted aggregates.

(267) The UK authorities claim that, in the same manner as shale, it appears that, slate can be found in association with a variety of other rock types. They are frequently found interbedded with sandstone and/or limestone. The term 'mainly' is intended to allow for compounds which mostly, but not entirely, comprise the exempt material as this is how they naturally occur. When compounds consist mainly of shale or slate, their physical properties make them less suitable for use as aggregate than if they were mostly formed of materials more likely to be used as aggregate.

(268) The United Kingdom estimated that around 6,33 million tonnes of slate waste chippings were produced annually and that historic, usable stockpiles amounted to around 277 million tonnes. Of this, only 0,66 million tonnes were sold for use as aggregate before the introduction of the AGL. ([63]) The remainder was either used as back-fill or left to form waste heaps.

(269) The UK authorities submit that the existence of the exemption for slate by-products does not encourage further slate extraction as slate quarry operators already struggle to find a market for the exempt waste product which arises from their existing quarrying activity. They claim that, the overall number of slate quarries/workings has remained largely unchanged since the introduction of the aggregates levy, standing at 50 in 2000 and 49 in 2010.

(270) The United Kingdom considers that waste slate chippings are correctly treated as the unavoidable by-product of an extraction process which is not carried out to produce aggregate, but which is carried out to obtain high quality slate for use as roofing tiles, cladding and other valuable products.

(271) The UK authorities claim that by-products from cut slate production are unable to be distinguished from slate deliberately produced as aggregate.

(272) The UK authorities contest allegations advanced by the BAA during the Court proceedings in T-210/02 RENV and in its submissions to the Commission according to which there would be slate quarries exploiting slate solely for aggregates purposes. Having investigated all the quarry names provided by the BAA throughout the procedures, the UK authorities maintained this conclusion. Furthermore, the UK authorities have expressed doubts concerning the evidence provided, as some quarries are mentioned both as producing roofing slate and as exploiting slate primarily for aggregates purposes.

(273) As regards the BGS, the UK authorities claim that the data relies on self-description of materials produced by quarries and their end uses. They note that that quarries may describe a material in a different way than it would be categorised for the purposes of the AGL, and the materials produced by a quarry may change over time. The data is, therefore, the most accurate list of quarries in the United Kingdom and end uses of materials in existence, but it is not possible to say that it contains a completely accurate list of quarries in the United Kingdom and the definite uses of the materials extracted. The UK authorities maintain that the data is also out of date and that they are aware that some listed quarries have ceased to be active. The UK authorities also claim that the list contains companies that may have a valid quarrying planning permission, but that in fact do not and have never acted as quarries.

([63]) See footnote 60.

(274) The UK authorities showed that out of the total list of quarries put forward by the BAA as producing slate, shale and clay solely for aggregates use, eight quarries have been found to either never having exploited aggregates, performing other activities not subject to the AGL or as inactive since before the introduction of the AGL. Some of these quarries have been used as landfill sites.

(275) Moreover, the UK authorities show that they have used the definitions provided by the Report that was drafted in 2003 specifically for assisting the tax authorities in enforcing the AGL. The objective criterion that is used by the UK authorities to distinguish between closely related rock types requires material categorised as slate to 'split only with a chisel into sharp flakes and tiles'. Where material does not have this slaty cleavage, it is not treated as slate for the purposes of the AGL, i.e. it is not exempted. Material such as that to which BAA refers would be categorised as mudstone and subject to the levy.

(276) The UK authorities took note of the submissions from various interested parties as regard to the possible misrepresentation as slate of the products of one particular quarry. The UK authorities maintain that if the material meets the criterion they use for determining the existence of slate, splitting with a chisel, then the material has been correctly labelled as slate for the purposes of the AGL. However, the UK authorities note that products usually obtained from slate that splits with a chisel appear as imported on the quarry's website. The geology of the material at this site has not yet been verified by the United Kingdom revenue authorities ('Her Majesty's Revenue and Customs' or 'HMRC').

(277) Given that HMRC's enforcement regime applies a risk-based approach and acts on information that a quarry may not be complying correctly with the tax regime, the UK authorities committed to investigate this and any other cases where research undertaken as a result of obtaining evidence for the Commission causes concerns about mis-classification of materials. HMRC undertook to request or take geological samples from these sites. If the material proves not to be slate, the levy will be charged on the material extracted and a penalty may be charged as well for mis-description of material.

(278) The UK authorities further show that in marketing rock for sale purposes, quarries may choose to use a description which does not match the objective test used by HMRC for the purposes of the levy.

(279) The UK authorities have reviewed confidential tax records and public information relating to each of the quarries which the BAA claimed were producing slate solely for aggregates purposes or which had allegedly mislabelled their products as slate so as to benefit from the exemptions. The results of the review were presented to the Commission and showed that there may be certain enforcement issues as regards one quarry. The UK authorities undertook to investigate what materials they actually produce and whether it has been labelled correctly as slate. However, as regards the rest of the quarries that were found to be or that have been active, no indication was found that they would be deliberately extracting slate for aggregates use.

(280) Mention should be made that in its review of the information presented by the UK authorities, the Commission took into consideration the fact that slate specialist architectural products are cut to dimension. Therefore, the Commission considered that slate quarries where cut stone appears as the main product produce specialised architectural products (and thus not aggregates), primarily because slate aggregates are a result of crushing.

(281) The UK authorities have provided statistics in support of their view that slate has not been displacing sales of secondary aggregates and that while demand for high quality crushed rock and high quality sand and gravel have both decreased over the period that the aggregates levy has been in place, sales of slate, clay and shale for construction have not risen by the same order of magnitude. Apparently, the proportion of the sales of the former is in line with the decrease in demand. The UK authorities conclude that slate, clay and shale have not substituted on a large scale high quality crushed rock, sand or gravel.

5.6.2.2. ***Shale***

(a) *Comments received from the BAA on 15 September 2014*

(282) The BAA claims that shale can be used as aggregates, i.e. low-grade aggregates purposes, as also shown by the Report ([64]). Shale, clay and mudstones may occur as overburden to crushed rock deposits and they can be sold as low-grade fill.

(283) According to the BAA, shale and clay can be used for specific aggregates uses for which other rocks are not or less available, such as lining and capping of landfill sites and lining of ponds and canals. They claim that, these represent uses of clay and shale as aggregates in the same way as the use of materials for drainage and sea defences represents an aggregates use. The BAA argues that while shale is extracted as a by-product of clay and coal, there are also very large areas in the United Kingdom where harder, more mature shale, is interbedded with sandstone.

(284) The BAA claims that, the harder variety of shale, similar to hard rock, has always been used as aggregate even before the introduction of the AGL. The BAA provided the example of a shale quarry that has been in operation since 1981 that produces building and walling stone, rockery and crazy paving stone together with some fill material.

(285) The BAA submitted a list of 20 clay and shale quarries extracted from the BGS *Directory of Mines and Quarries 2010* that allegedly exploit material only for purposes of aggregate.

(286) They claim that some quarries classified as 'sandstone' quarries in the BGS Directory of Mines and Quarries actually benefit from an exemption from the AGL on the basis that they are in fact shale quarries forming part of the Caithness Shale Beds in Scotland.

(287) The BAA maintains that there are many quarries of mixed geology including shale that benefit from the exemption for the material which consists mainly of shale, as shale occurs extensively within the United Kingdom and is often interbedded with other rock. The BAA provides the example of a purely aggregate quarry that benefits from the exemption in this manner.

(288) The BAA claims that the UK authorities hold information as regards the names of quarries which were exempt from the AGL on the basis that they were wholly or mainly slate or shale. However such information could not be provided to the BAA for confidentiality reasons.

(b) *Comments received from Robert Durward of the BAA on 17 January 2014*

(289) The BAA alleges that clay and shale for ceramic products and gypsum cannot be considered to be in a different situation from material taxed under the AGL in light of its environmental purpose. They claim that these materials are comparable to rock, sand or gravel extracted for use in construction as they have been extracted for construction purposes, and clay and shale are rock. Supposedly, large volumes of clay and shale are used to manufacture ceramic construction products. The extraction of clay used for production of bricks could be reduced by using concrete construction products that can be produced with quarry waste/by-product which is often taxed. According to the BAA, the non-taxation of clay and shale used in ceramic construction products undermines the AGL.

(c) *Comments received from Torrington Stone on 17 January 2014*

(290) According to Torrington Stone one of its quarries produces shale as a by-product of gritstone. It has a good quality and can be used for bulk-fills. Another of its quarries produces shale as a main product and sandstone as a secondary product, which is subject to the tax. Torrington Stone seem to imply that the products they sell are chippings, sub-base, scalpings, or fill and can be obtained from all their materials.

([64]) Report prepared in 2003 by the British Geological Society for the United Kingdom tax authorities to assist tax officers with the application of the exemptions for slate, shale and clay in a geologically correct manner.

(291) Following the introduction of the AGL shale prices were increased due to market forces.

(292) Torrington Stone also provided information in regard to the quarry Venn which produced shale as a by-product that is ideal for embankment fill which competed with a taxed by-product from one of Torrington Stone's quarries. The delivered price of the shale as by-product was about GBP 3,50 including the transportation estimated at GBP 3,00.

(d) *Comments received from Eunomia received on 17 January 2014*

(293) The comments received from Eunomia were sent on behalf of a consortium of United Kingdom secondary aggregates producers (slate, colliery spoil and incinerator bottom ash).

(294) According to Eunomia, colliery spoil (typically composed of shale) is available for re-use from either operational deep mines or closed/moth-balled deep mines. Colliery spoil is derived from the extraction of coal using deep mining methods. The qualitative properties of colliery spoil vary greatly between different mines and at different extraction phases, relating to the geology of the strata at the time of mining. Due to the inconsistent properties of colliery spoil, the material is very low grade and has very little reuse value.

(295) Eunomia maintains that the colliery spoil does not typically command a positive price. However, having an outlet enables the respective mine to operate, through preserving spoil tip void landholdings. Eunomia claims that without the opportunity of supplying colliery spoil at no cost or at a competitive price, reflecting its inferior quality, there are no other financially viable options available to move colliery shale to facilitate built development. Eunomia maintains that for colliery spoil, the post-extraction production cost, assuming delivery within 5 km of the source site typically GBP […] per tonne for operational deep mines, and GBP […] per tonne for closed/mothballed deep mines. Therefore, imposition of the AGL at GBP 2 per tonne would […] costs. It would then be cheaper for the colliery shale to be sent for disposal in the tip.

(e) *Comments from the UK authorities*

(296) The UK authorities maintain that the logic for exempting shale is that the vast majority of shale is not used as aggregate. Indeed, most shale is generally unsuitable for use as aggregate. The high-quality use of shale is for brick-making which is ceramic process and, thus, exempt from the AGL. Any by-products from shale extracted for use in brick-making would therefore be a by-product of a material extracted for non-aggregate use.

(297) The UK authorities claim that shale is part of the same family of rocks as clay. Clays range from soft and plastic to hard mudstones. Their physical and chemical properties and mineralogical composition determine their most appropriate use. Depending on the degree of fissility ([65]) it can be difficult to distinguish between shale and clay, at one end of the spectrum, and between shale and slate, at the other.

(298) The UK authorities maintain that shale is closely associated with clay extraction and also arises in coal mining. Like clay, shale can be used in the manufacture of facing, paving and engineering bricks (90 % of demand for brick clay is for use in the manufacture of facing bricks for the domestic housing market), tiles for roofing and cladding, and vitrified pipes for drainage and sewerage. Large tonnages are used in the manufacture of cement. Other uses include lining and capping landfill sites, lining ponds and canals, as landscaping material, in the manufacture of lightweight aggregate for block making and for general construction fill.

(299) The UK authorities maintain that shale can be used as low quality aggregate, most commonly to fill space and provide bulk underneath the surface of roads. Some shale is also suitable for the manufacture of lightweight aggregate, but only after it has undergone a manufacturing process which involves subjecting the materials to high temperatures. In some circumstances, geological conditions (pressure and heat) have resulted in the formation of harder shales which when crushed form more blocky granules which can be suitable for some low-grade aggregate applications such as construction fill.

([65]) The extent to which the material can easily be split along close parallel planes.

(300) According to the UK authorities, as shale and clay are geologically similar, they are grouped together in United Kingdom national statistics. In 2000, of 10 838 000 tonnes of clay and shale sold in the United Kingdom, 7 880 000 tonnes were used for bricks, pipes and tiles, with 2 958 000 tonnes of clay and shale sold for other uses. In 2012, of 5 497 000 tonnes of clay and shale sold in Great Britain, 3 569 000 tonnes were used for bricks, pipes and tiles. The UK authorities contend that since the extraction of clay and shale halved between 2000 and 2012 and that the sales of clay and shale for other purposes than for bricks, pipes and tiles were 35 % lower in 2012 than in 2002, it is unlikely that the introduction of the levy increased the extraction of shale specifically for use as aggregate.

(301) The UK authorities maintain that waste shale which arises during coal extraction is an unintended and undesirable by-product. It is generally only suitable as a basic fill in road construction or for flood embankments and is sold for a negligible price as a result. The waste-product is generally tipped in consolidated waste piles or used as additional fill material if there is an adjacent surface mine. While the coal itself sells for approximately GBP 50 per tonne, the shale is usually sold for a very low price, on average no more than GBP 1 to 2 per tonne, if demand arises close to the extraction site. The production costs are estimated to amount to between GBP 0,50 and GBP 2 per tonne. On occasion, the shale will even be given away for free so long as the purchasers transport it away themselves.

(302) The same is true of other colliery spoil, which is generally only used as a low-grade aggregate where demand arises close to its extraction site.

(303) The UK authorities maintain that, some of the shale by-product of other extraction activities is sold as aggregate but it is generally only economical to put shale to use as aggregate where demand arises close to its extraction site, because of the costs of transport. They claim that, since such shale has not been extracted for the purposes of commercially exploiting it as aggregate, and reduces demand for freshly extracted aggregate, its exemption would be in line with the environmental objective and the nature and logic of the AGL.

(304) The UK authorities maintain that clay and shale are treated as one category by the BGS and by the United Kingdom Minerals Yearbook, the United Kingdom's annual collection of data. Their average selling price, according to the Office for National Statistics, ranges between GBP 2,52 and GBP 2,88 per tonne. In 2012 the prices ranged between GBP 3,34 to 4,44 per tonne.

(305) The UK authorities provided information as regards a quarry that produces gritstone used in the production of asphalts for road surfacing. It also produces and sells shale which is interbedded within the layers of gritstone. The quarry estimated that the production cost for its shale products to be GBP 6,31 per tonne.

(306) As regards shale used for ceramic processes the UK authorities provided information supplied by the British Ceramic Confederation ('BCC'), the trade association for the UK ceramic manufacturing industry. They note that there is considerable variability in the production costs for shale, depending on a number of factors. They estimate a general range of GBP […]-[…] per tonne for the cost of extraction.

(307) The BCC estimate that the sale price of shale for use as aggregates would be GBP […] to GBP […] per tonne. They observe that shale may be sold at a loss to expose good quality brick-making materials from beneath the shale deposit in question.

(308) The BCC further note that most brick production occurs at sites associated with quarries, hence the material is not priced. However, they estimate a cost — if sold to a third party — of GBP […] to GBP […] per tonne, plus delivery costs. They observe that the sale price of shale would be lower than for high quality clays.

(309) As regards the exemption for materials consisting mainly of coal, lignite, slate and shale, the UK authorities show that as naturally occurring minerals do not have 100 % purity the exemption is necessary.

(310) The UK authorities consider that shale is not being quarried exclusively for use as aggregate and had investigated the initial claims made by the BAA in this regard with the occasion of the proceedings in front of Union courts. The UK authorities maintain that they found that shale continues to be produced as a by-product of other extraction activities, in particular clay, coal and limestone. The UK authorities contend that none of the documents put forward by the BAA before the Union courts or the Commission, prior to the adoption of the Opening Decision, showed that there would be quarries exploiting shale and clay primarily for use as aggregate.

(311) The UK authorities were asked by the Commission to provide information as regards the products of four quarries mentioned in an interested party submission as being exempt quarries that won contracts solely because of such exemption and that provide the same type of products as their taxed quarry could have. One of the quarries is mentioned to have received permission to exploit shale. The UK authorities found that all four quarries had been registered for the payment of the AGL and have been doing so since its introduction in 2002. The quarries appear to sell ([66]) quarried stone, sand, gravel, aggregate including recycled products and concrete products, hard stone aggregate, aggregates and filler, building products, decorative aggregates and sandstone flags, and, respectively, sand, gravel and other aggregates. No indication was found that any of the quarries benefited from an exemption for shale.

(312) The UK authorities have also considered eight quarries mentioned in the BGS database as quarries deliberately extracting shale for aggregates use. They claim that at least some of these quarries extract other products in addition to shale. They thus, were apparently, unable to conclusively identify any shale quarries extracting shale solely for aggregates use.

(313) The UK authorities explain that shale should also benefit from an exemption when it is a by-product of taxed aggregates. For example shale can be extracted as an unavoidable by-product of quarrying limestone or gritstone. The UK authorities claim that shale is a lower value material than limestone, and is unsuitable for a broad range of aggregate purposes. The UK authorities claim that shale produced as a by-product in this way was exempted in line with the environmental objective of the tax to enable quarries producing it as a by-product to sell it as a substitute for other freshly quarried aggregate for the limited range of applications for which it is suitable. If the material had originally been taxed in line with the limestone, quarries would have been unable to sell the waste shale.

(314) According to the UK authorities, given that shale is generally only suitable for limited and specific aggregates applications, and that it is generally only economic to use shale as aggregate where demand arises close to the extraction site, it is very unlikely that there would be sufficient demand for shale near any one quarry primarily extracting other aggregates (e.g. gritstone) to incentivise extraction of additional taxed aggregate in order to access the un-taxed shale by-product. The UK authorities claim that they are not aware of any such instance where this has occurred or where it would be likely to occur in the future.

(315) In response to an interested party submission to the Commission alleging that the primary material of Vyse quarry (belonging to Torrington Stone) in North Devon is mudstone and shale used as aggregate, with a secondary material of dirty sandstone, the UK authorities question whether shale is the primary material of this quarry as their website details their high quality sandstone products, and notes that 'universally acknowledged for its outstanding durability and quality, Braunton Aggregates supply a variety of sandstone from feature stone, hedging stone, garden chippings, rockery stones to screen fills and bulk aggregates'. In the 2010 Directory of Mines and Quarries produced by the British Geological Survey, Beam Quarry is listed as producing 'Sandstone, Carboniferous, Bude Formation'. They do not accept that the Vyse quarry is therefore evidence of shale being deliberately extracted for aggregates purposes.

(316) According to the UK authorities, with regard to shale, the HMRC uses the criterion — as described in the Report — setting out that this material must 'split easily (with pen knife) into mm-thick flakes'. Material which breaks into small centimetre-sized blocks (and is therefore more suitable for aggregate applications) is classified as mudstone and is subject to the tax. The BAA claims in their submission that a number of quarries are solely extracting material classified as shale for the purposes of the tax and selling this material for aggregate. The UK authorities show that if there were to be any substantive evidence that there was such mis-description of rock as shale for the purpose of exemption from the AGL, HMRC would investigate this as potential tax fraud.

([66]) The information was taken from open sources such as the internet.

(317) According to the UK authorities, all tax activity carried out by HMRC is risk-based. This means that not all businesses registered with HMRC are checked unless there is reason to query the returns that they make to HMRC. The UK authorities are aware of the risk of quarries benefiting from exemptions from the AGL by mis-describing the materials that they produce. HMRC carry out checks to ensure that the AGL is being applied accurately, and investigate where there is evidence of mis-description of materials.

(318) The UK authorities have reviewed confidential tax records and public information in regard to the quarries the BAA mentioned that were producing clay and shale solely for aggregates purposes or have mislabelled their products as shale so that they benefit from the exemptions. The results of the review as regards each quarry have been presented to the Commission. The review showed that there may be certain enforcement issues as regards one quarry and the UK authorities undertook to investigate. As regards, the majority of the quarries that were found to be or have been active, no indication was found that they would be exploiting shale or clay solely for aggregates use. However, the information provided to the Commission show that at least four or five ([67]) quarries are benefiting from the exemption although their main product is cut stone and shale is extracted in addition to it.

5.6.2.3. ***Coal***

(a) *Comments from the UK authorities*

(319) According to the UK authorities, coal is a combustible, sedimentary rock. British-produced coal has a high sulphur content and is used almost exclusively in coal-fired electricity generating stations fitted for flue gas desulphurisation, although there is also some domestic consumption. All coking coal (which is used in blast furnaces making steel) is currently imported. Coal is not suitable for use as aggregate.

(320) According to the UK authorities, where coal is extracted by surface mining, the overburden ([68]) and the strata from between the coal seams are lifted separately from the coal seams and the fireclays which lie immediately below some of the seams. Fireclay, which is a by-product of coal extraction, is extracted separately and sold at about 10 % of the price of coal, primarily as a colorant in the brick-making process. In all cases, the overburden, inter-seam dirt and any residue left after mineral processing (for example, to remove high ash content or other impurities) is replaced in the void after mining.

(321) The UK authorities claim that all underground mines process their coal in a density separation plant. The waste from the process is generally tipped and consolidated. Historic waste tips have generally been landscaped and covered with vegetation to reduce their visual impact. If there is adjacent surface mining of coal and/or other minerals the waste is sometimes used as an additional fill material for the restoration of those voids.

(322) According to the UK authorities, some spoil or waste from the production of coal can be used as low-grade aggregate, for example for bulk engineering fill or for flood embankments. The waste is fine grained and does not have the engineering capability to support, for example, a building development.

(323) The UK authorities maintain that there is no evidence that any quarry in the UK would be extracting coal solely for obtaining aggregate. They claim that, the AGL is designed to ensure that material consisting wholly of the spoil resulting from the mining of coal is not taxed. Clean seams of aggregate which are extracted when digging down to the coal are subject to the AGL.

([67]) From the information provided it is unclear what material one quarry actually produces although it appears in the list of quarries producing shale.

([68]) Overburden is the material which lies above the mineral which the quarry operator wants to extract

5.6.2.4. ***Lignite***

(a) *Comments from the UK authorities*

(324) According to the UK authorities, lignite is an intermediate material between peat and coal. The only significant deposit of lignite in Great Britain is in Devon, where it is a by-product of ball clay extraction. Small amounts are sold for horticultural use. Large deposits also exist in Northern Ireland, but there has been no commercial production of lignite there due to significant local opposition production. Lignite is not suitable for use as aggregate, in particular because of its high moisture and volatile matter content.

5.6.2.5. ***Assessment by the Commission***

5.6.2.5.1. **Slate**

(325) Although slate is an aggregate within the meaning of Section 17(1) of the Act 2001 it follows from the UK authorities and the interested party submissions that slate is extracted for obtaining architectural and dimensional products that sell for much higher prices than what is sold for aggregates use. It would not make economic sense to exploit the quarries solely to extract slate for aggregate use which due to their properties are, in most cases, not suitable for high end aggregates uses, but are used as low-grade aggregate. Moreover, extraction methods are far more expensive than standard aggregate extraction methods — it would be economically illogical to deliberately produce aggregate in such an expensive way. For example the cost of production of slate aggregates amounts to GBP 5,7 to GBP 6,5 per tonne, while the sell with up to GBP 6,42 per tonne.

(326) The material used for high quality slate purposes has a cut face due to the way in which it is extracted; heavy slate slabs are cut across the grain into set sizes using a saw, and then also usually have at least one face which is cleaved along a natural plane within the rock by riving (splitting with a mallet and chisel). In such case, the slate would undergo an exempt process in accordance with Section 18(2)(a) of the Finance Act 2001 and benefit from tax credit pursuant to Section 30.

(327) The BAA and several interested parties claimed that table tops, walling stone and hedging stone are aggregates uses and that the quarries producing such products as primary products should be taxed. The main argument for this is that the products structure of the respective quarries is not different from that of rock quarries (such as granite or sandstone) that would also produce walling stone with priority and afterwards the secondary low-grade aggregates.

(328) Unlike other aggregates such as limestone, slate appears to require deep quarrying, making its extraction expensive compared to the costs of an usual quarry. The UK authorities and interested parties have shown that there is an important difference between normal aggregates quarries (such as granite, sandstone and limestone) and slate quarries and that their different tax treatment is fully justified.

(329) The BAA and several interested parties claim that there would be slate quarries that do not produce specialised architectural products, but exploit slate deliberately for aggregates use. Moreover, there would be quarries that claim they should be exempted because they produce slate, but, in fact the material they produce does not have the appropriate slaty cleavage or has been mislabelled.

(330) In this regard the Commission notes, firstly, that according to the UK authorities there is no indication that any quarries would be deliberately extracting slate for aggregates uses. Indeed, in lack of clear evidence to the contrary, the UK authorities could not have been expected to prove a negative fact, i.e. that there are no quarries deliberately extracting slate for aggregates purposes. When provided with examples of quarries that allegedly exploited slate deliberately for aggregates use, the Commission has requested that the UK authorities provide information in respect of such quarries. The information shows that none of these quarries exploit slate deliberately and primarily for aggregates purposes. The information solely shed doubts as regards the qualification as slate of the products of one particular quarry which the UK authorities committed to investigate. A misrepresentation of the materials would constitute an abuse of the AGL and not a State aid issue.

(331) Secondly, as described above in recital 169 the Commission considers that advertisements in which quarries describe their products for the purposes of attracting clients are not entirely relevant for the assessment of the use of the materials for the purposes of the AGL. The UK authorities themselves do not take such descriptions into consideration for tax enforcement purposes.

(332) The criterion used by the UK authorities to check whether the material extracted by a particular quarry is slate is, in accordance with the Report ([69]), whether it 'splits only with a chisel into sharp flakes and tiles'. Therefore, if there would be quarries claiming they produce slate and thus benefiting from the exemption, which in fact produce material that does not have sufficient slaty cleavage as the BAA claims, these quarries would have abusively not declared themselves for the payment of the AGL. This would represent an enforcement issue and would be investigated as fraud by the HMRC. The UK authorities committed to investigate the quarry mentioned above and any other cases where research undertaken as a result of obtaining evidence for the Commission causes concerns about mis-classification of materials. If the material proves not to be slate, the levy as well as a penalty will be charged.

(333) In accordance with the findings of the General Court ([70]) the inclusion of certain materials in the scope of the levy under the normal taxation rule applicable depends 'only on their actual and established exploitation as aggregates'. For freshly extracted slate, this can be interpreted so that, if there is no evidence of quarries deliberately extracting slate for aggregate use, slate is not comparable with the taxable materials and, thus, the exemption related to slate falls within the general principles of the AGL.

(334) It has been demonstrated to the Commission that slate is not deliberately extracted for aggregates purposes, but quarried for obtaining dimensional and decorative products.

(335) The Commission therefore concludes that freshly extracted slate is in a different factual and legal situation than the taxed materials and thus does not fall within the normal taxation principle of the AGL.

(336) While it follows from the submissions that only a small part (around 5 %) of the material extracted from slate quarrying is high-quality slate which in suitably sized sheets can be sold as dimensional, architectural products and thus not for aggregates use, the remaining part of the quarry extraction is slate as by-product or waste which then can be used as aggregate (the exemption of spoil of slate extraction is assessed below in Section 5.6.4).

(337) However given that the extraction of the slate by-product is unavoidable phenomenon when quarrying the high quality slate for decorative and dimension material used in the construction and it cannot occur when quarrying other materials its exemption contributes to the objective of the AGL. It can, indeed, help to shift the demand from freshly extracted materials for aggregates use towards slate as by-product. Moreover, there is no risk that this exemption could encourage the fresh extraction of the slate given the high costs of the extraction of slate which can be covered only when slate for decorative and dimension is obtained. This has been confirmed also by the decreasing number of active slate quarries since the introduction of AGL (from 43 to 32) as informed by the UK authorities ([71]).

(338) The Commission notes that there might be naturally occurring slate that does not have a purity of 100 % purity, but that still meets the requirement to split only with a chisel into sharp flakes and tiles. In such cases, the UK authorities considered that the exemption should cover also material consisting mainly of slate.

(339) The Commission therefore considers that since no evidence was provided that such material mainly consisting of slate was deliberately extracted for the use as aggregates the same reasoning that applies to material wholly consisting of slate, should apply also to material consisting mainly of slate which covers the situation described in recital 338.

(340) Thus the exemption under Section 17(4)(a) of the Finance Act 2001 granted for material wholly or mainly of, or being part of anything consisting of slate does not derogate from the normal taxation of the AGL.

([69]) See footnote 64.
([70]) Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 72
([71]) See table in recital 143.

5.6.2.5.2. **Shale**

(341) As shale is a rock and, thus, an aggregate within the meaning of Section 17(1) of the Finance Act 2001, its exemption from the AGL does not constitute a derogation from the normal taxation principle under the AGL, if shale is not deliberately extracted for aggregates use. In case of such extraction its exemption could only be justified if it contributes to the environmental objective of the AGL, i.e. to achieve a shift in demand.

(342) Interested party submissions and the UK authorities pointed to a series of uses of shale as aggregate, mainly as low-grade aggregate to fill and provide bulk underneath the surface of roads or as embankment fill.

(343) Moreover, the Commission notes that shale is often interbedded with sandstone or with other taxed materials. In such cases, it can be considered that the shale is deliberately extracted together with such materials for commercial exploitation as aggregate.

(344) The UK authorities themselves have claimed that those materials which are extracted for use as aggregate, or which arise as by-products from a process which is intended to produce aggregate for commercial exploitation, are in a different factual situation to the exempted materials. Thus, the shale that is deliberately extracted for commercial exploitation as aggregate is also in a different factual situation to the exempted materials in the same way as all other freshly quarried taxed materials. Therefore, there would be no justification for a material to benefit from an exemption from the AGL when it is deliberately extracted for use as aggregate.

(345) The UK authorities showed that the vast majority of shale is not used as aggregate as most shale is generally unsuitable for use as aggregate. The high-quality use of shale is for brick-making which is a ceramic process.

(346) On the basis of information received from interested parties the Commission notes that freshly extracted shale can be used as aggregate, albeit not in widespread situations and, unlike the extraction of slate, there are no high-end specialised products being produced out of shale that would entail an exemption. In addition, shale itself is a material that can have very different characteristics from one exploitation point to another.

(347) The Commission takes note of the submission of the UK authorities, detailed in recital 297 that shale is in the same family of rocks as clay, however harder shale can be considered in the same family as slate.

(348) Moreover, in contrast to clay, some shale can be and is used for providing bulk in construction and it does not require physical transformations in this regard (recital 299).

(349) Firstly, interested party comments received by the Commission show that shale can and is deliberately extracted for commercial exploitation as aggregate. Shale achieves a price ranging between GBP […] and GBP 4,44 (see recitals 292, 304 and 307). Out of this price in some cases GBP 3 is only the price of the transportation of shale. The Commission notes however that it has not received pricing information for shale extracted as a main product of a quarry, but solely for shale extracted as a by-product of another material.

(350) Concerning the fresh quarrying of shale, the Commission has received evidence as regards at least four or five ([72]) quarries supporting that they are primarily extracting shale for aggregates use. As described in recital 318, in response to the list of quarries that appeared in the BGS *Directory of Mines and Quarries 2010* to be primarily extracting shale for commercial exploitation of shale aggregates submitted by the BAA, the Commission asked the UK authorities to provide information regarding these quarries from confidential tax records. This revealed that four or five ([72]) quarries were registered as benefiting from the exemption from shale while producing cut stone and shale for aggregates use. The UK authorities explained that as the quarries produce cut stone, the shale should be viewed as by-products of cut stone and hence duly benefit from the exemption. However, this explanation cannot be accepted by the Commission. As described in recitals 151 to 158, by-products of cut stone are not exempted from taxation under the AGL. Moreover, all aggregates quarries would produce some cut

([72]) See footnote 67.

stone if there is demand for it and if the rock is suitable for cutting. This does not mean however, that, if there is demand and it makes economic sense, they will not primarily produce aggregates when there is no demand for cut stone. Therefore, these quarries must be considered quarries that are deliberately extracting shale for aggregates use.

(351) The Commission notes the existence of a contradiction arising from a submission it has received. The comment received from Torrington Stone refers to their extraction and sale of shale aggregates obtained as a primary product from one of their quarries (Vyse). However, the UK authorities claim the quarry does not produce shale at all on the basis of how the quarries products are presented on its website. Nevertheless, the Commission notes that shale is mentioned on the website of Vyse Quarry, not in the description of their products, but in the technical specifications of the different products they extract ([73]).

(352) Moreover, since this is a submission from the quarry itself, the Commission has to take it into account. It may be the case that the material they produce has been wrongly labelled as shale, but the quarry itself claims it has benefited from the exemption for shale. Moreover, the UK authorities have stated on different occasions that they disregard, for the purposes of the AGL, the manner in which a quarry presents its products to the public. No mention was made of any geological test having been conducted at the quarry.

(353) On the basis of the information and evidence available the Commission considers that the freshly quarried shale is in a factual and legal situation comparable to that of others taxed materials.

(354) The UK authorities have not established that the exemption of freshly quarried shale for aggregates can be justified by the 'shift of demand' objective of the AGL. Indeed such exemption allows at least maintaining the fresh extraction of the shale for aggregates use and thus presents a derogation from the normal taxation principle of the AGL which is contrary to the objective of the AGL.

(355) The exemption for spoil from shale extraction is assessed below in Section 5.6.4.

(356) The Commission notes, however, that shale which occurs as a by-product of coal extraction benefits, in addition to the exemption under Section 17(4)(a), also from the exemption under Section of the 17(3)(f) of the Finance Act 2001. As will be established below in recital 367 of this Decision, coal is not and cannot be used as aggregate.

(357) Shale that is an unavoidable by-product of coal extraction is suitable for aggregates use and thus it falls under the scope of normal taxation under the AGL. However its exemption can be justified by the 'shift of demand' objective of the AGL. In addition, due to its value, it is highly unlikely that the exempted shale as by-product could provoke an increase in fresh coal extraction, as it would not make economic sense.

(358) Moreover, since shale is, like clay, mostly used in pipes, tiles and brick-making, which are ceramic products, it benefits from the tax credit granted for ceramic processes under Section 30(1)(c) of the Finance Act 2001. As this is not an aggregates use and as materials used for ceramic processes undergo extensive physical transformations, i.e. fusing to form a hard, durable and weather-resistant product, shale used for ceramic processes would duly benefit from the relief from the AGL. The Commission has already found in the Opening Decision the relief for industrial and agricultural processes (Section 30(1)(c)) to be in line with the normal taxation principles underpinning the AGL (recital 137).

(359) The Commission notes that the BAA and other interested parties commented that materials used for bricks should not benefit from an exemption. The UK authorities showed, however, that bricks and other ceramics processes are not aggregate uses. Bricks undergo an extensive manufacturing process. They are formed by heating shale or clay to a high temperature (more than 1 000 °C) in a kiln, changing the structure of the shale or clay to make a solid, durable brick. Other ceramic products are fired in a similar way in a kiln, but made into different shaped products, e.g. pipes or tiles.

(360) Bricks are not made to be used as bulk fill in a manner analogous to crushed rock. They are made to be stacked, in an orderly way, to form walls.

([73]) Information available here: http://www.brauntonaggregates.co.uk/technical-details.html accessed on 11 March 2015.

(361) On the basis of the above, the Commission concludes that the use of shale in ceramic processes may benefit from a relief from the AGL as this does not represent an aggregate use of shale.

(362) In addition, shale can be used in place of clay, slag or other materials as a source of aluminosilicate in the manufacture of cement. It is mixed with limestone, a process which is exempted from the AGL. The use of limestone, or limestone and other materials in cement, is exempted from the levy in accordance with Section 18(2)(c) of the Finance Act 2001 as in this use, the chemical properties of the material are important (with limestone providing calcium silicate, and clay or shale providing aluminosilicate). Therefore, shale used for the manufacture of cement together with limestone would duly benefit from an exemption under this section of the Finance Act 2001. The Commission has already found in the Opening Decision that the exemption for this process is in line with the normal taxation principles of the AGL (recital 90).

(363) Shale producers would have to show what uses the material wholly or mainly consisting of shale they produced had in order to claim an exemption from the AGL.

(364) For example, shale also occurs as an unavoidable by-product of clay extraction. Where this is the case and the shale is not already benefiting from another exemption or relief, it could be assessed whether the respective shale could not qualify for an exemption under the AGL as it has not been deliberately extracted for aggregates use. The exemption would be in line with the principles of the AGL as this regards shale that is obtained as an unavoidable by-product of a material that is neither an aggregate, nor used as aggregate and that could be used to replace freshly extracted aggregates.

(365) With regard to shale occurring as by-product of fresh quarrying of other taxed materials, such as gritstone or limestone, the Commission notes that the exemption does differentiate the shale compared to other taxed materials. However, it has to be considered whether such tax differentiation can be justified by the objective of AGL. Even if the exemption could lead to an increase in the deployment of shale as by-product for aggregates use at the expense of other not exempted by-products, the Commission has not received any evidence from the UK authorities or from interested parties showing that this exemption contributes to the achievement of the AGL objective which aims at reducing the fresh quarrying of material for aggregates purposes.

(366) The Commission therefore considers that material wholly or mainly consisting of shale that is deliberately extracted for aggregates use, including here shale occurring as by-product of fresh quarrying of other taxed materials, is in the same factual and legal situation as other aggregates that are taxed in light of the normal taxation principle of the AGL and of its environmental objective. Hence, the exemption is de facto selective.

5.6.2.5.3. **Coal**

(367) The joint submission received from the UK authorities and the BAA as well as information received on other occasions from the UK authorities confirms that coal is not and cannot be used as an aggregate. Therefore, coal is not in the same legal and factual situation as material taxed under the AGL in line with the objective of the AGL. The same applies to material that is mainly consisting of coal which covers the situation in which the coal extracted does not have a pure geological composition.

5.6.2.5.4. **Lignite**

(368) The joint submission received from the UK authorities and the BAA as well as information received on other occasions from the UK authorities confirms that lignite is not and cannot be used as an aggregate. Therefore, lignite is not in the same legal and factual situation as material taxed under the AGL in line with the objective of the AGL. The same applies to material that is mainly consisting of lignite which covers the situation in which the lignite extracted does not have a pure geological composition.

5.6.3. EXEMPTION OF AGGREGATES CONSISTING WHOLLY OF THE SPOIL, WASTE OR OTHER BY-PRODUCTS, NOT INCLUDING THE OVERBURDEN, RESULTING FROM THE EXTRACTION OR OTHER SEPARATION FROM ANY QUANTITY OF AGGREGATE OF ANY CHINA CLAY OR BALL CLAY (SECTION 17(3)(e) AND SECTION 17(3)(f)(ii))

(369) In their submissions to the Commission prior to the Opening Decision, the UK authorities had explained that china clay (also known as 'kaolin') ([74]) and ball clay ([75]) are valuable minerals. They are normally not quarried in order to serve as aggregates. Spoil consisting of waste rock and sand is an inevitable by-product of this extraction. China clay waste can be used in the construction of embankments and as general fill, in the production of bitumen bound materials for highway construction, and may be substituted for other fine aggregate in the manufacture of concrete. Ball clay waste can also be sold as aggregate into the construction market.

(370) The UK authorities had highlighted that since the spoil resulting from ball clay and china clay extraction is available as soon as ball clay and china clay has been extracted and given that this spoil can provide an alternative to various sand, gravel and rock specifically extracted for use as aggregate, the exemption helps reduce the extraction of sand, gravel and rock that were specifically extracted for their use as aggregate and, on balance, the exemption helps reduce the environmental impact of aggregates extraction. The UK authorities had provided information regarding the waste resulting from china clay and ball clay extraction and the waste heaps created.

(371) The Commission questioned in recital 106 of the Opening Decision whether such material would not be in a comparable situation to non-exempted aggregates, but observed that there may be a difference between the exempted material and non-exempted material in that the exempted materials constitute the spoil of china clay and ball clay extraction. It is an inevitable by-product of this extraction, which will occur not necessarily for the sake of aggregate extraction but in general for china clay and ball clay extraction. Indeed, both china clay and ball clay have specific properties that cannot always be replicated.

(372) The Commission questioned in recital 107 of the Opening Decision whether this difference was sufficient to demonstrate that the tax exemption is justified by the nature and logic of the AGL and mentioned it required more information.

(373) Following the publication of the Opening Decision the Commission received numerous submissions from interested parties in this regard.

5.6.3.1. ***Comments received by the Commission***

(a) *Comments received from Sibelco Europe on 16 January 2014*

(374) According to its submission, Sibelco is a company involved in the extraction, processing and sales of china clay (kaolin) and ball clay. The majority, 80 % to 90 %, of ball clay and china clay production is exported. Sibelco submits that the primary purpose for the exploitation of its quarries is the extraction of ball clay and china clay. Other materials necessarily extracted can be regarded as secondary materials that may or may not be suitable for aggregate end use depending upon its constituents and possible processing.

(375) Sibelco maintains that china clay and ball clay as well as the products derived from them cannot be used as aggregates. They are specialist industrial minerals with only non-aggregate applications and end uses. China clay and ball clay are distinguished by their unique physical and chemical characteristics and rarity and are, thus, highly valuable.

(376) According to Sibelco, the spoil from these mineral extraction activities does not constitute material that is specifically extracted in order for it to be used as aggregate. The spoil is extracted as a necessary consequence of obtaining china clay and ball clay. The by-products are entirely different from the ball clay and china clay minerals and their uses are not the same or in any way interchangeable. Moreover, Sibelco maintains that,

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

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

without the extraction of ball clay and china clay at these quarries, no potential aggregate materials would be available to the market since the quarries could not be economically operated other than for ball clay and china clay. The sales value of china clay and ball clay is significantly higher than site derived secondary aggregate. Indeed, the selling value is around […] to […] times higher for china clay and some […] to […] times higher for ball clay. According to Sibelco, 8 to 10 times more volume of inevitable spoil is extracted alongside china clay and up to twice as much volume of other materials is extracted alongside ball clay.

(377) Sibelco submits that given the location and distribution of china clay and ball clay sites, the specific geological conditions and the significant capital investment required to set up quarrying operations in these areas, without the china clay and ball clay extraction, no extraction activity of spoil would take place in any of these locations.

(378) According to Sibelco, all sales of aggregate derived from by-products of china clay and ball clay extraction result in a direct reduction in the volume of this material being placed in heaps and mounds at the extraction site.

(379) In accordance with the information provided by Sibelco, in china clay deposits, the clay mineral (kaolin) is formed by the decomposition and partial decomposition of feldspar minerals in granite. This process is known as kaolinisation and while the proportion and characteristics of the kaolin varies within the deposits, the overall yield of kaolin to the whole rock mass is typically around 10 %. While some element of selective extraction is possible, for the most part the whole rock mass (interburden) must be extracted before the kaolin can be separated. The process of separating out the kaolin by water separation, gravity methods and several stages of screening and sizing results in by-product material constituting weathered and un-weathered granite, stent (rock), quartz and mica. This by-product material is not, in its extracted form, suitable for aggregate use. Processing is required to make some part of it suitable for aggregate end uses.

(380) According to Sibelco, in ball clay deposits, the clay is essentially also a kaolin mineral but deposited by sedimentary geological processes producing an often distinct layering of strata. The layering interposes ball clays, lignitic ball clays and sand seams. These interburden seams must be extracted to reveal successive ball clay seams. The ball clay seams and indeed the interburden seams must be carefully selected to ensure no contamination of the ball clay with other material and no unplanned cross mixing of different quality ball clay seams. The interburden typically represents more than 50 % of the whole extracted volume. Following extraction of the ball clay seams, these are mixed in precise blends depending on the specific end use.

(381) According to Sibelco, the main difference between china clay and ball clay quarries and aggregates quarries is that in aggregate quarries the waste or by-products are essentially the same material. In ball clay and china clay quarries the by-products arising are distinctly different material than the clays which are being sought as the primary mineral.

(382) According to Sibelco, the current exemption for aggregate material sold from appropriate processing of material derived as an inevitable by-product of china clay and ball clay extraction will not result in an increase in china clay and ball clay extraction activities. China clay and ball clay demand and sales drive the quarry development. Even though some by-products of both china clay and ball clay extraction are subsequently processed and made suitable for aggregate end uses, the majority of the resulting by-products are still placed in heaps and mounds. This is because there is no further demand for the aggregates (notwithstanding the current exemption from the levy), but extraction in the quarries must continue to produce the market demand volume of china clay and ball clay. Currently there is around five times more spoil, waste and by-products handled in Sibelco's china clay and ball quarries than aggregate sales. This demonstrates that even the current levy exemption cannot further incentivise the extraction of material for aggregate use. In addition, it appears that sales of clays and sales of aggregates have a completely different pattern. In aggregates production a supply contract regards one specific project and lasts a relatively short period of time. However, the ball and china clay industry has to supply ceramic manufacturers with a consistent blend of material for a period of many years.

(383) In addition to its submission, Sibelco has also provided the Commission with an overview of the geology, extraction and processing of ball clay and china clay.

(b) *Comments received from Imerys Minerals Limited ('IML') received on 17 January 2014*

(384) IML has china clay and ball clay operations covering over 5 000 hectares of land in Cornwall, Devon and Dorset in the south-west of England.

(385) IML claims that the United Kingdom is a leading world producer and exporter of high-quality ball clay with more than 80 % of production exported. Ball clay is mainly used as a raw material in the manufacture of ceramics (particularly, sanitaryware, wall and floor tiles, and tableware). Other uses include in enamels and glazes, building bricks, refractory applications and as fillers and sealants. The material characteristics of ball clay render it unsuitable for use as aggregate. Aggregates generally need to be hard, granular materials. In contrast, ball clay is soft and fine-grained. The relative value of ball clay would also preclude its use as aggregate. It is a relatively rare and important material, with an ex-works value of up to GBP […] per tonne, depending on its quality and the level of demand in the marketplace.

(386) According to IML, the United Kingdom is one of the largest producers and exporters of china clay in the world with over 90 % of production exported.

(387) IML claims that china clay is valued for its whiteness, fine particle size and flat particle shape, soft non-abrasive texture and chemical inertness. Its main uses are in the manufacture of paper as a filler and coating pigment, sanitaryware and tableware. More specialist applications include as a filler in paint, adhesives, plastics, rubber and sealants; and in the manufacture of glass fibre and pharmaceuticals.

(388) According to IML, the material characteristics of china clay render it unsuitable for use as aggregate. The relative value of china clay would also preclude its use as aggregate. China clay is a very rare product, both nationally and internationally. Given its rarity and importance due to the demand for its use in a number of industries, it commands a relatively high price. A lower quality product in a basic application will sell for around GBP […] ex-works whereas a highly refined specialist product for use in a technical application will command more than GBP […] per tonne.

(389) According to IML, they receive a modest royalty averaging at approximately GBP […] per tonne for the material sold as secondary aggregates. According to IML, the extraction of ball clay and china clay would take place irrespective of any other factor, and the generation of waste product is inevitable. Its use as aggregate is far more beneficial for the environment than primary aggregate quarrying. Without a stable market for the waste more material will have to be surface tipped.

(390) According to IML, of the 8,47 million tonnes that are mined in total, approximately 6,5 million fall into the category of potential aggregates feed material. Breccia, crushed stone, gravel, interburden, rock and stent can be processed to form crushed aggregates of one type or another ranging from single size chipping to sub-base/fill material. The crushing process will also yield gravel and sand products. In addition, sand is generated during the bucket wheel separation process of china clay. Not all of the 6,5 million tonnes of feed can be processed into marketable secondary aggregates, and waste volume varies depending on the nature of the china clay area being worked. An existing processor of china clay waste calculates that a yield of 65 % is typical meaning of the 6,5 million tonnes of annual run of mine aggregate feed, over 4 million tonnes of saleable product can be made.

(391) According to IML, on average 'dry-screened' concrete sand sells for GBP […] ex-works and a crushed product (aggregates) for GBP […] ex-works. The sales are not made by the IML itself, but by a processor of china clay waste.

(392) IML claims that there is no way the AGL exemption could lead to more extraction of ball/china clay for the purposes of deriving more levy-exempt material. IML already tips more waste than it supplies for aggregates processing proving that the level of extraction depends entirely on the market demand for the primary mineral; china/ball clay.

(393) IML claims that, the extraction process already produces more waste than is currently sold and it would be illogical to mine more china/ball clay to derive the secondary aggregate by-product.

(394) According to IML, for the production of tradable aggregates additional processing is required. They claim that, a dry screening plant for sand production costs in the region of GBP 0,75 million, a crushing plant costs in the region of GBP 2 million and a washing plant for processing mortar sand would cost up to GBP 1,5 million. Using the average selling prices of sand at GBP […] per tonne and crushed aggregates at GBP […] per tonne, production costs would typically make up 35 % for sand and 50 % for crushed aggregates.

(395) According to IML, without the china clay content having been removed first, it would not be cost effective to quarry the sites for their aggregates potential. The potential aggregate materials are only available to the market because of the extraction of china and ball clay, as without this, the quarries would not be economically viable. Given the very high cost of extracting the minerals, and the relatively low quality of the by-product derived from that process when compared with primary aggregates, the sites would not generate any aggregates at all were it not for their mineral content.

(396) According to IML, the exemptions from the AGL distinguish between waste materials that arise as the by-product of the extraction of a non-aggregates mineral (such as waste from china/ball clay extraction) which are exempt, and waste materials that are the by-product of extraction of aggregates (such as waste from limestone), which remain subject to the AGL.

(397) IML claims that by-products from limestone and cut stone quarries are deliberately extracted for and used as aggregates, whereas by-products from china or ball clay extraction are unavoidable consequences of the extraction of those minerals.

(398) IML has also provided the Commission with a case study published in 'Construction News' concerning the use of recycled and secondary aggregates from the extraction of china clay in concrete in a major London site.

(c) *Comments received from Kaolin and Ball Clay Association received on 17 January 2014*

(399) According to the Kaolin and Ball Clay Association, as part of the exploitation of china and ball clay quarries other materials which are unavoidably extracted can be considered as 'secondary' materials, which may or may not be suitable for use as aggregates. The current AGL exemptions for these secondary materials were introduced in order to incentivise their use and to reduce the quantity of such materials being surface-tipped. The Kaolin and Ball Clay Association claims that china clay and ball clay cannot be used as an aggregate, and they are never extracted for such use.

(400) According to the Kaolin and Ball Clay Association, without the extraction of china and ball clay, the aggregate materials derived from them would never be available to the market. Quite simply the cost of separating the china clay and ball clay from the aggregates, and the value of the aggregates themselves, would make this totally unviable. Selling prices of china clay and ball clay are substantially higher than the aggregates, which is why it is cost effective to mine them in their own right.

(401) The Kaolin and Ball Clay Association maintains that further evidence of this is in the fact that currently, even with the aggregates levy exemption, only approximately one third of the material that could be processed into aggregates is processed.

(402) According to the Kaolin and Ball Clay Association, it is certain that sales of by-product material will fall if the levy is imposed on these currently exempt minerals, in fact there is already evidence of this happening for projects starting in April 2014.

(d) *Comments received from the BCC on 17 January 2014*

(403) The BCC claims that the primary purpose of the development of china and ball clay quarries is the extraction and processing of these materials which are specialist products differentiated by their rarity and unique physical and chemical characteristics. According to the BCC, china clay and ball clay and the products derived from them cannot be used as aggregate and are never extracted for such purposes. Other materials which are unavoidably extracted can be considered as secondary materials, which may or may not be suitable for use as aggregates. According to the BCC, they would not be extracted in isolation for use as aggregate and they become available only when china clay or ball clay are extracted, otherwise the quarry would not be economically viable.

(404) The BCC maintains that ball clay has a selling price at least 5 to 6 times higher and china clay at least 10 to 12 times higher than the by-product which can potentially be sold as secondary aggregate. Economics and site constraints would not result in a situation where more china clay and ball clay was extracted than could be sold in order to derive additional by-product material for aggregate production. Even with the exemption the majority (five times more) of china clay and ball clay by-products are still not being sold, but are placed in heaps on site.

(405) According to the BCC, exempt and non-exempt quarries are significantly different. Non-exempt aggregates quarries mainly extract the same material as their primary products and waste or by-products. However, in china clay and ball clay quarries the waste is different from the main materials. The latter are feldspar minerals while the former are mostly silica-based sands.

(406) The BCC maintains that the sales of the by-product material from china clay and ball clay quarries will fall if the levy is imposed on them. To meet demand additional virgin aggregates will have to be extracted.

(e) *Comments received from the BAA on 15 September 2014*

(407) The BAA has provided information from its members located in Cornwall as regards the fact that china clay prices can vary dramatically between GBP 50 to GBP 5 000 per tonne depending on its grade and quality.

(f) *Comments from the UK authorities*

(408) The UK authorities maintain that not only do the material characteristics of china clay and ball clay preclude their use as aggregates, the relative value of ball clay and china clay would also preclude such use. The UK authorities claim that, in fact, there is no actual and established exploitation of ball clay and china clay as aggregates. Accordingly, the Commission's summary of the difference between the position of the spoil, waste or by-product of the extraction of these materials is entirely correct. The exemption of the inevitable by-products of materials which cannot and are not used as aggregate is entirely consistent with the environmental objective of the AGL.

(409) The UK authorities provided a detailed description of ball clay and china clay and explained why they are not and cannot be used as aggregate. Moreover, both materials attract a high price. According to the UK authorities, ball clay is a relatively rare material, with a value of up to GBP 100 per tonne, depending on the particular grade of ball clay required and the level of demand in the marketplace. China clay is a very rare material, which commands a very high price on the market of between GBP 70 and GBP 400 per tonne. According to the UK authorities, the cost of producing of china clay and ball clay are also very high by comparison with the costs of production of other types of aggregates. The UK authorities provided information collected from companies active in the field. One company provided the average figure of GBP […] per tonne of china clay, with a range of GBP […] to GBP […] for different china clay products. Another company mentioned GBP […] per tonne. For a tonne of ball clay the average production cost is of GBP […] in Dorset and GBP […] in Devon. Another company mentioned GBP […] per tonne.

(410) According to the UK authorities, there are two companies currently supplying ball clay and china clay in the United Kingdom. The UK authorities provide the example of one supply contract for china clay and ball clay by-products where the price in 2012 was of GBP […] per tonne. In the case of another contract the price was of GBP […] per tonne of china clay waste sold. Ball clay waste had a price of GBP […]. Neither of these two companies sells the spoil or inevitable by-products generated by their activities directly to the construction end-users of such aggregates. Instead, both companies have entered into agreements with third parties (that specialise in the sale of aggregates) under which they agree to provide up to a certain amount of aggregate for a fixed price, irrespective of the amount which is actually supplied. Accordingly, as the price is not determined directly for each tonne of aggregate they produce, the ball clay and china clay quarries have no incentive to increase the amount of spoil which they remove beyond the level which has been agreed. The third parties then sell the aggregate on to end users. According to the UK authorities, owing to the economic downturn not even the entire amount of aggregates can be sold.

(411) The UK authorities claim that, the production of china clay cannot be separated from the production china clay waste. The nature of the wet extraction process is such that the pumps necessarily separate the desired kaolin material and waste products. Traditionally, the first stage in the extraction or quarrying of china clay was to remove the overburden and expose the rock bearing clays. The second stage of the process was that the quarry operator would subject the exposed clay or pit face to jets of water at high pressure. According to the UK authorities, this would remove the china clay, together with other products it was mixed with (sand and mica).

(412) According to the UK authorities, the overburden resulting from the extraction is subject to the AGL. The rest of the material which is unavoidable in the china clay extraction process is covered by the exemption.

(413) The UK authorities claim that ball clay is extracted entirely by open pit methods. Open pit extraction involves using hydraulic excavators and dump trucks to selectively dig, load and deliver individual production clays to storage and blending facilities. The overall clay to waste ratio for the industry is about 1 to 1,5.

(414) According to the UK authorities, where an operator would be unable to obtain the high value china clay or ball clay product, there would be no incentive to extract the by-products by themselves, in particular due to their low economic value. The presence of kaolinite or any other type of clay in a rock reduces the material's strength and therefore has a negative effect on its possible performance as aggregate. Even if the operator did not want to obtain the high value material, it would still incur the high costs of removing and disposing of the fine material i.e. the kaolinite, other clay and mica. Accordingly, it would be illogical to remove high value products and dispose of them in order to obtain the low-value by-products which can be used as aggregates. According to the UK authorities, even with the exemption from the levy it would, allegedly, not be economically rational for extraction activities to be undertaken at the sites in order to obtain exempt spoil unless the higher value china clay and ball clay was also being extracted.

(415) According to the UK authorities, the inevitable by-products generated by the extraction of ball clay and china clay are suitable for some aggregate uses.

(416) The UK authorities commented on the distinction between the extraction of limestone for lime production and cut stone and the inevitable by-products generated by the extraction of ball clay and china clay. They contend that cut stone and limestone are extracted for use as aggregate, as well as for those non-aggregate purposes. Cut stone is produced from sandstone or granite — both of which are extracted for use as aggregate. The spoil, waste or by-products derived from the production of cut stone and limestone can also be used as aggregate.

(417) According to the UK authorities, the fact that both limestone and its by-products can be used as aggregate is in part explained by their material characteristics. Waste arising from the extraction of limestone, which is used in the production of lime, is likely to consist not of a different waste material, but rather, additional limestone. The UK authorities claim that, in a small number of instances, the limestone 'waste' which arises from the quarrying of limestone for lime production may be chemically unsuitable for lime production. However, in the majority of instances, it would be perfectly suitable for either use as aggregate or the production of lime. The end-use of limestone will be determined more by local demand than chemical composition.

(418) Moreover, according to the UK authorities, waste arising from the extraction of rock to produce cut stone is likely to consist largely of the chippings of the same rock which is being extracted. Unlike ball clay and china clay, there are no additional costs in relation to the separation of the higher and lower quality grades of the same material.

(419) The UK authorities maintain, quoting the BGS, that both the freshly extracted material and their by-products are deliberately extracted for, and used as, aggregate ([76]). The quarrying of limestone and rock for cut stone generates high quality aggregates which would be extracted for sale on their own, even if there was no local demand for limestone or cut stone. The cost of limestone for lime is around GBP 12,50 to GBP 19,50 per tonne, whereas the price of its by-product is GBP 7,16 to GBP 11,70 per tonne. The price per tonne of sandstone and quartzite used for producing cut stone is around GBP 45,76 to GBP 82,42, whereas the cost of its by-product aggregate is around GBP 6,58 to GBP 10,04.

(420) According to the UK authorities, a granite quarry would produce varying proportions of cut stone for flooring, office buildings, domestic kitchens etc. and aggregate. Igneous rock (including granite), which is also used to produce cut stone, costs around GBP 5,51 to GBP 12,91 per tonne, whereas its aggregate by-product sells for around GBP 6,12 to GBP 12,82 per tonne.

([76]) British Geological Survey, *Mineral Planning Factsheet: Construction aggregates*, page 3.

(421) According to the UK authorities, the proximity in price of limestone/cut stone and its spoil (which in any event is the same substance) means that there are incentives to extract both, depending upon local demand. The UK authorities contend that the difference between the unavoidable by-products of china clay and ball clay and the by-products of limestone and cut stone is justifiable and any other tax treatment would lead to uncontrollable abuses and could not be enforced.

(422) The UK authorities further show that it is entirely consistent with the objective of the levy to encourage the use of the inevitable by-products of the extraction of china clay and ball clay, as they can be used as aggregate. As both limestone/cut stone and the by-products generated from their production can be used as aggregate, and are extracted for that purpose, the exemption of the spoil arising from extraction of limestone/rock used for cut stone would only serve to encourage increased extraction of fresh aggregate, and would not shift demand from freshly extracted aggregates to recycled aggregates and waste by-products.

(423) The UK authorities allege that limestone is a high quality aggregate, for which there is also market demand. There is a market in limestone quarried solely for aggregate (88 quarries in the UK, as shown in the joint submission of the BAA with the UK authorities), and as such there is an environmental rationale to substitute this material for by-products of other quarrying. There is allegedly no objective way to distinguish between limestone produced as a by-product of agricultural lime production and limestone quarried specifically for use as aggregate.

(424) One interested party mentioned that there are china clay and ball clay pits that have been reopened due to the introduction of the levy solely for extracting exempt aggregates. The UK authorities obtained confirmation from the two national producers of ball clay and china clay that this is not the case and maintained that they are not aware of any authorisations having been granted for such reopening purposes.

(425) As regards the comment from an interested party that silica sand that is a by-product of china clay extraction has always been used as a source of aggregate in Cornwall and the exemption does not reduce the extraction of freshly quarries sand, the UK authorities verified and provided partial sand sales for Devon and Cornwall and showed that they could not attribute any of the production to by-products of china clay extraction.

5.6.3.2. ***Assessment by the Commission***

(426) The submissions from ball clay and china clay producers, their respective trade associations, and the UK authorities clearly show that the by-products arise both unintentionally and unavoidably. The costly and complicated extraction process of ball clay and china clay and the fact that more waste is produced than china clay and ball clay producers are able to find a market for, shows that ball clay and china clay are not intentionally extracted to produce exempt by-product materials for aggregate use.

(427) In addition, ball clay and china clay commercially operate their businesses differently than quarries that supply aggregates for construction purposes, as they have to honour long term contracts to ensure a constant production of the respective end products. This means that they can neither quarry more, nor less than what they need to obtain the quantity of ball clay and china clay provided in their contracts, thus the amount of extraction by-products would remain the same. The introduction of the AGL for ball clay and china clay by-products would only affect the financial situation of the respective businesses without achieving any environmental benefits.

(428) Unlike the by-products from limestone and cut-stone, by-products of ball clay and china clay would never be quarried for their own sake in order to produce more exempted aggregates. The exemption for by-products of ball clay and china clay are does not lead to more extraction of the freshly quarried ball clay and china clay and their selling value is much lower. There is no proximity in price like in the case of limestone and cut stone. In fact, the price difference is much greater. Thus, there is no risk that the exemption might lead to a deliberate increase of fresh quarrying. The exemption for by-products from the extraction of ball clay and china clay encourages their use instead of freshly extracting new aggregates and is in line with the principles underpinning the AGL.

5.6.4. EXEMPTION OF AGGREGATES CONSISTING WHOLLY OF THE SPOIL FROM ANY PROCESS BY WHICH COAL, LIGNITE, SLATE OR SHALE HAS BEEN SEPARATED FROM OTHER ROCK AFTER BEING EXTRACTED OR WON WITH THAT OTHER ROCK OR OF THE SPOIL FROM ANY PROCESS WHERE THE SUBSTANCES IN SECTION 18(3) OF THE FINANCE ACT 2001 HAVE BEEN SEPARATED FROM OTHER ROCK AFTER EXTRACTION OR WON WITH THAT OTHER ROCK (SECTION 17(3)(f)(i) AND (ii))

(429) Coal, lignite, slate and shale and the substances listed in Section 18(3) of the Finance Act 2001 are normally not quarried for their use as aggregates, but are quarried for other purposes. Prior to the adoption of the Opening Decision, the UK authorities had explained that the exemption is meant to encourage use rather than disposal in waste tips of the spoils. This both improves the visual landscape and reduces the need to extract other materials for aggregates use.

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

(431) The Commission doubted, however, whether this difference is sufficient to demonstrate that the tax exemption is justified by principles underpinning the AGL. It considered the difference from taxed aggregates is justified only if the exemption is limited to the inevitable spoil of the extraction of those substances. The Commission considered this to be the case as the exemption is limited to material that constitutes at 100 % the spoil of the separation process.

(432) The Commission doubted the difference in situation with exempted materials as compared with non-exempted materials that occur as the spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces. In addition, the Commission wondered whether the exemption can be justified in the light of the objective assigned to the AGL if, for instance, slate and shale or any of the other substances listed in Section 18(3) would be extracted to be used as aggregates.

(433) The Commission received extensive comments from interested parties which are presented in the relevant sections in relation to the exemptions for coal, lignite, slate or shale.

5.6.4.1. ***Comments received by the Commission***

(a) *Comments from the UK authorities*

(434) The UK authorities maintain that the exemptions from the AGL distinguish between waste materials that arise as the by-product of the extraction of a non-aggregate mineral (such as waste from china and ball clay extraction), which are exempt, and waste materials that are the by-product of the extraction of aggregate (such as waste from limestone), which remain subject to the tax.

(435) As regards spoil from coal extraction, the UK authorities maintain that the negligible price of shale and colliery spoil show that there is little to incentivise extracting additional coal in order to obtain extra by-product, whether or not that by-product is exempt from the levy.

(436) According to the UK authorities, the exemption for waste arising from slate quarrying does not lead to more slate extraction for the purpose of obtaining slate chippings, in particular because slate production already produces large quantities of waste slate chippings, only about 10 % of which is currently used as aggregate and because it would not be economically feasible to operate the quarry for such purposes.

(437) The UK authorities maintain that the distinction between slate waste on the one hand and cut stone and limestone waste on the other hand stems from the objective of discouraging the additional fresh extraction of limestone for aggregate use while not discouraging the production of non-aggregate material. Even where limestone is being extracted for non-aggregate purposes or rock is being extracted to produce cut stone, the spoil which is created is at the same time deliberately being extracted for use as aggregate and is well-suited for that use. The quarrying generates high quality aggregates which would still be extracted for sale on their own, even if there were no local demand for lime or cut stone. The same is apparently not true as regards to spoil from slate, shale, coal, lignite, clay and the substance mentioned in Section 18(3). The UK authorities maintain that, there is no evidence that any quarry deliberately extracts slate, shale, coal, lignite, clay or the Section 18(3) substances specifically in order to obtain the spoil for use as aggregate. Also, according to the UK authorities, the exemption does not encourage additional quarrying in order to obtain spoil for use as exempt aggregates.

(438) However, according to the UK authorities, exempting spoil from the extraction of limestone (whether or not it is to be used for a non-aggregate purpose such as lime) and of rock for cut stone would be likely to encourage additional quarrying in order to obtain spoil for use as an exempt aggregate. That is because the spoil consists of the same substance as the principal quarried material, is relatively close in value to the price of the principal material, and is suitable for use as a high quality aggregate material. To exempt such materials from the tax would be likely to encourage additional quarrying and would defy the AGL's environmental logic.

(439) The UK authorities maintain that they considered at some point introducing an exemption for waste from primary aggregates production or from the production of the higher quality aggregates. However, the consultation with the industry showed that this would not be feasible as the range of quarries' products varies significantly and what some quarries consider high grade aggregates would be the waste produced by other quarries. The UK authorities maintain that apart from the significant risk of tax avoidance, providing an exemption for 'waste' arising from aggregate quarrying would therefore also be contrary to the logic and overarching environmental goal of the AGL. It would, in effect, serve to reduce the relative price of lower grade aggregates, thereby increasing demand and potentially leading to an increase in aggregate quarrying (and associated environmental damage) at the sites concerned.

(440) According to the UK authorities, a slate quarry would produce high quality architectural products selling for in excess of GBP 200 per tonne. Around 5 % of the slate extracted is suitable for this purpose due to the geological formation of the slate, and so a large amount of waste slate is produced. This waste slate is suitable for sale for some aggregate purposes, and a small proportion of the waste created is sold for between GBP 2 and GBP 8 per tonne, with the remainder piled in heaps. The UK authorities maintain that the cost of producing any tonne of product for use as an aggregate is higher than a typical drill and blast aggregates operation which the limestone or granite quarries could operate since slate is being taken from various processes and handled many times before being crushed. The marketing strategy is to maximise the value of the resource at its disposal, increasing the yield of high value material.

5.6.4.2. ***Assessment by the Commission***

(441) The Commission already concluded in recital 366 above that since it has been evidenced that shale has been deliberately extracted for use as aggregate at least by one quarry, its exemption under Section 17(4)(a) of the Finance Act 2001 is not justified by the principles underpinning the AGL.

(442) The Commission has also already established above in recitals 205, 333, 367 and 368 that coal, lignite, slate and the substances listed in Section 18(3) cannot or are not freshly extracted for use of aggregate and thus are not in the same legal and factual situation as taxed materials.

(443) In addition, the Commission assessed the difference between these exemptions and spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces in the context of establishing the underpinning principles of the AGL as detailed in recitals 149 to 158.

(444) As regards spoil of slate extraction, which could be used as aggregate and also consist of slate, the Commission notes that no fresh slate quarrying would take place deliberately for obtaining these products due to their low value (see recitals 226 and 237-240). Spoil from slate extraction achieves a selling price between GBP […] and GBP […] per tonne. High quality architectural slate products appear to have a selling price starting from GBP 200 per tonne and rising to above GBP 1 000 per tonne. Only a small part of the spoil from slate extraction can actually find a market and is sold even with the exemption from the AGL. Moreover, slate extraction is an extremely costly process for which more costs are incurred than in the case of regular quarrying. According to the UK authorities the cost of producing slate spoil amounts to GBP 5,7 to GBP 6,5 per tonne (recital 263). This demonstrates that it does not make economic sense to deliberately extract slate solely to benefit from the exempted spoil of its extraction. Thus this exemption is unlikely to increase the fresh extraction.

(445) In accordance with the typical revenue of slate quarries, the specialised architectural products, although only 5 % of production, bring revenues to the quarries that are 2,54 to 3,52 times higher than the revenues brought by slate spoil (see recital 263).

(446) Given that spoil from slate extraction can and is used as aggregates it could be considered in a comparable factual and legal situation as other taxed materials.

(447) The Commission therefore concludes that the exemption from the AGL for spoil from slate extraction represents, first, an exemption for spoil from extraction of a material which is not freshly extracted for aggregates use, and, second, does not lead to any additional fresh quarrying of materials, but can increase the use as aggregates of a material that would otherwise be discarded or tipped as waste. Thus this exemption is justified by the 'shift of demand' objective of the AGL.

(448) The same applies for spoil of coal, lignite and of the substances in Section 18(3) of the Finance Act 2001 which are either not aggregates or not extracted for aggregates use.

(449) Firstly, the extraction of lignite does generate spoil. In accordance with the information from the UK authorities, lignite is itself a by-product of ball clay extraction in Devon. Lignite deposits in Northern Ireland are not exploited.

(450) Secondly, as submitted by interested parties and by the UK authorities, spoil from coal extraction, which can include shale, are either not suitable for aggregates use, for example, fireclay, or are generally tipped and consolidated. Some spoil or waste from coal extraction is suitable for use as aggregates and it can, thus, replace freshly extracted aggregates.

(451) Pricing information as regards the price of coal (GBP 50) versus the price for which coal spoil sells (GBP 1 to 2), when there is demand for such products, shows that the exemption for spoil of coal cannot lead to more extraction of coal just for obtaining the exempted materials.

(452) The exemption from the AGL for spoil of coal extraction helps achieve the environmental scope of the AGL.

(453) Thirdly, as explained in Section 5.6.2, the substances listed in Section 18(3) of the Finance Act 2001 are not deliberately extracted for aggregates use as the majority of them are not aggregates or are not suitable for use as aggregates. The only substances suitable for lightweight aggregates are perlite, pumice and vermiculite which are not extracted in the United Kingdom. Moreover, the UK authorities have shown that the substances listed in Section 18(3) of the Finance Act 2001 either do not generate spoil that could be used as aggregates, are themselves a spoil of the extraction of something else, or are no longer extracted. Therefore, the exemption for the spoil of the substances listed in Section 18(3) of the Finance Act 2001, if any, cannot lead to more extraction of the main material so that the exempted aggregate product is obtained.

(454) Therefore, the Commission can now conclude that the exemption of aggregates consisting wholly of the spoil from any process by which coal, lignite or slate has been separated from other rock after being extracted or won with that other rock or of the spoil from any process where the substances in Section 18(3) have been separated from other rock after extraction or won with that other rock is in a different factual and legal situation than materials taxed under the AGL in light of the objective of the AGL.

(455) Spoil of shale extraction when the shale is deliberately extracted for aggregates use is comparable with spoil from the extraction of any other taxed material (for instance limestone, granite and gritstone). The Commission notes that it has received very little information as regards the cost of shale extraction and the price which shale achieves when it is extracted as a primary product of a quarry. It has received some pricing information for shale that is used for brick-making, shale as by-product of another material or shale together with clay. However, the fact that a deliberate extraction of shale for aggregates use takes place (see recitals 350 and 351) sheds doubt on the achievement of the environmental purpose of the AGL by such exemption as also found by the General Court ([77]).

(456) The spoil of any process by which the shale has been separated from other rock can be still used as aggregates. The possibility to sell spoil from the extraction of shale for aggregates use exempted from AGL gives an extra leverage to shale producers and can, potentially, encourage fresh extraction of the shale as pointed by the General Court ([78]). As the main product, shale appears in some instances to be deliberately extracted for aggregates use. Spoil from the process of obtaining shale could also potentially be sold as aggregates. Therefore, there is no guarantee that the exemption for spoil of shale that is deliberately extracted for commercial exploitation as aggregate does not lead to more fresh extraction of shale, thus undermining the environmental objective of the AGL.

(457) The spoil of shale extraction, when the shale is deliberately extracted for commercial exploitation as aggregate, falls into the scope of the normal taxation rule of the AGL and are not in a different factual and legal situation than materials taxed under the AGL in light of the environmental objective of the AGL. In addition, the exemption for such spoil cannot be justified under the nature and logic of the AGL as shown above in recital 456.

(458) With regard to shale as spoil occurred with the quarrying of shale for non-aggregates use (for instance for brick-making) the Commission considers — on the basis of the available information — that albeit being in the comparable legal and factual situation as other taxed materials, it could not be demonstrated that the exemption of such spoil can lead to an increase of fresh quarrying of the shale for non-aggregates use. Given the relatively low price of shale as by-product when sold for aggregates use (GBP […] to GBP 4,4 per tonne including transportation costs), it is highly unlikely that the exemption for the spoil from shale extraction might lead to an increase of shale quarrying. In any event such increase of fresh quarrying of shale for non-aggregate use would not be contrary to the objective of the AGL.

(459) Shale producers would have to show what uses the shale they produced had in order to claim an exemption from the AGL for the spoil, i.e. if it was commercially exploited for aggregates use.

5.6.5. AGGREGATES CONSISTING MAINLY OF, OR BEING PART OF ANYTHING CONSISTING MAINLY OF, THE SPOIL OR WASTE FROM, OR BY-PRODUCTS OF ANY INDUSTRIAL COMBUSTION PROCESS OR FROM THE SMELTING OR REFINING OF METAL (SECTION 17(4)(c)(i) AND (ii))

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

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

(462) The Commission doubted that the application of the exemption to materials that are mainly (i.e. as of 50 %) composed of the spoil or waste from, or by-products of any industrial combustion process or the smelting or refining of metal would still be in line with the nature and logic of the AGL.

(463) The Commission has received several comments from interested parties in this regard.

([77]) Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraphs 89-90.
([78]) See footnote 77.

5.6.5.1. ***Comments received by the Commission***

(a) *Comments received from Mineral Products Association on 2 January 2014*

(464) The Mineral Products Association supports the conclusions of the Commission in the Opening Decision that these materials are not in the same legal and factual situation as taxed material. The justification is clear for materials consisting wholly of spoil or waste. But for materials consisting mainly of spoil or waste an exemption would be justified only if there is a small amount of residue of other material mixed with the exempt material.

(b) *Comments received from QPANI on 8 January 2014*

(465) According to QPANI, there is a significant supply of materials used in aggregates markets which are the by-product of industrial combustion processes or the smelting or refining of metal such as iron and steel slags and incinerator bottom ash. The association supports the conclusion in recital 124 that these materials are 'not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL'. There is a clear justification for materials which are 'wholly' the spoil or waste from, or by-products of these processes at the point of commercial exploitation to be exempt from the AGL.

(c) *Comments received from the BAA on 17 January 2014*

(466) The BAA submitted a letter by the Hart Quarry, an agricultural lime quarry, showing the difficulties that quarry has encountered in having their secondary products compete with slag aggregates from nearby steel works. The aggregates produced by the quarry are exempt although the environmental impact of the steel works is much higher than that of the Hart Quarry. The AGL has allegedly prevented the Hart Quarry from competing on the aggregates market. According to the BAA, the quarry sells all the lime it produces and the amount of aggregates produced as a by-product in proportion to the total output has remained constant, they cannot be decreased or increased. Therefore, there are not large heaps of unsold aggregates that have built up during the AGL. The quarry, allegedly, cannot increase its lime production to meet export demand due to the unsold by-products.

(d) *Supplementary information received from Mr Bird of the BAA on 10 February 2014*

(467) Mr Bird claims that slag aggregate is not a waste product from the steel manufacturing industry, but a by-product that can be used as aggregate. Mr Bird enclosed information referring to slag from the final report by the UK Competition Commission into the aggregates and cement markets in the UK. According to Mr Bird, slag can be ground into an additive or an alternative to ordinary Portland cement making it an important product making a first class aggregate.

(e) *Comments of the UK authorities*

(468) The UK authorities maintain that the exemption regards chemicals added to the materials resulting from any industrial combustion process or the smelting or refining of metal so that they can be used as aggregates.

(469) According to the UK authorities, for a variety of reasons, the by-product of the industrial combustion processes is not always of suitable quality or sufficient on its own to be used as aggregate. However, if an extra material is added this can improve its suitability for such use. For example, the production of stainless steel produces di-calcium silicate on cooling. That substance turns the slag (called AOD ([79]) slag) into a powder, which raises dusting issues that render it unsuitable for use as construction aggregate or otherwise. If the steel producer adds the chemical anhydrous sodium tetra borate (Borax) to the molten slag after it has been melted in the furnace, the chemical will stabilise the slag. The addition of the chemical removes the dusting problem and results in the stabilised slag forming a crystalline rock-type material that can then undergo a metal recovery process, crushing and screening and weathering and is then suitable for certain aggregate uses, e.g. in the preparation of asphalt materials.

([79]) Argon Oxygen Decarburisation.

(470) The UK authorities maintain, the addition of a chemical to the by-product of an industrial combustion process does not render the exemption inconsistent with the objective of the levy, since the resultant material is not a taxable aggregate.

5.6.5.2. ***Assessment of the Commission***

(471) The Commission has already concluded in recital 124 of the Opening Decision that aggregates consisting wholly of, or being part of anything consisting mainly of, the spoil or waste from, or by-products of any industrial combustion process or from the smelting or refining of metal ('by-products of industrial combustion processes or from the smelting or refining of metal') are not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL.

(472) Both the UK authorities and the Mineral Products Association have demonstrated that aggregates consisting mainly of by-products of industrial combustion processes or from the smelting or refining of metal are not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL.

(473) Indeed the Commission received submissions showing that by-products of industrial combustion processes or from the smelting or refining of metal have a high value as aggregates and have various uses. The BAA submitted the example of a limestone quarry that produces primarily agricultural lime, but that competes with by-products of industrial combustion processes or from the smelting or refining of metal on the market of their secondary products, i.e. limestone aggregates. This shows that the exemption for by-products of industrial combustion processes or from the smelting or refining of metal is even more justified, as an unavoidable by-product such as this, is actually replacing other freshly extracted aggregates such as limestone aggregates.

(474) The Commission has already addressed the difference between by-products from the extraction of limestone for the production of agricultural lime and exempted by-products of non-aggregate processes in recitals 151 to 158.

(475) The BAA claims that by-products of industrial combustion processes or from the smelting or refining of metal should not benefit from an exemption under the AGL as the environmental impact from steel works is much higher than that of aggregates' extraction. This may be the case. However, steel works are a process that is unrelated to the AGL. The exemption for by-products of industrial combustion processes or from the smelting or refining of metal merely serves the selling of these as aggregates so that they can replace fresh extraction for aggregates use.

(476) Therefore, the Commission considers that the comments received do not constitute a reason to cause it to depart from its initial assessment from the Opening Decision (recital 124).

(477) In relation to the exemption which extends to material which is mainly, but not wholly, the by-product of industrial combustion process or metal smelting/refining, the UK authorities explained that additional chemicals are sometimes required to stabilise the material to render it suitable for aggregate use.

(478) The Commission notes that the Extractive Waste Directive (Directive 2006/21/EC of the European Parliament and of the Council) ([80]) describes in Article 3.3 'inert waste' as waste that does not undergo any significant physical, chemical or biological transformations and therefore should not entail pollution risks. The example provided by the UK authorities (in recital 469) involving the use of 'borax' could be interpreted to relate to an example of an additional chemical that could increase the risk of pollution, depending on the amounts used, its concentration and the areas (soil, water body, etc.) affected. Nevertheless, the use of borax does not fall in the scope of the present Decision.

([80]) Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC — Statement by the European Parliament, the Council and the Commission (OJ L 102, 11.4.2006, p. 15).

(479) The Mineral Products Association proposed that where materials are mixed with materials which are subject to the levy, the tax liability should be in proportion to the amount of taxable material in the mixture. As the AGL is structured, this is already the case. The aggregate material which has been 'mixed with another material other than water' is deemed to have been commercially exploited, and as such, would already be liable for the levy (Section 19(1)(d) of the Act).

(480) The Commission therefore concludes that the exemption under Section 17(4)(c)(i) and (ii) of the Act falls within the principles underpinning the AGL and does not constitute a selective advantage.

5.6.6. EXEMPTION FOR MATERIAL WHOLLY OR MAINLY CONSISTING OF CLAY (SECTION 17(4)(f))

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

(482) The Commission, however, noted that, in geological terms, clay is considered a rock and that it can be used as aggregate ([81]). In so far as a material wholly or mainly consisting of clay was extracted to be used as aggregate, it did not consider clear how the exemption could be justified on the basis of the normal taxation principles or to what extent it may be deemed in a different situation from taxed materials in the light of the objective of the AGL.

(483) The Commission has received the following comments from the BAA.

5.6.6.1. ***Comments received by the Commission***

(a) *Comments received from the BAA by on 15 September 2014*

(484) The BAA maintains that clay can be used as aggregate without being chemically or physically altered. They claim that clay falls under the definition of aggregate provided by the Opening Decision. It can be used for a number of aggregate uses including construction fill. The BAA provides a chapter of a book as regards the uses of clay in civil engineering and construction. According to the BAA, clay is also used in large quantities by the UK Highways Agency for highway works. BAA maintains this is a use for aggregates purposes. Clay falls into one of the categories of acceptable materials provided by the specification for highway works in the United Kingdom. It can be used as cohesive fill for highway works. The BAA has provided examples of quarries that allegedly extract clay suitable for highway works. Moreover, clay is suitable for specific aggregates uses for which other rocks are not suitable, i.e. lining and capping of landfill sites and lining ponds and canals.

(485) The BAA has provided a list of eight quarries that, allegedly, extract clay for use as aggregates. The list is extracted from the BGS *Directory of Mines and Quarries 2010*. Moreover, the BAA provided examples of two quarries extracting clay suitable for sea wall/flood defence, engineering projects, landfill capping, pond lining, fill material and land reclamation, all, supposedly, aggregate uses. The material extracted also falls into the category of cohesive material that is suitable for highway works. The BAA further provides an example of the use of clay from one of the quarries for the construction of a road.

(486) The BAA maintains therefore that there are numerous quarries that produce and sell clay for aggregates use and not only for ceramic processes. According to the BAA, there are also a number of quarries where clay is interbedded with other materials from which material consisting mainly of clay would be exempted.

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

(b) *Comments from the UK authorities*

(487) The UK authorities maintain that clay is readily distinguished from other types of very fine-grained sedimentary rock by its plasticity and ability to be cut and shaped with a knife or trowel (definition in the Report ([82])). These plastic properties of clay make it unsuitable for most aggregate purposes because it swells as it absorbs water and cracks when it dries out.

(488) According to the UK authorities, most clay is soft and non-granular and without chemical or physical transformation is suitable only for use as fill in earthworks, e.g. landfill linings and flood defences. Clay is generally not used for foundation fill beneath buildings because its low-strength, compressibility and susceptibility to shrinking and swelling is highly likely to cause the building to move beyond its permissible limits, causing it to crack and fail. Hard, granular aggregate is preferred for this purpose because it will form a much more stable platform for the building. Thus, untreated clays are generally considered unsuitable for 'typical aggregate use' (such as building foundation fill, concrete manufacture, road metal or mortar). These uses account for the vast proportion of production in the United Kingdom. 'Typical aggregate use' almost always requires a hard granular material — usually sand, gravel and/or a crushed hard rock such as limestone, igneous rock or sandstone, or granular material recycled from demolition waste or road planning. The only circumstances in which clay can be utilised for 'typical aggregate use' is where the clay has been pelletised and heated to over 1 000 °C in an industrial process to form a lightweight hard pellet which can be used as a granular aggregate in concrete for some specialised but minor applications. The UK authorities state that they have been unable to identify any quarry where it can be said that clay is being extracted specifically for use as aggregate.

(489) However, according to the UK authorities, the properties of clay make it suitable for non-aggregate applications where the clay remains hydrated and its impermeability to water is a key requirement. The UK Authorities do not consider that lining and capping landfill sites uses material as an aggregate — it is not the bulk of the material that is required, but impermeability to water and leachates. Specialist uses of clay include lining landfill sites, lining watercourses and lakes or ponds and flood defences. Clay used for these purposes is not an aggregate use; rather than being used as bulk fill where the hard, granular properties of the material are required, the clay — which is neither hard, nor granular — is used to create a barrier through which liquid has restricted passage.

(490) In response to the BAA's observation that clay may be used for road works, the UK authorities note that the Highways Agency has informed the UK authorities of the uses of clay. The UK authorities maintain that clay excavated from the site of a road construction project may be used, due to its permeability for bulk earthworks such as fill and embankment construction where it does not need to be transported (i.e. clay is not specifically quarried, it is a by-product of the construction of the road). Clay may be treated with lime or cement to improve its road-bearing capacity. It may be used in lining drainage channels (where its permeability is important) or as backfill for minor structures where it is not required to hold large weights. The UK authorities note that excess clay excavated from roadwork sites may be sent to landfill as a waste material and occasionally commercial bodies may heat-treat clay to produce lightweight aggregates for road construction.

(491) The UK authorities, quoting the Highways Agency, explain that earthworks materials are divided into granular (class 1) and cohesive (class 2) categories. Granular categories are aggregates — materials used to provide stable, bulk fill. Cohesive materials are not aggregates, but comprise materials with a smaller particle size, such that they behave cohesively, i.e. they are sticky and have limited permeability to water.

(492) According to the UK authorities, clay can only be used as a granular material if it is heat-treated and pelletised. It can, however, be used as a cohesive material without heat-treatment. In these uses, the clay cannot be substituted by aggregate materials, e.g. crushed granite or limestone, as these are granular materials. Clay can be substituted by pulverised fuel ash (e.g. from coal-fired power stations) as this too has cohesive properties.

([82]) See footnote 64.

(493) According to the UK authorities, unlike clay, armour rock for sea defences is formed of aggregate. This is a bulk role where the hard, granular properties of uncut, irregular pieces of rock form a stable material which protects softer land from erosion by the sea. Rock armour sea defences are very different to the use of clay in flood defences; rock armour resists erosion caused by water rather than containing water by being impermeable to it. The requirements of the specification depend on the severity of the marine environment, but density and aggregate abrasion value are key properties.

(494) The UK authorities claim that there is no clear evidence, including in the material identified by the Commission or in the material BAA submitted to the General Court, which shows that clay is being extracted for use as an aggregate in the United Kingdom. The General Court's view was expressly qualified as being 'subject to evidence to the contrary' (see paragraphs 86-91 of its judgment in T-210/02 RENV). The UK authorities have investigated the suggestions submitted by the BAA as regards quarries that would be exploiting clay solely for aggregates use and concluded this is not the case. The information extracted from confidential tax records have been provided to the Commission.

(495) The UK authorities have contacted a quarry which BAA had claimed used their clay for building a road. According to the UK authorities, the quarry explained that clay is used for road building as a stable non-permeable layer to raise the road out of the flood plain on which the stone aggregate and tarmac are placed. It is not used to replace stone aggregate as it would not be suitable without treatment

(496) The UK authorities maintain that the material characteristics and value of clay makes its extraction for use as aggregates inherently unlikely.

(497) According to the UK authorities, naturally occurring clay, soil or organic matter does not have 100 % purity. In defining the materials clay, soil, vegetable or other organic matter as exempt from the aggregates levy, it was therefore necessary to allow for materials which mainly comprise these materials.

5.6.6.2. ***Assessment by the Commission***

(498) The interested parties and the UK authorities disagree as to the use of clay as aggregate. Only if such a use can be established would clay be in a factual and legal situation comparable with such of taxed materials.

(499) Clay is distinguished from other materials by its properties of plasticity, ability to be cut and shaped with a knife or trowel and non-permeability, which make it unsuitable for most aggregate purposes because it swells as it absorbs water and cracks when it dries out.

(500) The BAA claimed that uses of clay for landfill lining, flood defences and as cohesive material for road works are aggregates uses. The UK authorities, however, mention that these are not aggregate uses of clay. Given that all these uses are based on the specific qualities of non-permeability and plasticity of clay and not on the bulk of the material, the Commission considers that the UK authorities are entitled to view clay used for landfill lining, flood defences and as cohesive material for road works as a non-aggregate use.

(501) The Commission asked the UK authorities to access confidential tax records in regard to the eight clay quarries the BAA submitted as extracting clay for aggregates use. The information received by the Commission from the UK authorities show that none of these quarries are exploiting clay for aggregates use. Some of the sites were not even quarries, but landfills.

(502) Following the information received the Commission notes that clay is not extracted for use as aggregate. It is not used for aggregate purposes and cannot be used for aggregates purposes unless it is subjected to physical transformations, i.e. it is pelletised and heated to over 1 000 °C in an industrial process to form a lightweight hard pellet.

(503) The Commission therefore concludes that clay cannot be used and is not extracted for use as aggregate and is, thus, in a different legal and factual situation than taxable materials in view of normal taxation rule of the AGL

(504) Moreover, as clay does not have 100 % purity, material consisting mainly of clay is also in a different legal and factual situation than taxable materials in view of the normal taxation rule of the AGL.

5.7. *CONCLUSION ON SELECTIVITY*

(505) On the basis of the above, the Commission concludes that: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including shale occurring as by-product of fresh quarrying of other taxed materials: and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; are in the same legal and factual situation as taxed aggregates in view of the normal taxation rule and objective of the AGL and the exemptions for such materials cannot be explained under the nature and logic of the AGL. Therefore, these exemptions are selective.

(506) The Commission further concludes that the tax exemptions, tax exclusions and tax reliefs established in Sections 17(3)(e), 17(3)(f)(i) and (ii) (except for spoil of shale that is deliberately extracted for commercial exploitation as aggregate), Section 17(4)(a) (except for material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials), Section 17(4)(c)(i) and (ii), 17(4)(f) (as far as clay is concerned), 18(2)(b) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b)) of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007 concern materials that are not in the same factual and legal situation as taxable material in view of the objective of the AGL and are, thus, not selective.

5.8. *ADVANTAGE*

(507) By granting the exemptions for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; instead of taxing them, the United Kingdom is foregoing resources and relieves the beneficiaries of these exemptions from a charge they should normally pay. Therefore, the measure entails a selective advantage to the beneficiaries of the exemptions for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate.

5.9. *STATE RESOURCES AND IMPUTABILITY*

(508) The measure is financed from state resources as the state is forgoing resources. The measure is also imputable to the state as it was established by way of legislation.

5.10. *DISTORTION OF COMPETITION AND EFFECT OF TRADE*

(509) There is trade between Member States in the aggregates sector and producers of the exempted aggregates are in competition with other aggregate producers. The Commission has also received extensive submission as to the distortions of competition caused by the exemptions from the AGL. Moreover, the United Kingdom has a natural land border with the Republic of Ireland and aggregates trade across this border is extensive ([83]).

(510) Therefore, the exemptions from the AGL for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; might distort competition and have an effect on trade.

([83]) See Decision in SA. 18859 *Relief from aggregates levy in Northern Ireland* (ex N 2/04), http://ec.europa.eu/competition/state_aid/cases/241379/241379_1594138_163_2.pdf

5.11. *CONCLUSION ON THE EXISTENCE OF AID*

(511) The Commission concludes that the exemptions from the AGL for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; constitute State aid.

(512) The Commission concludes that the tax exemptions, tax exclusions and tax reliefs established in Sections 17(3)(e), 17(3)(f)(i) and (ii) (except for spoil of shale that is deliberately extracted for commercial exploitation as aggregate), Section 17(4)(a) (except for material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials), Section 17(4)(c)(i) and (ii), 17(4)(f) (as far as clay is concerned), 18(2)(b) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b)) of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007, do not constitute State aid.

6. **LEGALITY OF THE AID**

(513) Although the AGL was notified by the UK authorities before being put into effect, the UK did not observe the standstill clause of Article 108(3) since the AGL entered into force on 1 April 2002 before the Commission adopted its decision on 24 April 2002 to not raise objections. The Commission decision was timely challenged and eventually annulled by the General Court on 7 March 2012 (T-210/02 RENV). Thus that decision must be considered void with regard to all persons as from the date of its adoption. Since the annulment of the Commission decision put a stop, retroactively, to the presumption of its lawfulness, the implementation of the aid in question since 1 April 2002 must be thus regarded as unlawful ([84]). According to the case-law the recipients of the aid cannot entertain legitimate expectations as to the lawfulness of the implementation of the aid, since the Commission decision not to raise objections to the measure was challenged in due time before the General Court ([85]).

7. **ASSESSMENT OF THE COMPATIBILITY OF THE STATE AID**

7.1. *LEGAL BASIS*

(514) Given the environmental purpose of the AGL, the Commission had examined in the Opening Decision the compatibility with the internal market of exemptions and reliefs from the AGL in accordance with Article 107(3)(c) TFEU and in the light of guidelines on State aid for environmental protection.

(515) As mentioned in recital 513 above, the result of the annulment of the Commission decision is that the aid must be deemed unlawful. In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid ([86]), paragraph 82 of the 2001 EAG and paragraph 205 of the 2008 EAG the Commission had assessed the compatibility of the tax exemptions and reliefs under the 2001 EAG in so far as they were applied between 1 April 2002 and 31 March 2008 and under the 2008 EAG as far as they were applied as from 2 April 2008 and until 31 March 2014, the date of the suspension of the exemptions.

(516) The Commission has received comments from the BAA and argumentation from the UK authorities as regards the compatibility of the exemptions from the AGL. The Commission will only present and address the comments relating to the exemptions from the AGL for shale and products consisting mainly of shale when used as aggregate and shale spoil when extracted together with shale that is used as aggregate.

(517) Mention should be made that both the comments from the BAA and the argumentation submitted by the UK authorities relates mostly to all or some of the exemptions as regards to which the Commission raised doubts in the Opening Decision and there are few specific arguments relating exclusively to shale.

([84]) See Case C-199/06 CELF [2008] ECR I-469, paragraphs 61 and 64.
([85]) See Case C-199/06 CELF [2008] ECR I-469, paragraphs 63 and 66 to 68.
([86]) Commission notice on determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

(518) Moreover, the submission from the UK authorities is based on the assumption that shale is not deliberately extracted for commercial exploitation as aggregates and they provided no compatibility grounds specific for the situation at hand in which the Commission found that there are instances when shale is deliberately extracted for commercial exploitation as aggregates.

7.1.1. COMMENTS RECEIVED BY THE COMMISSION

(a) *Comments received from the BAA on 17 January 2014*

(519) The BAA considers that the tax exemptions, exclusions and tax reliefs from the AGL cannot be found compatible with the internal market in accordance with Article 107(3)(c) TFEU and the Environmental Aid Guidelines and provide extensive comments in this regard. They claim that, the application of these exemptions undermines the environmental objective pursued by the AGL, namely, the shifting of demand towards alternative sources of aggregates.

(520) The UK authorities maintain that none of the exemptions under investigation relate to material which is deliberately extracted for use as aggregate. They claim that, the exemptions as regards to which the Commission expressed doubts in the Opening Decision only extend to materials that arise unintentionally and unavoidably during non-aggregate extraction. In accordance with the UK authorities, they have not found any evidence that the exempted materials are being deliberately extracted for use as aggregate.

(521) In the UK authorities' view the use of unintentional by-product or waste as aggregate is environmentally preferable to the undertaking of additional aggregate quarrying. They claim that the exemptions do not amount to State aid. Each exemption under investigation leads to an improvement in environmental protection in at least one of the following two ways:

(i) the exemption helps to shift demand away from further aggregate quarrying; and/or

(ii) the exemption helps to reduce the build-up of waste.

(522) The United Kingdom contends that if any of the exemptions under investigation give rise to State aid, that aid is in any event compatible with the internal market in accordance with Article 107(3)(c), including in the light of the 2001 Guidelines and the 2008 Environmental Aid Guidelines and/or on the basis of the direct application of Articles 107(3)(b) or (c) TFEU.

(523) The UK authorities maintain that the exemptions to the AGL fall outside the strict scope of State Aid Guidelines and that their compatibility should be assessed directly under Articles 107(3)(b) or (c) TFEU. The UK authorities quote the case N 629/2008 in relation to the United Kingdom's carbon reduction commitment scheme. The Commission considered that since the respective scheme and its modalities were designed at protecting the environment through the re-distribution of resources in favour of undertakings which protect the environment the most, the guidelines were not applicable and proceeded to an assessment directly under the Treaty.

(524) The UK authorities claim that the 2008 EAG, in the chapter regarding tax exemptions, regard situations in which an undertaking is exempted from the scope of environmental tax because of: (a) concerns over the impact of the tax on the competitiveness of certain undertakings; (b) other economic concerns; and (c) the inability of the Member State to impose the tax at a higher rate without granting some exemptions to certain undertakings. They claim that, the Guidelines are designed to ensure that exemptions from environmental taxes do at least contribute indirectly to the environmental aim of the tax to be introduced and that the exemptions do not undermine the general environmental objective being pursued.

(525) The UK authorities submit that the objective of the AGL as a whole is the protection of the environment and the exemptions granted from the scope of the AGL are deliberately designed to achieve the twin objectives of: (a) shifting demand from freshly extracted aggregate to waste and other by-products; and (b) reducing the build-up of waste tips. Therefore, the exemptions contribute to and ensure that the objective of the AGL is fulfilled. They are one of the key ways in which the environmental objective of the AGL is achieved. Therefore the UK authorities contend that, it may be the case that, neither the 2001, nor the 2008 EAG are applicable to the measure.

(526) Relying directly on Article 107(3) TFEU, therefore, the United Kingdom submits that the purpose of any aid arising from the exemptions under investigation can be categorised as either: (i) aid to promote the execution of an important project of common European interest i.e. the protection of the environment (Article 107(3)(b) TFEU); or (ii) aid to facilitate the development of certain economic activities (the use of recycled aggregate or waste products as aggregate) where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c)).

(527) The UK authorities maintain that, the exemptions are a necessary and proportionate means of achieving the environmental objective of the AGL and any aid arising from the exemptions would lead to very little or no distortion of competition. The exemptions therefore do not adversely affect trading conditions to an extent contrary to the common interest.

(528) The Commission will assess the measure under the 2001 EAG, the 2008 EAG and conduct an alternative assessment directly under Article 107(3)(c) TFEU. As explained below, the Commission considers that Article 107(3)(b) TFEU cannot be applied to the measure at hand.

7.2. *ASSESSMENT UNDER THE 2001 EAG*

(529) Paragraph 47 of the 2001 EAGH provides that: 'When adopting taxes that are to be levied on certain activities for reasons of environmental protection, Member States may deem it necessary to make provision for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. In general, such exemptions constitute operating aid caught by Article 87 of the EC Treaty. In analysing these measures, it has to be ascertained among other things whether the tax is to be levied as the result of a Community decision or an autonomous decision on the part of a Member State.'

(530) Paragraph 48 further provides that: 'If the tax is to be levied as the result of an autonomous decision on the part of a Member State, the firms affected may have some difficulty in adapting rapidly to the new tax burden. In such circumstances there may be justification for a temporary exemption enabling certain firms to adapt to the new situation.'

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

(532) The complainant had ([87]) contended that some of the exemptions have been granted in order to protect the international competitiveness of the producers of exempted materials. This would suggest that certain firms may have some difficulty in adapting rapidly to the new tax burden and, in that case, the exemptions from the AGL could be assessed under paragraphs 47 and 48 of the 2001 EAG.

(533) At the time of the Opening Decision, the UK authorities had not provided any compatibility grounds for the measure and the Commission did not have sufficient elements to conclude whether the conditions laid down in paragraphs 47 and 48 of the 2001 EAG were met. Nor did the Commission have sufficient elements to conclude whether the exemptions could be regarded as compatible with the internal market based on provisions other than paragraphs 47 and 48 of the 2001 EAG.

(534) The BAA contends that the exemptions from the AGL could not be found compatible in accordance with the 2001 EAG. According to the BAA, the exemptions for shale, slate and clay do not make a significant contribution to protecting the environment (paragraphs 50 and 51(2)(a)). The exemptions, by their very nature, undermine the general objectives pursued and do not have an appreciable positive impact in terms of environmental protection.

(535) The BAA maintains that the exemptions for shale, slate and clay do not constitute temporary exemptions justifiable under paragraphs 47 and 48. They claim that the AGL intends to make a material such as shale quarried for use as aggregate competitive.

([87]) Recital 150 of the Opening Decision

(536) The BAA maintains that the exemptions do not constitute operating aid which may be authorised under paragraph 51. No agreements have been concluded under which the recipient firms undertake to achieve environmental protection objectives during the period of the exemptions. Further, according to the BAA, the alternative condition under paragraph 51(1)(b) has not been met, as the firms eligible for the reduction have not paid a significant proportion of the AGL.

(537) The UK authorities contend that the result of applying the AGL to the exempted materials would be to increase production costs for operators in the specific market sectors which could not be passed on to their customers. This would lead to a marked decrease in the amount of waste and by-products being sold for use as aggregate, and a corresponding increase in the quarrying of fresh aggregate.

(538) The UK authorities claim that, the effect of applying the AGL to the exempted materials would be to undermine its environmental objective as it would no longer operate to shift demand to unavoidable waste and by-products generated by the extraction of these materials.

7.2.1. ASSESSMENT BY THE COMMISSION

(539) The UK authorities rely exclusively on paragraphs 47 and 48 of the 2001 EAG to justify the compatibility of the measures at issue.

(540) They seem to argue that the quarries exploiting the exempted aggregates will encounter serious difficulties in dealing with the tax burden, as summarised in recital 537 above.

(541) The Commission, however, notes that the 2001 EAG only permit temporary exemptions enabling firms to adapt to the new situation which is not the case for the exemptions under the AGL. The exemptions at hand are not limited in time and have applied already for 12 years. The application of the exemptions has been temporarily suspended due to the formal investigation procedure of the Commission, however, the suspension legislation mentions expressly that all exemptions will be reinstated once the Commission's investigations is complete if the results are positive.

(542) The Commission therefore concludes that paragraphs 47 and 48 of the 2001 EAG could not serve as basis for declaring the exemptions from the AGL for shale and products consisting mainly of shale when used as aggregate and shale spoil when extracted together with shale that is used as aggregate compatible with the internal market.

(543) The Commission further notes that no other provisions of the 2001 EAG could serve as a basis for determining the compatibility of the AGL as shale producers do not pay a significant portion of the tax (paragraph 51(1)(b)) and no agreements have been concluded between the UK authorities and the shale producers (paragraph 51(1)(a)).

(544) On the basis of the above the Commission concludes that the exemptions from the AGL for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate cannot be found compatible with the internal market on the basis of the 2001 EAG.

7.3. ASSESSMENT UNDER THE 2008 EAG

(545) Given the environmental purpose of the AGL, with the occasion of the Opening Decision, the Commission had also examined the tax exemptions and exclusions under chapter 4 of the 2008 EAG that concerns operating aid in the form of reductions of environmental taxes.

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

(547) The Commission acknowledged that it is not contested that the extraction of aggregates has a negative impact on the environment, in particular in the form of damage to biodiversity, dust, noise, and visual amenity. This is further substantiated by the studies commissioned by the UK authorities referred to in recital 17 of the Opening Decision. The AGL thus constitutes an environmental tax within the meaning of point 70(14) of the 2008 EAG and the tax exemptions could be assessed under Chapter 4 of the 2008 EAG in so far as they applied as of 2 April 2008.

7.3.1 ENVIRONMENTAL BENEFIT

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

(549) The Commission considered that, in this case, the possibility to grant exemptions for certain materials might have enabled the United Kingdom to introduce the AGL.

(550) The BAA maintains that the exemptions do not fulfil the criteria enshrined by the 2008 EAG and could not be found compatible on this basis.

(551) The BAA claims that, the exemptions do not contribute to an improvement of the level of environmental protection and, in fact, undermine the general objective pursued (paragraph 151 of 2008 EAG).

(552) The BAA refers to a quarry mentioned in the *Cornish Building Stone and Slate Guide 2007* as a slate and shale quarry producing walling stone to illustrate that quarries are exempted just because they produce shale and slate, thus undermining the objective of the tax as it creates even greater demand in the construction industry for such materials. As per their submission, the BAA is aware ([88]) of a number of instances where quarry operators have opened slate and shale quarries, simply as a result of and in order to benefit from the advantages deriving from the AGL exemptions. Moreover, quarries subject to the AGL have experienced a significant reduction in sales of low-value by-product or waste such as scalpings and quarry fines. Stockpiles of these materials have increased by over 500 %. According to the BAA, this demonstrates that the AGL has completely failed to achieve its environmental objective as some piles are replaced with others.

(553) The BAA submits examples of lime quarries the primary product of which is un-taxed agricultural lime, and which have accumulated such high heaps of waste and unsold by-product, that the production of agricultural lime is impeded even with increased demand.

(554) The BAA claims that points 158(b) and 158(c) of 2008 EAG aim at preventing the placing of a business at a competitive disadvantage on the basis that it is subject to taxation whereas its direct competitors are not. However, according to the BAA, in this instance, it is clear that competitors of the producers which benefit from the exemption are in fact subject to taxation and are unable to sell their products due to the disadvantages caused by the AGL exemptions.

(555) The BAA claims that the exemption for shale is not necessary and proportionate (paragraphs 155 to 159). The BAA alleges that the exemptions for slate, clay and shale are not based on objective criteria and that operators producing the same products are treated very differently, based on the geology of their area. Moreover, none of the criteria for proportionality are met and the exemptions go beyond a period of 10 years.

([88]) No evidence has been provided.

(556) The BAA have provided to the Commission a separate letter from a quarry regarding the effects of the AGL on their sales of low value products (secondary aggregates), i.e. sub-bases, scalpings, crusher-run, quarry fines which have fallen by two thirds.

(557) The BAA has provided to the Commission a study of the effects on aggregates production since the introduction of the AGL in 2002 drafted by BDS Marketing Research Ltd in February 2014 for the BAA.

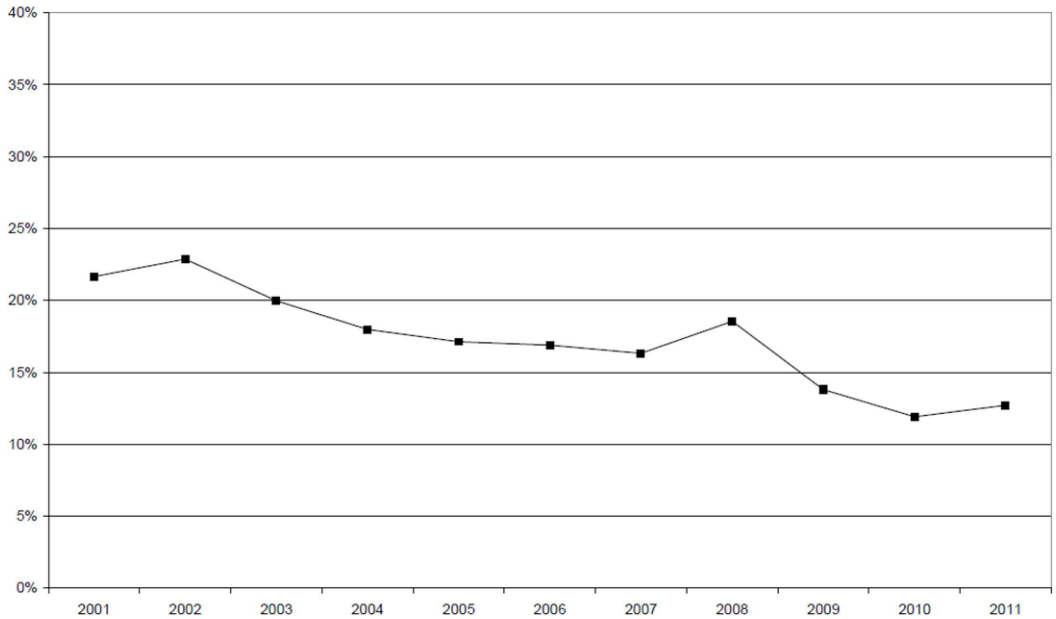
(558) The findings of the study are as follows:

(559) An aggregates levy of GBP 2 per tonne can represent a half or a third of the total cost of lower value aggregates to the customer.

(560) The conclusion of the study is that the main effect of the AGL has been an increase in the use of exempted aggregates (primary and by-product) at the expense of taxed by-products of taxed high value materials. Quarrying companies have found it difficult — often impossible — to find markets for these remaining lower value materials. As a result, quarrying companies have had to landfill these materials. The net change has therefore been a wider use of untaxed aggregates (primary and by-product) at the expense of taxed by-product aggregates which previously were sold, but are now a waste material. One waste material has simply been replaced by another waste material. On occasions, this has involved sterilising good quality reserves.

(561) The report mentions that since 2001 sales of primary (high value) aggregates fell by 24,9 %, due to the recession. Sales of taxed by-product aggregates have fallen by 60 %, i.e. 31,5 million tonnes, since introduction of the AGL in 2002. Sales of taxed by-products amounted in 2001 to 52 190 and in 2011 to 20 648 and sales of taxed primary (high value) aggregates fell from 188 843 in 2001 to 141 754 in 2011. The sales decrease is also presented in a graph:

Proportion of sales of taxed by-products since 2001 — Total



(562) Three detailed graphs are included as regards the evolution of sales of taxed by products in the following categories: hardstone, sandstone, limestone and sand and gravel. While for sand and gravel the sales appear to have maintained at a constant level with a recent slight increase, the sales of the former three materials appear to have declined.

(563) Volumes of exempt aggregates sold appear to have increased from less than 5 million tonnes to nearly 30 million tonnes since the introduction of the AGL. These figures exclude quarries that produce only exempt aggregates as these sites are not required to produce returns. Thus, according to the study, the total increase in exempt volumes

would be even higher than the six fold increase suggested by the figures. The study shows that there has been a steady increase in volumes of sales of exempt aggregates every year. It concludes that an increasing number of quarries are gaining full or partial exemptions, i.e. taxable sales are being converted into exempt sales.

(564) Demand for recycled aggregates has increased only slightly since the introduction of the AGL in 2002. It was the introduction of the landfill tax in 1996 that resulted in an increase in demand for recycled aggregates. According to BDS, the place of the low value taxed aggregates has been taken by the low value aggregates benefiting from the exemption as illustrated in the table below:

BDS estimates of the low-value aggregates market, by type of aggregate

	2001		2012		Change (%)
	MT	%	MT	%	
Quarries (taxed low value materials only)	52,2	51,1	19	19,8	(63,6)
Recycled aggregates	45	44,0	47	49,0	4,4
Exempt aggregates	5	4,9	30	31,2	500,0
Total	102,2	100,0	96	100,0	(6,1)

(565) The United Kingdom claims that if the exemptions were considered to give rise to State aid they would be compatible with the 2008 EAG because they:

(i) contribute, at least indirectly, to an improvement in the level of environmental protection; and/or

(ii) enabled the United Kingdom to introduce the AGL as the exemptions made it feasible to adopt higher environmental taxes for other undertakings engaged in the production of aggregate, which further incentivises the achievement of the AGL's environmental objective and results in an overall improvement of cost internalisation.

(566) The UK authorities maintain that through the exemptions, the AGL aims to encourage the use of recycled or by-product material (which arises during a process not intended to produce aggregate), so as to reduce the demand for virgin aggregate and thereby reduce the environmental damage associated with aggregates quarrying.

(567) The UK authorities submit that each exemption under investigation leads to an improvement in environmental protection in at least one of the following ways: (i) helps to shift demand away from further aggregate quarrying; and/or (ii) helps to reduce the build-up of waste.

(568) The exemption for shale meets criteria laid down in Chapter 4 of the 2008 EAG. Shale is suitable for use as aggregate in some instances, but its physical composition and the slabby shapes which it forms render it unsuitable for more-high end applications. The UK authorities claim that since shale is not known to be extracted for the specific purposes of commercial exploitation as aggregate, it is only obtained as an unavoidable by-product. The use of shale reduces the demand for freshly extracted aggregate, and thus, its exemption from the AGL reduces the environmental damage that is associated with aggregate extraction. Its exemption from the levy also helps to reduce the build-up of waste heaps of material and reduces the visual damage associated with that.

(569) Moreover, as regards spoil of shale extraction, the UK authorities claim that through incentivising the use of spoil which arises unintentionally and unavoidably, the exemption shifts demand away from quarried aggregate, thereby reducing the environmental damage caused by it.

(570) The UK authorities argue that even if the Commission were to find that there is evidence that any of the exempted materials are deliberately extracted for use as aggregate, the exemptions afforded to these materials would still directly contribute to the achievement of the AGL's environmental objective. They claim that, if there is any evidence that any exempted materials are in fact being deliberately extracted for use as aggregate, this would at most be on a very small scale at a strictly limited number of quarries. According to the UK authorities, if it were the case that a very limited amount of deliberate quarrying of the exempted materials for use as aggregate took place, that would not alter the fact that there is an objective justification for exempting the relevant materials. The justification would be that (a) the materials are not normally extracted for use as aggregate; and (b) the quarrying of these materials generates a large amount of unavoidable by-product and waste which can be used as aggregate when the right commercial incentives are present.

(571) The UK authorities contend that even if a small number of quarries were to be deliberately extracting exempt material for use as aggregate, the exemptions remain justified if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation and providing further incentives to achieve the AGL's environmental objective.

(572) The UK authorities provided argumentation in this regard for colliery spoil shale.

7.3.1.1. ***Assessment by the Commission***

(573) The Commission has already established that the AGL is a tax pursuing an environmental objective.

(574) However, a general exemption for shale appears to undermine the environmental objective of the AGL as it has the potential to encourage the extraction of shale and shale spoil, as also found by the General Court ([89]).

(575) Shale is a material which can be used as aggregate, albeit in somewhat limited occasions as low-grade aggregate, and which is being used as aggregate and extracted specifically for use as aggregate, as the interested parties submissions and evidence received by the Commission show. Shale extracted specifically for use as aggregate is, in fact, a freshly extracted material and an exemption simply incentivises further extraction.

(576) Therefore, given that the Commission has found cases where shale is deliberately extracted for commercial exploitation as aggregate, a general exemption for shale only makes its extraction more competitive and encourages further extraction.

(577) In addition, shale is currently exempted when it is extracted as a by-product of material which is taxed (such as gritstone, sandstone and limestone). The Commission noted above in recital 365 that the exemption does differentiate between shale and other taxed materials, such as other by-products of the main extraction of gritstone, sandstone and limestone. The Commission also considered whether such tax differentiation could be justified by the objective of the AGL. However, the Commission has not received any evidence from the UK authorities or from interested parties showing that this exemption contributes to the achievement of the AGL's objective which is to reduce the fresh quarrying of material for aggregates purposes.

(578) Moreover, the exemption does not help reduce the build-up of waste in general as it simply replaces the build-up of heaps of shale with the build-up of heaps of taxed low quality aggregates which can no longer find a buyer.

(579) The UK authorities claim that the exemption for shale made it feasible to adopt higher taxes for other undertakings; however they did not provide arguments for such claim as to allow the Commission to consider this justification in its assessment. The only argumentation provided by the UK authorities in this regard relates to colliery spoil, the exemption for which was already considered by the Commission not to constitute State aid.

(580) The UK authorities claim that even if the Commission found evidence that shale is extracted for commercial exploitation as aggregate, the exemption would still serve an environmental purpose due to the limited amount of deliberate quarrying. However, the Commission has found that only the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil

([89]) See footnote 77.

of shale that is deliberately extracted for commercial exploitation as aggregate; constitute State aid, and not in general the exemption for shale and spoil from the extraction of shale. Therefore, the assessment of the Commission already differentiates shale in view of its deliberate quarrying for commercial exploitation as aggregate and does not regard the large amount of shale and unavoidable spoil of shale when it is not deliberately quarried for commercial exploitation as aggregate. Therefore, the justification of the UK authorities based on the limited exploitation as aggregate cannot serve as a basis for a common assessment of all shale and all shale spoil.

(581) In line with the findings of the General Court ([90]), where there are quarries deliberately extracting shale for commercial exploitation as aggregates, there is no longer any guarantee that the exemption does not lead to more fresh extraction of the exempted material.

(582) The Commission therefore concludes that a general exemption for shale and shale spoil undermines the general environmental objective pursued by the AGL as it may encourage fresh quarrying of such material.

7.3.2. PROPORTIONALITY

(583) Taxation of aggregates has not been harmonised at Union level and the Commission has therefore analysed proportionality of the proposed measure in the light of paragraph 159 of the 2008 EAG.

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

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

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

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

(585) The UK authorities claim that whilst the exemptions do not ensure that the beneficiary pays at least 20 % of the national tax, a complete exemption can be justified by the limited distortion of competition.

(586) According to the UK authorities, even combined, the exempt materials under investigation make up only a very small proportion of the aggregates market in the United Kingdom. The UK authorities submit, using data available from the Office for National Statistics, the Department for Local Communities and Government and the Department for Business, Innovation and Skills, that of the total of 205 million tonnes of aggregate sold in Great Britain each year, only 6 million are derived from the materials subject to the Commission investigation, of which 3 million are derived from china clay and ball clay waste. According to the Mineral Products Association, the largest trade body for aggregate producers in the United Kingdom, the exemptions under investigation would account for only around 3 % of the UK aggregate market.

(587) The UK authorities submit that the impact on competition of the exempted materials is limited by the costs of transporting the aggregate. They maintain that the transport cost amounts to 8,55 pence per tonne. On average then, the exemption from the GBP 2 per tonne levy will only give the producer of the exempt material a competitive advantage within a 23-mile radius. According to the UK authorities, in case of a round trip the exempt material will only be able to be transported for an extra 11,6 miles. Moreover, the UK authorities claim that, the quantities supplied are generally very small as the exempt materials are only suitable for low-grade aggregates. If more traditional aggregates are required for a project, no distortion of competition will occur.

([90]) See footnote 77.

7.3.2.1. ***Assessment by the Commission***

(588) Information received by the Commission discloses the exemption for shale significantly distorts competition.

(589) Numerous interested parties claimed that shale is used as aggregates and has a significant impact on local markets, especially in Northern Ireland. Apparently, in Northern Ireland there have been hundreds of thousands of tonnes of shale imported from Donegal, in Ireland. Shale from Ireland is sold in construction markets across the whole of Northern Ireland. Construction projects along the border with Ireland have used exempt aggregates from Ireland classified as shale.

(590) Interested parties also pointed to a particular problem with shale deposits that are being used on large construction sites, especially along the Glasgow-Edinburgh corridor. Around 1 million tonnes of shale was used for roads construction. This has affected competition between different quarries and prevented other quarries from selling their low value by-products.

(591) Moreover, the Commission notes that the market for shale aggregates is rather local and that the national market for aggregates in the United Kingdom does not offer a good assessment base. Due to the low prices of the shale aggregates and the high transportation costs, as also pointed out by the UK authorities, they can only travel for a limited distance in order to supply customers and be able to compete with other low-grade aggregates producers. Therefore, an assessment of this type would be more relevant on a local level. The information received by the Commission from interested parties point to the fact that the exemption for shale displaces sales of low-grade aggregates that are taxed with which they compete on a local level.

(592) The Commission therefore concludes that a general exemption for shale and shale spoil distorts competition on local aggregates markets. The arguments of the UK authorities as regards the limited distortion of competition of the exemption for shale cannot be accepted. Therefore, such justification cannot serve the exclusion of the payment of 20 % of the AGL.

(593) The measure is therefore not proportional as required by paragraph 159 of 2008 EAG.

(594) The Commission concludes, without considering it is required to assess also the necessity of the measure, that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate are not compatible with the internal market on the basis of the 2008 EAG.

7.4. *ALTERNATIVE ASSESSMENT UNDER ARTICLE 107(3)(b) TFEU — AID PROMOTING THE EXECUTION OF AN IMPORTANT PROJECT OF COMMON EUROPEAN INTEREST*

(595) As mentioned above, the UK authorities contend that the exemption for products consisting wholly or mainly of shale and shale spoil could be found compatible with the internal market on the basis of Article 107(3)(b) TFEU as promoting environmental protection as a project of common European interest. The UK authorities did not provide any arguments for the assessment of the compatibility of the measures on such basis.

(596) The Commission has set out in paragraph 147 of the 2008 EAG conditions in which it would consider that aid may be considered compatible with the common market according to Article 107(3)(b) TFEU.

(597) Those conditions are the following:

(a) the aid proposal concerns a project which is specific and clearly defined in respect of the terms of its implementation including its participants, its objectives and effects and the means to achieve the objectives. The Commission may also consider a group of projects as together constituting a project;

(b) the project must be in the common European interest: it must contribute in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection, such as by being of great importance for the environmental strategy of the European Union. The advantage achieved by the objective of the project must not be limited to the Member State or the Member States implementing it, but must extend to the Community as a whole. The project must present a substantive contribution to the Community objectives. The fact that the project is carried out by undertakings in different Member States is not sufficient;

(c) the aid is necessary and presents an incentive for the execution of the project, which must involve a high level of risk;

(d) the project is of great importance with regard to its volume: it must be substantial in size and produce substantial environmental effects.

(598) Furthermore, in order to allow the Commission to properly assess such projects, the common European interest must be demonstrated in practical terms: for example, it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental objectives of the Community (paragraph 148 EAG 2008).

(599) The Commission notes that while the AGL serves a certain policy of a particular Member State it does not seem to relate to a project and *a fortiori* not a project which would be 'specific and clearly defined in respect of the terms of its implementation'.

(600) Furthermore, it does not appear possible for the measure to qualify as a project of common European interest as it remains a policy that is national in scope.

(601) In addition, since the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; do not seem to have themselves any environmental benefit as they simply encourage the extraction of such material, it cannot be said how such exemptions contribute to an increase in environmental protection.

(602) More importantly, as the General Court made clear in Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani*, 'an aid measure can benefit from the derogation provided for in [Article 107(3)(b) of the Treaty] only if it does not benefit mostly the economic operators of one Member State rather than the Community as a whole' ([91]). That criterion is not fulfilled where the national aid scheme merely seeks to improve the competitiveness of the undertakings concerned, in the case at hand to incentivise the use of one type of aggregate.

(603) Consequently, the Commission considers that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; cannot be found compatible with the internal market on the basis of Article 107(3)(b) TFEU as promoting environmental protection as a project of common European interest.

7.5. *ALTERNATIVE ASSESSMENT UNDER ARTICLE 107(3)(c) TFEU — DEVELOPMENT OF CERTAIN ECONOMIC ACTIVITIES OR OF CERTAIN ECONOMIC AREAS*

(604) For an assessment of the aid measure under Article 107(3)(c) of the Treaty, it should be examined if the aid in question:

(a) meets a clearly-defined objective of common interest;

(b) is necessary, appropriate and proportionate for achieving this objective;

(c) does not affect competition and trade between Member States to an extent contrary to the common interest.

([91]) Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.*, ECLI:EU:T:2008:537, paragraph 337.

(605) As a preliminary remark, the Commission notes that measures involving operating aid are in principle incompatible under Article 107(3)(c).

(606) The AGL contributes to environmental protection as already established above in recital 87 in line with the findings of the General Court. Environmental protection could be regarded as an objective of common EU interest.

(607) According to the UK authorities, the exemptions from the AGL granted for products consisting wholly or mainly of shale and shale spoil, also pursue the objective of environmental protection by seeking to shift demand from freshly extracted aggregates to shale (wholly or mainly) and to shale spoil. The UK authorities claim that these materials are not traditionally extracted for use as aggregates, and that they have no indication that they are intentionally extracted for use as aggregates.

(608) The UK authorities provided information as to the state of the aggregates sector before the introduction of the AGL and the necessity to introduce a tax that would diminish the fresh extraction for aggregates use while providing suitable alternatives.

(609) The Commission notes that, in principle, the exemptions from the AGL served as further means to fulfil its environmental purpose.

(610) There are also indications that the same decrease in the extraction of fresh aggregates could not have been achieved without the AGL and its exemptions. In this regard, numerous comments from interested parties point to the fact that materials exempted under the AGL have successfully replaced freshly extracted aggregates products. Both high quality primary products aggregates, but, particularly, lower quality secondary aggregates have been replaced by exempted materials. This does not include: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate.

(611) Shale appears to have various uses as aggregate and to also be specifically extracted for aggregates use as detailed in recital 341.

(612) Therefore, an exemption for shale and spoil of deliberately quarried shale only makes its extraction more competitive and risks encouraging further shale extraction As explained in recitals 575 to 580, shale that is deliberately extracted for commercial exploitation as aggregate is similar to taxed materials freshly extracted for aggregates use, the same is applicable to shale extracted as a by-product of taxable materials which is the same as other by-products of taxable materials which are taxed. The exemptions only make one category of freshly extracted material (shale) less expensive than the others. This can encourage shale's fresh extraction. This conclusion is supported by the findings of the General Court ([92]).

(613) Shale is a rock and its quarrying has similar environmental effects to other minerals' quarrying. There have been no claims made by the UK authorities aiming to show that shale is a more environmentally friendly alternative to other sources of aggregates even if it is specifically obtained for commercial exploitation as aggregate. Interested parties have also argued that the exemption from the AGL damages the environment even more than the extraction process itself as the exemption allows the shale to be transported farther and still compete with other taxed materials. Transportation is ensured by lorries which pollute the air and damage the roads due to their weight. The Commission notes that the cost of transportation represents a very high part of the cost of selling shale (see recital 292) meaning that shale producers use the margin offered by the AGL to transport the material farther than they usually would and compete on a wider area with other quarries.

(614) In addition, although arguing in general that the exemptions under investigation aim at helping to reduce the build-up of waste, the UK authorities have not demonstrated that the exemptions considered as state aid with regard to shale indeed can contribute to such reductions. The Commission considers that these exemptions rather simply replace the build-up of heaps of spoil from shale fresh extraction for aggregates use and shale as by-products from extraction of taxed materials with the build-up of heaps of taxed low quality aggregates which can no longer find a buyer.

([92]) Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 89.

(615) The Commission therefore concludes that even if environmental protection is an objective of common interest, a general exemption for shale and spoil of shale when freshly extracted, as currently in place, actually risks to undermine this interest and does not represent an appropriate instrument for achieving it.

(616) The Commission further notes, as also described in recitals 589 and 590, the highly distortive nature of the operating aid granted to shale producers which, in accordance with interested party submissions, has driven other aggregates producers off the market or has displaced other low-grade aggregates that normally compete with shale as they cannot compete with the low prices shale producers can offer.

(617) Since the Commission found that the factual and legal situation of: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; is comparable to that of taxed aggregates under AGL, the tax exemption of these materials may be justified only in accordance with the environmental objectives of the AGL if it could be demonstrated that the environmental objectives of the AGL can be nevertheless pursued by these materials.

(618) However, as explained above in recitals 611 to 615 and in line with the findings of the General Court ([93]), the Commission considers that since shale is specifically extracted for commercial exploitation as aggregate and that since there are no indications that it would be more environmentally friendly than other aggregates, the environmental objectives of the AGL cannot be pursued by exemptions for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate.

(619) The Commission has not received any compatibility grounds from the UK authorities as regards shale or spoil of shale that are deliberately extracted for commercial exploitation as aggregate that it could take into account in its assessment on the compatibility of the said AGL exemptions with the internal market.

(620) Therefore, the Commission concludes that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; cannot be regarded as compatible with the internal market on the basis of Article 107(3)(c) TFEU.

8. **CONCLUSION AND RECOVERY**

(621) The Commission concludes that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; which have been unlawfully implemented, represent State aid that is incompatible with the internal market.

(622) According to the Treaty and established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([94]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([95]).

(623) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([96]).

([93]) See footnote 77.
([94]) See Case C-70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13.
([95]) See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75.
([96]) See Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671 paragraphs 64 and 65.

(624) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ([97]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(625) Thus, given that the exemptions from the AGL granted for the material specified in recital 620 of this Decision were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the aid was put at the disposal of the beneficiary (i.e. the day from which the beneficiary would have been obliged to pay the AGL if the unlawful and incompatible exemptions from the AGL had not existed) until the day when the advantage of the beneficiary ceased to exist. The sums to be recovered should bear interest until effective recovery.

(626) As the exemptions constitute forgone revenues by the UK authorities, the recovery of the aid entails that the beneficiaries of the exemptions should pay the AGL, for the period of its application, together with interest until effective recovery.

(627) The Commission acknowledges that shale material which: (i) is extracted as by-product of coal extraction; or (ii) is used in ceramic processes; or (iii) is used in place of clay, slag or other materials as a source of aluminosilicate in the manufacture of cement; or (iv) is otherwise demonstrably used for other than aggregate purposes; should not be considered commercially exploited as aggregate and should therefore be excluded from recovery.

(628) There should be no obligation to recover aid that had been granted under the scheme which fulfils all the conditions set out in a *de minimis* regulation or in a block exemption regulation adopted on the basis of Articles 1 and 2 of Council Regulation (EC) No 994/98 ([98]) but applicable at the time the aid was granted.

(629) As cumulation is excluded for the same eligible costs, where the total amount of aid received by a beneficiary is more than EUR 200 000, the UK authorities should recover it in its entirety, as the *de minimis* regulations enacted on the basis of Article 2 of Regulation (EC) No 994/98 which were applicable at the time the aid was granted cannot be made use of.

(630) In order to define the beneficiaries of the unlawful and incompatible aid and the respective aid amounts, the UK authorities should first determine all companies which produced shale and products consisting mainly of shale during the period between 1 April 2002 and the present ('shale producers'). The UK authorities should then, by means of all available sources of information, including public information and confidential tax records, establish the amounts of shale material specified in recital 621 of this Decision commercially exploited by these shale producers. Should it not be possible to establish these amounts on the basis of the available information, the UK authorities should request the shale producers to demonstrate to what extent the shale material they produce is (and to what extent it is not) the material specified in recital 621 of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme consisting of the exemptions from the aggregates levy established for in Section 17(4)(a) and 17(3)(f)(i) of the Finance Act 2001 as amended by the Finance Act 2002 and the Finance Act 2007 granted for:

(a) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and

([97]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

([98]) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

(b) aggregates consisting wholly of the spoil from any process by which shale that is deliberately extracted for commercial exploitation as aggregate has been separated from other rock after being extracted or won with that other rock;

put into effect by the United Kingdom in breach of Article 108(3) TFEU are incompatible with the internal market.

2. The tax exemptions, tax exclusions and tax reliefs established in the following provisions of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007:

— Section 17(3)(e), 17(3)(f)(i) and (ii) (except for the materials listed in Article 1(1) of this Decision),

— Section 17(4)(a) (except for the materials listed in Article 1(1) of this Decision), Section 17(4)(c)(i) and (ii), Section 17(4)(f) (as far as clay is concerned),

— Section 18(2)(b), and

— Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b)),

do not constitute State aid.

Article 2

The United Kingdom of Great Britain and Northern Ireland shall abolish the aid scheme in so far it concerns the materials referred to in Article 1(1).

Article 3

Individual aid granted under the scheme referred to in Article 1(1) does not constitute aid if it fulfils the material conditions laid down by the Regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the aid was granted.

Article 4

Individual aid granted under the scheme referred to in Article 1(1) which fulfils the conditions laid down by a regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 and applicable at the time the aid was granted or by any other approved aid scheme is compatible with the internal market.

Article 5

1. The United Kingdom shall recover the incompatible aid granted under the scheme referred to in Article 1(1) from the beneficiaries.

2. The aid to be recovered shall include interest from the date on which it was put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([99]).

Article 6

1. Recovery of the aid granted under the scheme referred to in Article 1(1) shall be immediate and effective.

2. The United Kingdom shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

([99]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

Article 7

1. Within two months following notification of this Decision, the United Kingdom shall submit the following information to the Commission:

(a) a list of all entities producing the material referred to in Article 1(1) between 1 April 2002 and the date of submission of the list;

(b) for each of the entities referred to at (a) above:

(i) the total amount of material referred to in Article 1(1) commercially exploited since 1 April 2002;

(ii) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned in order to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The United Kingdom shall use all possible sources of information for compiling the list of shale producers and the total amount of material referred to in Article 1(1) commercially exploited by them since 1 April 2002, from public sources and confidential tax information, such as: tax, sales and other records held by the companies themselves, tax records including profit tax records, the companies' register, the land registries, statistical data, planning permits/consents, data held by the local authorities and the county councils, including, without limitation, Her Majesty's Revenues and Customs registration data for the purposes of the aggregates levy before and after 1 April 2014, data from the Mineral Planning Authorities, the Annual Minerals Raised Inquiry, the database BritPits and British Geological Survey data, the *UK Minerals Yearbook* and the *Cornish Building Stone and Slate Guide 2007*.

3. The United Kingdom shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1(1) has been completed. It shall immediately submit to the Commission, upon the Commission's request, any information on the measures already taken and planned to be taken in compliance with this Decision.

It shall also provide detailed information concerning the amounts of aid and recovery interest recovered from the beneficiaries.

Article 8

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 27 March 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission