In the General Court of the European Union
Case [ ]

BRITISH AGGREGATES ASSOCIATION

Applicant

v.

EUROPEAN COMMISSION

Defendant

APPLICATION

For annulment pursuant to Article 263 TFEU of the decision of the European Commission of 27 July 2015 C(2015) 2141 final (not yet published in the Official Journal of the European Union) in Case SA.34775 (201/C) (ex 2012/NN) – Aggregates Levy

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The Applicant consents to service by e-Curia.

TABLE OF CONTENTS

PART I: BACKGROUND

(A) The Application

1. This Application seeks the annulment in part of Decision C(2015) 2141 final of the European Commission ("**Commission**") of 27 July 2015 not yet published in the Official Journal of the European Union, in Case SA.34775 (2013/C) (ex 2012/NN) – Aggregates Levy (the "**Final Decision**"). The Final Decision is attached to this Application at **Annex A.1**.

2. In the Final Decision, the Commission raised no objections to a number of tax exemptions, tax exclusions and tax reliefs as part of an aggregates levy (the "**AGL**") contained in the Finance Act 2001, as amended, 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 ("**TFEU**"). This Application seeks the annulment of the Final Decision in respect of eight exemptions, namely the exemptions, tax exclusions or tax reliefs for the following;

   i. clay aggregates;[1]

   ii. slate aggregates;[2]

   iii. clay and shale used in ceramic construction products;[3]

   iv. perlite, pumice and vermiculite;[4]

   v. by-products of china clay and ball clay extraction;[5]

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[1] Under section 17(4)(f) of the Finance Act 2001 ("*aggregate ...is exempt …if it consists wholly or mainly of ….clay*"), discussed in sub-section 5.6.6 of the Final Decision. The relevant sections of the Finance Act 2001 are extracted at **Annex A.2**, except for section 18(2)(d) which is extracted at **Annex A.3**.

[2] Under section 17(4)(a) of the Finance Act 2001 ("*aggregate …is exempt ...if it consists wholly or mainly of …slate*"), discussed in sub-section 5.6.2 of the Final Decision.

[3] Under section 18(2)(d) of the Finance Act 2001 as amended on 1 April 2014 (*see* **Annex A.3**) ("*"exempt process" means ...the use of clay or shale in the production of ceramic construction products*"), and section 30(1)(b) of the Finance Act 2001 (concerning the provision of a tax credit for "*aggregate ...[to which] an exempt process is applied*"), discussed in paragraphs 168 and 358-361 of the Final Decision.

[4] Under section 18(2)(b) of the Finance Act 2001 ("*"exempt process" means ...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*", where "*relevant substance*" is defined under section 18(3)(o), (q) and (u) to include perlite, pumice and vermiculite) and section 30(1)(b) (concerning the provision of a tax credit for "*aggregate ...[to which] an exempt process is applied*"), discussed in sub-section 5.6.1 of the Final Decision.

[5] Under section 17(3)(e) of the Finance Act 2001 ("*aggregate is exempt ...if ...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*"), and section 17(3)(f)(ii) ("*aggregate is exempt ...if ...it consists wholly of the spoil from any process by which …a substance listed in section 18(3) …has been separated from other rock after being extracted or won with that other rock*" and section 18(3)(b) and (e) include ball clay and china clay), discussed in sub-section 5.6.3 of the Final Decision.

vi. by-products of slate extraction;[6]

vii. by-products of shale extracted for non-aggregate use;[7] and

viii. aggregates consisting mainly of industrial by-products;[8]

(each a "**Contested Exemption**" and together the "**Contested Exemptions**")

3. This Application also seeks the annulment of the Final Decision in respect of the conclusions reached on the normal taxation principle and objective of the AGL.[9]

(B) The Applicant

4. The Applicant is the British Aggregates Association ("**BAA"**), an incorporated association representing small and independent quarrying companies in the United Kingdom. It has approximately 65 members who operate, among other things, over 100 quarry sites. The Applicant will be referred to as the BAA throughout this Application. Further information on the BAA can be found at http://www.british-aggregates.co.uk. The BAA wishes to note that, although the AGL is presented as an environmental levy, the BAA has consistently questioned the lack of any evidence quantifying the alleged environmental effects of aggregate extraction. Aggregate quarries traditionally extract from relatively small sites, average size 25 acres. Very few complaints of an environmental nature are levelled against aggregate quarries. Exempt china clay and slate operators on the other hand extract from very large sites in some cases measured in square miles rather than acres (and with a much greater environmental impact). Recycling plants which are often located in towns and cities also have a much greater environmental impact than aggregate quarries and are the subject of many complaints.

(C) The Final Decision and the Procedure Leading to its Adoption

5. On 15 April 2001, the Applicant complained to the Commission that the AGL, an environmental tax scheme in the United Kingdom introduced by the Finance Act 2001, as amended, made unjustifiable distinctions between undertakings in a comparable position and, therefore, gave rise to State aid.

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[6] Under section 17(3)(f)(i) of the Finance Act 2001 ("*aggregate is exempt ...if ...it consists wholly of the spoil from any process by which …slate …has been separated from other rock after being extracted or won with that other rock*"), discussed in sub-section 5.6.4 of the Final Decision.

[7] Under section 17(3)(f)(i) of the Finance Act 2001 ("*aggregate is exempt ...if ...it consists wholly of the spoil from any process by which …shale …has been separated from other rock after being extracted or won with that other rock*"), discussed in sub-section 5.6.4 of the Final Decision.

[8] Under section 17(4)(c) of the Finance Act 2001 ("*aggregate ...is exempt …if ...it consists wholly or mainly of …the spoil or waste from, or other by-products of (i) any industrial combustion process, or (ii) the smelting or refining of metal*"), discussed in sub-section 5.6.5 of the Final Decision.

[9] Discussed at sub-sections 5.3-5.5 of the Final Decision.

6. On 24 April 2002, the Commission issued Decision C(2002) 1478fin "State aid N 863/01 – United Kingdom / Aggregates Levy" (the "**2002 Decision**") in which the Commission made two findings in respect of the AGL: (i) that the distinctions made by the AGL, including an exemption for exported material, were justified by the AGL's "nature and general scheme" and, therefore, did not give rise to State aid;[10] and (ii) that a temporary exemption relating to Northern Ireland was compatible with the common market.

7. On 12 July 2002, the Applicant brought an action for annulment against the first aspect of the Commission's decision, *i.e.*, that the distinctions made by the AGL are justified by its "nature and general scheme", registered under Case T-210/02. On 13 September 2006, the (then) Court of First Instance dismissed the action and ordered the Applicant to bear its own costs and to pay those of the Commission (the "**2006 Judgment**").

8. On 27 November 2006, the Applicant appealed the judgment of the Court of First Instance. By judgment of 22 December 2008 in Case C-487/06P (the "**Appeal Judgment**"), the Court of Justice set aside the appealed judgment and referred the case back to the General Court.

9. On 7 March 2012, in its judgment in Case T-210/02 RENV (the "**2012 Judgment**"), the General Court annulled the Commission's 2002 Decision. The General Court found that the Commission failed to demonstrate that tax differentiations associated with exemptions from the AGL were 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 and had failed to explain in its decision why certain exempt materials were not in the same legal and factual situation as taxed materials.

10. Following the annulment of the Commission's 2002 decision, the Commission was required to re-assess whether the exemptions, exclusions and tax reliefs from the AGL set out in the Finance Act 2001, as amended, constitute State aid.

11. On 31 July 2013, the Commission issued an opening decision (the "**Opening Decision**", attached at **Annex A.4**) under which it decided to (i) initiate the formal investigation procedure under Article 108(2) TFEU in respect of certain tax exemptions, tax exclusions and tax reliefs laid down in the Finance Act 2001, as amended (including some of the Contested Exemptions); and (ii) raise no objections to certain other tax exemptions, tax exclusions and tax reliefs under the Finance Act 2001, as amended, on the ground that they do not constitute aid within the meaning of Article 107(1) TFEU.

[10] 2002 Decision, paragraph 34.

12. On 10 February 2014, the Applicant brought an action for annulment against the Opening Decision with respect to those tax exemptions, tax exclusions and tax reliefs in relation to which the Commission had not decided to initiate the formal investigation procedure under Article 108(2) TFEU (the "**Application for Annulment in Case T-101/14**", attached at **Annex A.5**). That action was stayed until the adoption of the Commission's Final Decision by order of the Court on 12 May 2014.

13. On 27 July 2015, the Commission published the Final Decision, concluding the formal investigation procedure, in which it decided that only two of the tax exemptions, tax exclusions and tax reliefs under investigation constituted aid within the meaning of Article 107(1) TFEU: (i) shale aggregate, to the extent that it is deliberately extracted for commercial exploitation as aggregate, including shale occurring as by-product of fresh quarrying of other taxed materials;[11] and (ii) shale by-product to the extent that it is deliberately extracted for commercial exploitation as aggregate.[12]

PART II: SUMMARY OF THE APPLICATION

14. This Application is an application for annulment under Article 263 TFEU of the Final Decision in respect of its conclusion that the Contested Exemptions do not constitute State aid within the meaning of Article 107(1) TFEU, and in respect of its conclusions on the normal taxation principle and objective of the AGL.

15. The Applicant claims that the Court should:

    i. Annul the Decision in respect of its conclusions that the Contested Exemptions do not constitute State aid, and in respect of its conclusions on the normal taxation principle and objective of the AGL; and

    ii. Order the Commission to pay the Applicant's costs.

16. The Application contains three pleas. The Applicant submits that:

    i. The Commission has made manifest errors of assessment in respect of its conclusion that the Contested Exemptions do not result in selectivity and, therefore, do not constitute State aid under Article 107(1) TFEU, and in respect of its conclusions on the normal taxation principle and objective of the AGL.

[11] Under section 17(4)(a) of the Finance Act 2001 ("*aggregate …[that] consists wholly or mainly of …shale*"), discussed at sub-section 5.6.2.5.2 of the Final Decision.

[12] Under 17(3)(f)(i) of the Finance Act 2001 ("*aggregate …[that] consists wholly of the spoil from any process by which …slate or shale …has been separated from other rock after being extracted or won with that other rock*"), discussed at sub-section 5.6.4.2 of the Final Decision.

ii. The Commission has failed to make a genuinely diligent and impartial examination.

iii. The Commission has failed to state reasons for its Decision, contrary to Article 296 TFEU.

PART III: LEGAL GROUNDS

ADMISSIBILITY

17. The Decision is addressed to the United Kingdom, but is of direct and individual concern to the Applicant within the terms of Article 263 TFEU.

18. It is settled law that where an applicant calls into question the merits of a decision appraising the aid as such, in order to demonstrate direct and individual concern, it must show that it enjoys a particular status within the meaning of *Plaumann v. Commission*. The applicant must demonstrate :

> "*that the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision*."[13]

19. This criterion will be fulfilled in particular where the applicant's market position would be substantially affected by the aid to which the decision at issue relates.

20. It is also settled law that an action brought by an association acting in place of one or more of its members who could themselves have brought an admissible action will itself be admissible.[14]

21. As the General Court had decided in its 2006 Judgment with respect to the application for annulment of the Commission's 2002 Decision, and as upheld by the Court of Justice in the Appeal Judgment, the AGL significantly affects the competitive position of a number of the Applicant's members.[15] Accordingly, the Final Decision is of direct and individual concern to the Applicant.

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[13] *See, inter alia*, Case 25/62 *Plaumann v Commission* [1963] ECR 95, page 107; Case C-487/06 *P British Aggregates Association v. Commission*, Judgment of 22 December 2008, [2008] ECR I – 10515, paragraph 26 and case-law cited therein.

[14] *See* Appeal Judgment, paragraph 39, and case-law cited therein.

[15] *See* 2006 Judgment, paragraphs 53-63; and Appeal Judgment, paragraphs 24-41 and 46-58.

FIRST PLEA: VIOLATION OF ARTICLE 107(1) TFEU: MANIFEST ERROR OF ASSESSMENT IN THE APPLICATION OF THE SELECTIVITY CRITERION

(A) Introduction

22. The Applicant submits that the Commission has made manifest errors of assessment in deciding that, in light of the normal taxation principle and objective of the AGL, the materials subject to the Contested Exemptions are not in a comparable factual and legal situation to taxed materials, and thereby that the Contested Exemptions do not constitute State aid under Article 107(1) TFEU. The Applicant also submits that the Commission has made manifest errors of assessment in determining the normal taxation principle and objective of the AGL for the purposes of this assessment.

23. For the avoidance of doubt, in describing these errors as "manifest" errors the Applicant does not seek to limit the General Court's standard of review. It is expected that, in accordance with the case-law, [16] the General Court will carry out a comprehensive review of all errors made.

24. At the outset the Applicant also wishes to bring to the Court's attention how greatly troubled and surprised it has been that these errors have occurred. The Commission has had the benefit of the fact that many of the issues in question had been subject to the prior court proceedings in this case, which spanned a period of almost nine years. The Commission has also taken 16 months to open the formal investigation procedure from the date of the General Court's 2012 Judgment (whereas, in normal circumstances, the preliminary review procedure must be completed within two months of receipt of a complete notification from a Member State[17]), and 24 months to conclude it (six months longer than the indicative time period for a formal investigation procedure).[18] Furthermore, the Final Decision reaches conclusions that contradict the findings of the General Court in its 2012 Judgment and the preliminary findings of the Commission's Opening Decision. Doing so merited a more cautious and thorough assessment than the Commission has conducted to ensure its conclusions were correct. To the contrary, the Applicant fears that the Commission has unreasonably persisted with patently flawed reasoning, repeating conduct displayed during the 2012 General Court proceedings and for which it has already been criticized by the General Court.[19]

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[16] *See* Appeal Judgment, paragraph 111, and case-law cited therein.

[17] *See* Regulation No 659/1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [1999] OJ L83/1, as amended [2006] OJ L363/1 and [2013] OJ L204/15 (the "**Procedural Regulation**"), article 4(5).

[18] *See* Procedural Regulation, article 7(6).

[19] *See* Case T-210/02 RENV-DEP *British Aggregates Association v European Commission*, paragraph 38 ("*[t]he applicant is also correct to submit that the difficulties inherent in the present case were made more acute, inter alia, by the Commission's conduct, which, even following the judgment on appeal, continued to defend the contested decision in all respects and, in particular, its contention – initially accepted, in essence (first judgment of the General Court, paragraphs 114 to 117, 128 and 130), but then explicitly rejected by the General Court (paragraph 52 of its second judgment) – that the AGL, as 'an exceptional fiscal burden on a narrowly defined economic sector' escaped ipso facto the scope of Article 87(1) E*").

25. (Note that all emphasis in quotations is added and does not appear in the original text.)

(B) Manifest Error in Determining the Objective and Normal Taxation Principle Underlying the AGL

26. The Applicant first submits that the Commission has made manifest errors of assessment in determining the objective and normal taxation principle underlying the AGL. These errors are relevant because they impair the Commission's assessment of selectivity (namely whether the materials subject to the Contested Exemptions are in a comparable factual and legal situation to taxed materials).

1. Objective of the AGL

27. As the General Court noted in its 2012 Judgment, "*a measure by which the public authorities grant certain undertakings a tax exemption which places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC*."[20]

28. Applying the criterion of the selectivity of an advantage involves, as the Final Decision summarizes from the 2012 Judgment, three steps:

> "*(i) Determination of the reference system (or normal taxation system) (i.e. determine what is the normal taxation principle and objective of the measure.)*
>
> *(ii) The establishment whether the measure constitutes a derogation from the normal taxation regime inasmuch as it differentiates between economic operators who are in a comparable legal and factual situation.*
>
> *(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*."[21]

29. In the 2012 Judgment, the General Court, as part of the first step, first defined the normal taxation principle underlying the AGL. This is discussed further in the following section, but it is relevant to note here at the outset its main conclusions. The General Court clarified that the AGL is "*a specific tax system applicable to the aggregates sector in the United Kingdom*" [22] rather than a general tax system applicable to all forms of mineral extraction. It then went on to conclude 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'*".

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[20] 2012 Judgment, paragraph 46.

[21] Final Decision, paragraph 78; c.f. 2012 Judgment, paragraphs 47-49 and 83.

[22] 2012 Judgment, paragraph 51.

30. As for the second part to the first step, defining the objective of the AGL, the General Court held the following:

> "*63. As the parties unanimously acknowledged, including at the hearing, the principal objective underpinning the AGL is the protection of the environment, although that is not immediately apparent from the wording of the AGL.*
>
> *64. That objective essentially entails the promotion in the construction industry of the use of aggregates which are the by-products of or waste from certain processes (also known as 'secondary' aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as 'primary' aggregates), which are non-renewable natural resources, and thereby limiting the damage to the environment associated with that process of extraction ('the aim of shifting demand' or 'the environmental objective of the AGL').*"[23]

31. Furthermore, the General Court made clear, in light of the normal taxation principle underlying the AGL and having regard to the coherent and effective implementation of the "shift in demand" / environmental objective, that the polluter pays principle is not an objective of the AGL:

> "*there is no need in this instance to deal with the question whether the AGL is also guided by the 'polluter pays' principle, which is not apparent either from the wording of the relevant provisions of the AGL or from the statement of reasons for the contested decision …That principle presupposes that the levy applies, as a rule, to any mineral-extraction activity in order to internalise the environmental costs generated … if such an additional purpose meant that the levy had to be imposed on every mineral extracted from underground, irrespective of whether or not it was intended to be commercially exploited as aggregate, it would risk calling into question not only the normal taxation principle, …but also the coherent and effective implementation of the aim of shifting demand.*"[24]

32. In this regard, the Final Decision errs in determining the objective of the AGL. Contrary to the position of the General Court, the Final Decision not only accedes to the relevance of the polluter pays principle but treats it as the principal objective of the AGL, whilst the shifting demand objective is only mentioned as a secondary and additional objective:

> "*[t]he 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*

[23] 2012 Judgment, paragraphs 63-64.

[24] 2012 Judgment, paragraph 66.

> *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*."[25]

33. This error is significant because it leads the Commission to argue that certain materials that cannot be replaced by waste/by-products (and thereby the taxation of which will be unable to promote the shift in demand objective) should nevertheless be taxed because they promote the polluter pays objective (as discussed further at paragraphs 55-56 below).

2. Normal Taxation Principle

34. The General Court's 2006 Judgment provides a summary of the key provisions of the Finance Act 2001, which have been adopted verbatim in the Court of Justice's Appeal Judgment and in the 2012 Judgment. In particular:

> "*7. Section 16(2) of the Act, as amended, states that the charge to the AGL is to arise whenever a quantity of taxable aggregate is subjected, on or after the commencement date under the Act, to commercial exploitation within the United Kingdom….*
>
> *…9. Section 17(1) of the Act, as amended, states: "In this Part, 'aggregate' means (subject to section 18 below) any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it."*
>
> *10. Section 17(2) of the Act provides that an aggregate is not taxable in four cases: if it is expressly exempted; if it has previously been used for construction purposes; if it has already been subject to a charge to the AGL, or, if, on the commencement date under the Act, it was not on its originating site.*
>
> *11. Section 17(3) and (4) of the Act, as amended, specify certain exemptions from the levy.*
>
> *12. In addition, section 18(1), (2) and (3) of the Act, as amended, lay down the processes that are exempted from the levy and the materials to which that exemption relates*."[26]

35. Absent from this summary but also of key relevance is section 30 of the Finance Act 2001. Section 30 provides a tax credit for materials that are otherwise taxable, *inter alia*, depending on the subsequent use to which they are put. This includes when taxable materials are put to one of the exempt processes listed in section 18 (section

[25] Final Decision, paragraph 87; *see also* paragraph 176.

[26] 2006 Judgment, paragraphs 7 and 9-12; *see also* Appeal Judgment, paragraph 2, and 2012 Judgment, paragraph 1.

30(1)(b)) but it also includes when taxable materials are put to a prescribed industrial or agricultural uses (section 30(1)(c)). Schedule 1 to the Aggregates Levy (General) Regulations 2002 (the "**2002 Regulations**") lists a total of 38 industrial processes (including such things as the manufacture of glass and paper manufacturing) and seven agricultural processes (such as the production of fertiliser, and the manufacture of additives to soil).[27]

36. In light of the wording of the Finance Act 2001, the General Court in its 2012 Judgment concluded 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'*."[28] In doing so, however, the General Court recognized that "*the Act does not offer a precise definition of the term 'aggregate' or general taxation criteria explaining that term, inter alia by reference to the physicochemical properties, composition, size or commercial value of the materials in question*;"[29] and that the "*normal taxation system of the AGL is not established by reference to a generic definition of aggregate*."[30]

37. The Final Decision takes the Court's findings as a starting point[31] and explicitly accepts that the Finance Act 2001 does not provide a "*genuine definition*" of an aggregate.[32] On that basis, the Commission concludes that "*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.*""

38. However, just as the Finance Act 2001 does not contain a generic definition of an aggregate in terms of its physical properties, nor does it contain a generic definition of when a material is "used" as an aggregate either. Indeed, the Final Decision even describes the difficulties the Government had in implementing a use-based definition of a taxable aggregate:

> "*[i]n the course of drafting the AGL legislation, the UK authorities realized that a use-based definition of the scope of the tax would prove problematic, as the intended use for the product could change after the tax point had passed. 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*

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[27] Schedule 1 to the 2002 Regulations is attached at **Annex A.6**.

[28] 2012 Judgment, paragraph 55.

[29] 2012 Judgment, paragraph 53.

[30] 2012 Judgment, paragraph 54.

[31] Final Decision, paragraph 172.

[32] Final Decision, footnote 45 to paragraph 172.

> *that have been used for certain purposes or have been subjected to certain processes.*"[33]

39. In other words, the Final Decision, on the one hand, considers that a definition of "aggregate use" is an essential element of the "normal taxation principle" of the AGL, but on the other hand, explains that there is no such definition. The obvious conclusion should have been that there is, therefore, no sufficiently clear "normal taxation principle" that could be used to save the AGL from a finding of selectivity (and that the legislation is merely a list of taxed and untaxed aggregate which is inherently selective). In the Final Decision, the Commission does not, however, draw that inevitable conclusion but takes the entirely unacceptable step of putting forward its own "general" definition of aggregate use:

> "*[i]n 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, the Commission found in the Opening Decision 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 bitumous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill ("aggregates use").*"[34]

40. Of course, when assessing selectivity, the Commission cannot itself put forward (in 2015) a general definition of "*aggregate use*" that is neither supported by the wording of the Finance Act 2001 nor any clear statements made by the United Kingdom authorities when the Finance Act 2001 was designed and introduced in 2001. It is also the case that the Commission's "general" definition is not supported by the way in which the United Kingdom has most recently defined the concept.[35]

41. In the absence of an objective and coherent definition of a taxable aggregate in the Finance Act 2001 in order to explain the distinctions made between taxation and non-taxation, the Commission cannot seek to create the missing element itself. By doing so anyhow, the Commission is "reverse engineering" the selectivity analysis: it creates the factual basis allowing it to conclude absence of selectivity. On this basis alone, the Applicant submits that the Final Decision must be annulled.

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[33] Final Decision, paragraph 86.

[34] Final Decision, paragraph 173.

[35] As explained by the Commission at paragraph 30 of the Final Decision, in amending the AGL to suspend certain exemptions about which the Opening Decision had expressed doubt, namely the exemptions for certain materials when they are "*extracted for use as aggregates*", the United Kingdom had to introduce new wording to explain what "*extracted for use as aggregates*" meant. The United Kingdom, however, did not amend the AGL by adding the words "*when used in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill*", but merely added the words "*for construction purposes*."

42. The Applicant submits in addition that the Commission's approach to the normal taxation principle is flawed because, irrespective of the correctness of its general definition of aggregate use, it does not apply a consistent definition of a taxable aggregate when comparing materials subject to the Contested Exemptions with materials that are taxed. As considered further below, in places, the Commission reduces the scope of an aggregate use simply to whether a material can serve as "*bulk fill*,"[36] and in other places even denies that the use to which a material is put plays any role in determining the scope of a taxable aggregate.[37]

(C) Manifest Errors in the Assessment of Selectivity of the Contested Exemptions

1. Contested Exemption for Clay

43. In the 2012 Judgment the General Court held that: (i) clay is in physical terms an aggregate; (ii) the Commission and the United Kingdom had provided no evidence to suggest it was not also used as an aggregate other than by saying it is not traditionally used as an aggregate;[38] (iii) thereby the Commission and the United Kingdom had failed to show that clay was not in a comparable situation to taxed materials; and (iv) the tax differentiation was not justified by the nature and general scheme of the tax system established by the AGL, in particular, given the risk that the exemption would encourage fresh extraction of clay, and lead to stock piles for taxed by-product materials in a comparable position that suffer a decrease in demand.[39]

44. In the Opening Decision the Commission followed the General Court, recognizing that clay is in geological terms a rock and that the Applicant's evidence before the General Court showed that it could be used as an aggregate.[40] On this basis, the Commission concluded: "*it is not clear how the exemption can be justified on the basis of the normal taxation principles or to what extent it may be deemed in a different situation from taxed materials in the light of the logic of the AGL*."[41]

45. However, in the Final Decision the Commission reaches a very different conclusion. The Final Decision 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*

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[36] *See, e.g.*, Final Decision, paragraph 83 ("*[a]s 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*"); *see* further below at paragraph 45 of this Application with respect to the Contested Exemption for clay and paragraph 78 with respect to the Contested Exemption for ceramic construction products.

[37] *See* further below at paragraphs 57-58.

[38] 2012 Judgment, paragraphs 71-72.

[39] 2012 Judgment, paragraphs 89-90.

[40] Opening Decision, paragraph 130 and footnote 52, attached at **Annex A.4**.

[41] Opening Decision, paragraph 130.

in view of normal taxation rule of the AGL."[42] In doing so it argued that the aggregate uses put forward by the Applicant, namely, use in landfill lining, lining watercourses and lakes or ponds and flood defences, were "*non-aggregate use[s]*" because they are "*based on the specific qualities of non-permeability and plasticity of clay and not on the bulk of the material*."[43] The Commission also relied on the following reasoning of the UK authorities, which is provided in summary form in the Final Decision:

> "*untreated clays are generally considered unsuitable for 'typical aggregate use' (such as building foundation fill, concrete manufacture, road metal or mortar). …'Typical aggregate use' almost always requires a hard granular material …The only circumstances in which clay can be utilised for 'typical aggregate use' is where the clay has been pelletised and heated to over 1000^{o} 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*"[44]

46. The Applicant submits that there are five main problems with the reasoning relied upon for the Commission's conclusion here.

47. First, the Commission does not explain why the fact that clay requires physical transformation before it can be used for "*bulk*" uses should bar it from being considered a taxable aggregate. It is not a requirement contained in the AGL, nor does it fit with the normal taxation principle or objective of the AGL as identified by the General Court. Indeed, as the Applicant had argued during the formal investigation procedure, [45] whether a material requires physical transformation before being used as an aggregate is entirely irrelevant to the environmental logic of the ALG. Furthermore, exempting material because it requires physical transformation by heating is inconsistent with the fact that materials that must be heated to high temperatures in order to make asphalt are taxed, and materials that need to be mixed with cement, and thereby also undergo physical transformation before they can be of use, are also taxed.

48. Second, even if the Commission's general definition of an aggregate use (noted above at paragraph 39) is considered correct, untreated clay can be used as an aggregate within the scope of that definition in terms of being "*suitable for use …on …[its]own or with the addition of cement [or] lime … for use as construction fill*". This is apparent from evidence provided by the UK highway authority quoted in the Final Decision: "*[c]lay <u>may be treated with lime or cement</u> to improve its road bearing*

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[42] Final Decision, paragraph 503.

[43] Final Decision, paragraphs 484 and 500.

[44] Final Decision, paragraph 488; *see also* paragraph 502.

[45] *See e.g.*, Final Decision, paragraphs 94 and 100.

capacity. It may be used in lining drainage channels (where its permeability is important) or as <u>backfill</u> for minor structures where it is not required to hold large weights. …clay excavated from the site of a road construction project may be used, due to its permeability for bulk earthworks such as <u>fill</u> and embankment construction where it does not need to be transported."[46] This is just the same as adding water and cement to other aggregates such as sand and gravel to make them stronger (*i.e.*, to make concrete).

49. Third, it is not clear why, if clay is used sometimes for less typical purposes turning on specific characteristics such as non-permeability and plasticity, it cannot still be classed as an aggregate. As the General Court had explained (and as the Commission had appeared to appreciate, as noted above at paragraph 37), the AGL does not contain a precise definition of an aggregate nor does it circumscribe what properties or uses it must have to be taxable.[47] All that is clear about the scope of a taxable aggregate is that it must be made of (i) rock, sand or gravel, (ii) exploited commercially for construction purposes in the UK, and (iii) it must be possible to substitute its use by a waste or by-product material in order that taxing it can advance the environmental logic of the AGL. Untreated clay satisfies these requirements. (i) It is a rock, (ii) it is exploited commercially for a range of construction purposes in the UK, and (iii) there are waste/by-product substitutes for these purposes. Indeed, it is in fact notable that the Commission did not examine as part of its analysis whether clay can be substituted by waste/by-products, although this is a factor that was raised by the UK authorities during the formal investigation procedure. This is apparent from the summary of its submissions to the Commission at paragraph 492. The UK authorities argue that clay cannot be substituted by typical aggregate materials ("*as a cohesive material without heat-treatment …clay cannot be substituted by aggregate materials e.g. crushed granite or limestone, as these are granular materials.*"[48] However, the UK authorities also noted that "*[c]lay can be substituted by pulverised fuel ash (e.g. from coal fired power stations) as this too has cohesive properties*."[49] Furthermore, in respect of treated clay, it is clear that clay bricks, pipes and tiles, can be substituted with concrete pipes, tiles and building blocks made from waste/by-product materials, such as "*fines*".[50]

50. Fourth, in terms of evidence, it is unclear how the Commission can conclude in absolute terms that clay "*is not extracted for aggregate use*". This is the case for the following reasons:

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[46] Final Decision, paragraph 490.

[47] 2012 Judgment, paragraph 53.

[48] Final Decision, paragraph 492.

[49] Final Decision, paragraph 492.

[50] See Final Decision, paragraph 125 ("*fines, [a] by-product or waste of certain quarries, …can be used in the manufacturing of concrete building blocks that could be used to replace bricks manufacture with untaxed clay*").

i. The Commission relies entirely on the evidence of the UK authorities, yet even the UK authorities, in their submissions to the Commission as summarized by the Final Decision, go only as far as saying that "*there is no clear evidence*" that clay is extracted for aggregate use.[51]

ii. The Commission states that it "*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.*"[52] Yet the summary of the UK submissions contained in the Final Decision indicates that one of the quarries contacted said that "*clay is used for road building as a stable non-permeable layer to raise the road out of the flood plane on which the stone aggregate and tarmac are placed*."[53] This is evidence that clay is being deliberately extracted for aggregate use.

iii. It is unclear on what basis the UK authorities concluded that the eight quarries identified by the Applicant were not exploiting clay for aggregate use. In particular, if the UK authorities had used its definition of "*typical aggregate uses*" referred to in paragraph 488 of the Final Decision, the UK authorities might have discounted all quarries that exploited clay for uses such as landfill lining, lining watercourses and lakes or ponds and flood defences. The Applicant maintains that these are aggregate uses, so the UK authorities would be incorrect to discount the evidence on this basis.

iv. It is incontestable that quarries extract clay for ceramic construction products.

v. Even if it is the case that the evidence is unclear whether or not there are quarries currently producing clay for aggregate use, the Commission's reasoning is flawed because it does not assess the risk that the exemption from the AGL could encourage the extraction of clay deliberately for aggregate purposes.

51. Fifth, the Commission's assessment is inconsistent with how it treats certain materials which are taxed. These are high PSV[54] stone, armour rock for sea defences, walling stone,[55] high quality aggregates,[56] and decorative aggregates.[57] For example, high

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[51] Final Decision, paragraph 494.

[52] Final Decision, paragraph 501.

[53] Final Decision, paragraph 495.

[54] PSV stands for "polished stone value" which is a measure of the resistance of a rock to polishing.

[55] Walling stone refers to uncut stone with a rough angular surface, used to construct building walls and boundary walls, and made from a range of geologies, including granite, sandstone, limestone and slate.

[56] High quality aggregates refers generally to aggregates with special properties commanding relatively high values.

PSV stone used for making bends in roads skid resistant relies on specific physical properties that make the material resistant to being polished, whilst armour rock used in sea defences relies on its specific physical properties of high density and resistance to abrasion.[58] Neither material is used as bulk fill nor is their use reliant on granularity as a physical property.[59] It is furthermore the case that neither material is substitutable for its specific use by other aggregate materials nor by waste/by-products, which means their taxation does not aid the shift in demand logic underlying the AGL.

52. It is unclear, therefore, why the Commission reasoned that clay is not in a comparable situation to such taxed materials. The Commission does in fact admit that high PSV stone, armour rock for sea defences, walling stone, and high quality aggregates are "*specialized uses*,"[60] and does not contest the view of both the Applicant and the UK authorities that decorative aggregates are an "*atypical use*."[61] But the Commission tries to justify why these materials should be taxed, citing a number of reasons, each of which is erroneous.

53. In the first place, the Commission argues that these materials have the physical properties of an aggregate in being "*of the same rock*" and therefore "*in general suitable for aggregates use*."[62] However, this is not defensible because clay is also in physical terms an aggregate for the purposes of section 17(1) of the Finance Act 2001 and it can also be used as an aggregate, even for bulk purposes, as discussed above.

54. In the second place, the Commission argues that because these materials are suitable for making aggregates generally, it "*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*."[63] However, as noted above, the Commission never considered

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[57] Decorative aggregates, as noted at paragraph 146 of the Final Decision, "*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*."

[58] Final Decision, paragraphs 163-164.

[59] Furthermore, it is the case that the Commission, at footnote 4 to paragraph 14 of the Final Decision, rely on European Standard BSEN 12620:2002 for defining the notion of an aggregate. European Standard BSEN 12620:2002 is a standard for the use of aggregates in concrete, and defines an aggregate in terms of whether the material has a sieve size between 0 to 63 mm. It is clearly the case that amour rock and walling stone will not fall within this definition, and therefore do not amount to aggregates for the purposes of European Standard BSEN 12620:2002.

[60] Final Decision, paragraph 159.

[61] Final Decision, paragraph 146.

[62] Final Decision, paragraph 160-161.

[63] Final Decision, paragraph 162.

this risk with respect to clay. This is erroneous because, as the Applicant submits, there is evidence that clay is being extracted for aggregate use and therefore the risk that the exemption would encourage its extraction to be used as an aggregate equally cannot be excluded. Moreover, even on the basis of the UK authorities' assessment that there is "*no clear*" evidence that clay is currently being extracted for aggregate, surely this means that the Commission still "*cannot exclude*" that the exemption could encourage fresh extraction.

55. In the third place, the Commission argue that it is irrelevant that these materials have specialized uses that are not substitutable because substitutability is not relevant to the logic of the AGL:

> "*[m]oreover, 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.*"[64]

56. In doing so the Commission effectively rejects the relevance of the shift in demand logic in favour of the polluter pays principle, contrary to the proper understanding of the AGL's logic as determined by the General Court.[65]

57. In the fourth place, the Commission go even further by arguing, in paragraph 167, that only geology matters to the definition of an aggregate:

> "*[t]he 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*."

58. Such reasoning has no basis in the normal taxation principle underlying the AGL. Furthermore:

    i. It is contrary to the functioning of the AGL, and in particular, the inclusion of section 30(1)(c) to the Finance Act 2001. Section 30(1)(c) enables materials that would otherwise qualify as a taxable aggregate to benefit from a tax credit, *inter alia*, where they are subsequently put to non-aggregate use, namely one of the 38 industrial processes or one of the seven agricultural

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[64] Final Decision, paragraph 165.

[65] As discussed above at paragraphs 30-31.

processes listed in the 2002 Regulations.[66] In other words, the AGL contains no less than 45 exemptions based on the end use of an aggregate.

ii. It is contrary to statements in the Opening Decision on the nature of the AGL in light of the availability of tax credits under section 30:

> "*a general exemption can also not be accepted based on the argument that most of the time they are not used as aggregates. It is precisely because it was difficult to determine in advance to what use the materials would serve that the UK chose to grant a tax credit in case some of the materials subject to tax would be used for industrial and agricultural purposes*."[67]

iii. It is also contrary to earlier statements in the Final Decision in which the Commission appreciated that the normal taxation principle under the AGL turns on the use of a material, and that this was reflected by the inclusion of section 30.[68]

59. For these five reasons the Commission has, therefore, made a manifest error in concluding that clay is not in a comparable situation to taxed materials, and thereby that the Contested Exemption for clay does not result in selectivity and does not result in State aid under Article 107(1) TFEU.

2. Contested Exemption for Slate

60. In its 2012 Judgment the General Court held that: (i) slate is in physical terms an aggregate; (ii) the Commission and the United Kingdom had provided no evidence to suggest it was not also used as an aggregate other than by saying it is not traditionally used as an aggregate;[69] (iii) neither had challenged the Applicant's argument that there are a number of quarries within the UK producing (primary) slate aggregate;[70] thereby both had failed to show that slate was not in a comparable situation to taxed materials; and (iv) the tax differentiation was not justified by the nature and general scheme of the tax system established by the AGL, in particular, given the risk that the exemption would encourage fresh extraction of slate, and lead to stock piles for taxed by-product materials in a comparable position that suffer a decrease in demand.[71]

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[66] See Schedule 1 to the 2002 Regulations, attached at **Annex A.6**.

[67] Opening Decision, paragraph 85.

[68] As noted above at paragraphs 37-38.

[69] 2012 Judgment, paragraphs 71-72.

[70] 2012 Judgment, paragraphs 71-72.

[71] 2012 Judgment, paragraphs 89-90.

61. In the Opening Decision the Commission had regard to the evidence before the General Court that slate is used as an aggregate. It also reasoned, in light of the functioning of the AGL, that the fact that slate might only rarely be used as an aggregate could not justify why slate should benefit from a general exemption:

> "*[a] general exemption can also not be accepted based on the argument that most of the time they are not used as aggregates. It is precisely because it was difficult to determine in advance to what use the materials would serve that the UK chose to grant a tax credit in case some of the materials subject to tax would be used for industrial and agricultural purposes*."[72]

62. In the Final Decision, however, the Commission conclude, first, that it is not economical to deliberately produce slate as an aggregate, and second, that there is no evidence that slate is deliberately extracted as an aggregate. Each of these conclusions will be considered in turn.

63. Regarding the first contention that it would not be economically rational to increase extraction of slate in order to benefit from the exemption, the Commission, at paragraph 325, refer to differences in the cost structure of slate building stone quarries compared with other building stone quarries:

> "*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*."

64. However, the Commission provide no comparative data on the costs of quarrying for so-called "*standard aggregate extraction methods*" to evidence this. Furthermore, the figures cited by the Commission derive from the UK authorities, as is apparent from the summary in the Final Decision of the UK authorities' submission on the exemption for slate, namely, at paragraph 262. But a closer look at paragraph 262 and other parts of the summaries of the UK authorities' submissions indicate that the Commission's reasoning is highly misleading.

    i. In the first place, footnote 62 to paragraph 262 indicates that for the cost of producing slate aggregate of GBP 6.5 per tonne, crushing costs account for GBP 5 per tonne. Given that crushing is a process that applies equally to aggregates made from other rocks, such as granite or limestone, the costs of production for slate cannot be significantly higher if at all than the costs of production for other aggregates.

    ii. In the second place, the Commission have clearly been selective in using GBP 6.42 per tonne as an indicative selling price for slate aggregate. Indeed, paragraph 145 refers to a selling price of slate aggregate in 2012 of up to GBP 8 per tonne; paragraph 262 refers to a selling price of up to GBP 6.42 per

[72] Opening Decision, paragraph 85.

tonne for one quarry but up to GBP 7.36 per tonne for another, and paragraph 265 refers to a selling price of around GBP 15 per tonne for decorative slate aggregates. Furthermore, although not cited in the Final Decision, a United Kingdom submission to the Commission that was, for exceptional reasons, disclosed to the Applicant during the formal investigation procedure (the "**Undated UK Submission**"), refers to an average selling price of GBP 31.70-£54.40 per tonne for slate by-product for the year 2011. [73] Whilst the figures selected by the Commission at paragraph 325 suggest that the costs of production might exceed or be very close to the price at which the aggregate can sell, these other figures provided by the UK authorities clearly indicate otherwise. For example, if the cost of production of slate aggregate is GBP 5.7 per tonne and its selling price is GBP 8 per tonne, the profit margin could be as much as 40%. Moreover, if the selling price was GBP 54.40 per tonne, the profit margin would be as much as 854%.

65. The Commission therefore fails to substantiate that extracting slate for aggregate purposes is more costly than quarrying for other aggregates or that it is not economically rational. To the contrary, it is evident that it can be highly profitable.

66. The Commission goes on further at paragraph 328 to state that:

> "*[u]nlike 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*."[74]

67. However, it is apparent from the summary of the submissions from third parties and from the UK authorities on the exemption for slate that only one slate quarry indicated that slate quarrying involves "*deep quarrying*" making its extraction more expensive. [75] The Applicant contests whether this is a valid enough basis for concluding that slate quarrying involves any deeper quarrying or any greater expense than quarrying for other materials. Slate is a surface mineral and where deep quarrying is necessary this simply results from how many years the quarry has been in use. For the same reason, granite or other materials may also require deep quarrying. Furthermore, as demonstrated already above, given that the majority of the costs of production in slate quarrying are "*crushing costs*" the Commission has failed to substantiate that there is an "*important difference between normal aggregates quarries (such as granite, sandstone and limestone) and slate quarries*." In addition,

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[73] *See* paragraph 3.16 of the Undated UK Submission (attached at **Annex A.7**). The Undated UK Submission was disclosed to the Applicant directly by the United Kingdom at the Applicant's request on 1 August 2014. It is undated but page 1, paragraph (v) suggests that it was sent to the Commission on 1 October 2013. No other submissions from the United Kingdom were disclosed to the Applicant.

[74] Final Decision, paragraph 328.

[75] *See* Final Decision, paragraph 242, summarising the submission of Burlington Slate Limited.

there are reasons, not acknowledged in the Final Decision, why the production costs for slate aggregate may generally be less than the production costs for other type of rock aggregates including: (i) the fact that slate is a relatively soft rock which requires less crushing, and (ii) the fact that slate does not get used as a high specification aggregate and therefore requires less processing.

68. Regarding the second contention, whether there is evidence that slate is quarried for aggregate use, the Commission concluded categorically that "*slate is not deliberately extracted for aggregates purposes, but quarried for obtaining dimensional and decorative products*."[76] In reaching this conclusion the Commission relies on the UK authorities' assessment of the evidence on quarries that extract slate for aggregate use that the Applicant submitted to the General Court and to the Commission during the formal investigation procedure.[77] In doing so, however, the Commission made a number of errors of assessment.

69. In the first place, the Commission and the UK authorities had ample opportunity to contest the evidence the Applicant submitted to the General Court during the proceedings leading to the 2012 Judgment, yet, as noted in the judgment, neither had been able to do so then.[78] It is perplexing why the Commission and the UK authorities are able to doubt the evidence now but could not do so then.

70. In the second place, the evidence cited in the Final Decision in fact fails to demonstrate that there are no quarries that deliberately extract slate for aggregate purposes, despite the Commission's conclusion to the contrary.

    i. The Commission say "a*ccording to the UK authorities there is no indication that any quarries would be deliberately extracting slate for aggregates uses*".[79] Yet if we turn to the summary of the UK authorities' submissions on the exemption for slate it is not evident that the UK authorities had reached this conclusion. Instead they had concluded that none of the quarries identified by the Applicant extracted slate "*solely for aggregate purposes*."[80] This leaves open the possibility that there are still quarries that extract slate deliberately for aggregate purposes whilst also extracting slate for other purposes.

    ii. The UK authorities had in fact identified one quarry where there was doubt whether it produced slate aggregate as a primary product. However, the UK authorities and the Commission seek to characterize this as an enforcement

[76] Final Decision, paragraph 334.

[77] Final Decision, paragraph 330.

[78] 2012 Judgment, paragraph 72.

[79] Final Decision, paragraph 330.

[80] Final Decision, paragraphs 272 and 279.

issue rather than a State aid issue. [81] They assert that the only issue is whether or not this quarry has misrepresented its product as slate deliberately in order to benefit from the exemption when it fact its product would not qualify as slate. (By way of background, for the purposes of enforcing the AGL the UK's tax authorities define "slate" as material that "*splits only with a chisel into sharp flakes and tiles*";[82] material that meets this definition can benefit from the exemption for slate whereas material that does not is taxed.) Given, as the Final Decision notes, that this quarry has not yet been investigated by the UK authorities it is improper for the UK authorities and the Commission to assume that it only raises an enforcement issue, and to discount that this quarry might be evidence of quarrying a material that is slate deliberately for aggregate purposes. If anything the fact that this quarry is only being investigated in 2015 and has apparently been able to sell untaxed slate aggregate that was deliberately extracted for use as aggregate since 2002 suggests that it does provide such evidence. It is also the case that the Commission admits later in its discussion that it is possible for a quarry to produce a material that can qualify as slate under the test applied by the UK's tax authorities but which cannot be used in dimensional and decorative products.[83]

iii. The Applicant had submitted additional evidence to the Commission identifying seven quarries in the British Geological Survey ("**BGS**") Directory of Mines and Quarries 2010 where the slate has insufficient slaty cleavage for tiles and so is used for aggregate use instead. Whilst it is apparent from the summary of the UK authorities' submissions that the UK authorities found a number of weaknesses with this data, they do not go as far as dismissing its validity outright.[84]

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[81] Final Decision, paragraph 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*.") and paragraphs 330-332 ("*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. …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*").

[82] Final Decision, paragraphs 330 and 332.

[83] *See* paragraph 338 ("*[t]he 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*").

[84] *See* Final Decision, paragraph 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 categorized 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*

71. In the third place, with respect to whether there are quarries in existence that exploit slate for aggregate use, the Commission states that the UK authorities are not required to prove a negative:

> "*according to the UK authorities there is no indication that any quarries would be deliberately extracting slate for aggregates uses. 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 examples of quarries deliberately extracting slate for aggregate purposes*."[85]

72. However, this standard of evidence is inconsistent with the very high standard of evidence the Commission applies to the assessment of taxed materials. For example with regards to the question whether making the exemption available for high PSV rock, armour rock for sea defences, walling rock, and primary high quality aggregates, would encourage their extraction for aggregate purposes, the Commission in fact expected the Applicant to prove a negative fact:

> "*[t]he 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.*"[86]

73. In fact, not only did the Commission here expect the Applicant to prove a negative fact (that the exemption for these uses would not encourage further extraction) but a negative fact about future behaviour, which is a higher burden still. When comparing taxed materials to exempt materials for the purposes of the assessment of selectivity the same evidential standard must be used otherwise the comparison is meaningless.

74. For these reasons the Final Decision fails to demonstrate that it would be economically irrational to extract slate for aggregate uses, and fails to rebut the conclusion before the General Court that there are quarries that primarily extract slate for aggregate use. The Commission has therefore committed a manifest error in concluding that the Contested Exemption for slate does not result in selectivity, and thereby does not result in State aid under Article 107(1) TFEU.

3. Contested Exemption for Clay and Shale Used in Ceramic Construction Products

75. As noted at paragraphs 29 and 30 of the Final Decision, on 1 April 2014, the United Kingdom amended the AGL by suspending the exemptions for the materials which the Commission had expressed doubts about in the Opening Decision. In doing so, however, the United Kingdom also added a new exemption, for clay and shale used in

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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.").

[85] Final Decision, paragraph 330.

[86] Final Decision, paragraph 162.

ceramic construction products (added as section 18(2)(d) of the Finance Act 2001).[87] In the Final Decision the Commission has regard to the compatibility of this new exemption with Article 107(1) TFEU and concludes that it does not constitute State aid.[88] The Applicant submits that the Commission has erred in drawing this conclusion for three main reasons.

76. First, the Commission say that the exemption for ceramic construction products does not raise concerns because ceramic construction products already benefit from exemption under section 30(1)(c) of the Finance Act 2001 and that section had "*already been considered in the Opening Decision and found not to constitute State aid.*"[89] In particular, ceramic construction products would fall as being aggregates subject to a "ceramic process", which is one of the prescribed "industrial processes" under Schedule 1 of the 2002 Regulations eligible for a tax credit under section 30(1)(c). However, the Opening Decision did not in fact decide conclusively that materials subject to an industrial or agricultural process under section 30(1)(c) do not constitute State aid. In fact, the Commission's approval of the tax relief under section 30(1)(c) was expressly conditional: "*[t]o the Commission's knowledge, none of the concerned tax relief is granted when rock, sand or gravel are used as aggregates*".

77. Second, the Commission defends the exemption on the basis that clay extracted for use in bricks, in particular, should not be classed as an aggregate use because brick production involves a manufacturing process.[90] However, whether or not a material must undergo manufacturing is irrelevant to the normal taxation principle and shift in demand objective underlying the AGL (as discussed above at paragraph 47). Moreover, concrete building blocks equally undergo a manufacturing process yet they are taxed.

78. Third, the Commission defends the exemption on the basis that bricks are not used "*as bulk fill*" but "*to be stacked, in an orderly way, to form walls*."[91] However, this turns on an artificially narrow definition of an aggregate for the purposes of the normal taxation principle of the AGL (as discussed above at paragraphs 39-42), and is also inconsistent with the treatment of taxed materials in a comparable situation, such as taxed limestone and granite used to manufacture concrete building blocks and bricks, and taxed "walling stone" (uncut stone with a rough angular surface) used to construct building walls and boundary walls. These are, of course, also "*stacked, in an orderly way, to form walls"*, yet the material extracted for these uses is taxed while clay for bricks is not.

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[87] Section 18(2)(d) of the Finance Act 2001 is attached at **Annex A.3**.

[88] Final Decision, paragraphs 168 and 358-361.

[89] Final Decision, paragraph 168; *see also* paragraph 358.

[90] Final Decision, paragraph 359.

[91] Final Decision, paragraph 360.

79. For these reasons the Commission has failed to demonstrate that the Contested Exemption for clay and shale used in ceramic construction products does not result in selectivity and thereby does not constitute State aid under Article 107(1).

4. Contested Exemption for Perlite, Pumice and Vermiculite

80. In the Opening Decision, the Commission had queried whether certain of the materials listed under section 18(3) of the AGL are used as aggregates and therefore whether their exemption under sections 18(2) and 30(1)(b) was in line with the normal taxation principle and whether they were not in a comparable situation to taxed materials.[92] In the Final Decision, the Commission found that perlite, pumice and vermiculite are used as lightweight aggregates,[93] but concluded nevertheless that these materials are not in a comparable situation to taxable aggregates.[94] The Applicant submits that the Commission errs in drawing this conclusion.

81. First, the Commission argued that none of these materials are currently extracted in the UK.[95] However, the Commission fail to consider whether the exemption would not risk encouraging their re-extraction in the UK for aggregate uses.

82. Second, the Commission argued that perlite and vermiculite require physical transformation before they can be used as aggregates.[96] However, as explained above (at paragraph 47 above) physical transformation is not a relevant criterion for the purposes of the normal taxation principle and the shift in demand objective of the AGL.

83. Third, the Commission argued that all three materials have specific physical properties, serve specialised uses, have a higher price and "*could not possibly substitute aggregates extracted in the United Kingdom*."[97] However, such reasoning is inconsistent with the treatment of high PSV rock, armour rock for sea defences, walling rock, primary high quality aggregates, that are in a comparable situation, as discussed above at paragraphs 51-58.

84. The Commission has, therefore, made a manifest error of assessment in concluding that the Contested Exemption for perlite, pumice and vermiculite does not result in selectivity, and thereby does not result in State aid under Article 107(1) TFEU.

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[92] Opening Decision, paragraphs 72-78 .

[93] Final Decision, paragraphs 192, 194, and 197.

[94] Final Decision, paragraph 205.

[95] Final Decision, paragraph 203.

[96] Final Decision, paragraph 201.

[97] Final Decision, paragraph 201-202.

5. Contested Exemptions for By-products

(a) General

85. In its 2012 Judgment, the General Court held that: (i) slate, china clay, ball clay, and shale aggregates are in physical terms aggregates; (ii) the Commission and the United Kingdom had provided no evidence to suggest that they were not also used as aggregates other than by saying they are not traditionally used as an aggregate;[98] (iii) thereby the Commission and the United Kingdom had failed to show that they were not in a comparable situation to taxed materials; and (iv) the tax differentiation was not justified by the nature and general scheme of the tax system established by the AGL, in particular, given the risk that exemption would encourage fresh extraction of those materials, and lead to stock piles for taxed by-product materials in a comparable position that suffer a decrease in demand.[99]

86. In the Opening Decision, the Commission broadly followed the findings of the General Court. The Commission recognized that the by-products of china clay, ball clay, slate and shale (i) all constitute rock,[100] (ii) can serve aggregate uses;[101] (iii) are an inevitable by-product of the extraction of material that may be extracted for non-aggregate uses, and therefore are not in a comparable situation to most taxed aggregates;[102] but (iv) it was not clear why they are in a different position to taxed by-products such as the by-products of lime production and cut-stone;[103] (v) exemption of such by-products presents the risk of encouraging their extraction as aggregates; and (vi) they should not, therefore, be subject to a general exemption.[104]

87. However, in the Final Decision the Commission come to the opposite conclusion. The Commission relies upon the fact that the by-products of china clay, ball clay, slate and shale are not extracted for aggregate purposes and that exemption of such by-products poses no risk of encouraging their extraction for aggregate purposes. Furthermore, the Commission reasoned that these by-products are not in a comparable situation to the by-products of lime production and cut-stone because the latter are, by contrast, extracted for aggregate purposes and exemption would encourage their further extraction as such. In doing so, the Applicant submits that the Commission has made a manifest error of assessment.

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[98] 2012 Judgment, paragraphs 71 and 72.

[99] 2012 Judgment, paragraphs 89 and 90.

[100] Opening Decision, paragraphs 79 and 105.

[101] Opening Decision paragraphs 102 and 113.

[102] Opening Decision, paragraphs 106 and 114.

[103] Opening Decision, paragraphs 109 and 117.

[104] Opening Decision, paragraphs 110 and 119.

(b) Treatment of By-products of Lime Production and Cut-stone

88. In order to put the errors in respect of the Contested Exemptions for the by-products of china clay, ball clay, slate and shale into context, it is first necessary to consider how the Commission treats the by-products of lime production and cut-stone. The Commission provide four main reasons for why the by-products of lime production and cut-stone are not in a comparable position to the exempt by-products for china clay, ball clay, slate and shale, but each reason is erroneous.

89. First, the Commission considers that the by-products of lime production and cut-stone are not in a comparable situation to the by-products of china clay, ball clay, slate and shale because they are extracted for aggregate uses:

> "*[t]he 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.*"[105]

90. How the Commission can reach this conclusion is unclear as it appears to deny the fact that limestone used in lime production and rock for cut-stone are non-aggregate uses, which is elsewhere entirely uncontested. Indeed, the Final Decision elsewhere recognizes that lime is used for a range of industrial and agricultural purposes, *i.e.*, non-aggregate purposes,[106] and that cut-stone, as natural building stone with one or more flat surfaces, benefits from exemption under section 18(2)(a) of the Finance Act 2001.

91. Second, to assess the risk as to whether making the by-products of lime production and cut-stone exempt would encourage their extraction deliberately for aggregate purposes, the Commission examine the difference in selling price between the primary products (*i.e.*, limestone for lime production and stone for cut-stone) and the by-products (*i.e.*, limestone aggregate and stone aggregate) to consider whether it would be economically rational, in the event of a drop in demand for the primary product, to extract the material for the purposes of selling the by-product. In doing so, the Commission relies, at paragraph 156, on the following pricing information provided by the UK authorities:

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[105] Final Decision, paragraph 152.

[106] *See* Final Decision, footnote 13 ("*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*.") and footnote 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*").

> "*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*."

92. On the basis of these figures, the Commission conclude:

> "*[t]his would mean that if there is no demand for the high quality specialized 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* ".[107]

93. However, assuming these figures are accurate, they do not convincingly support the conclusion the Commission draws from them. If the averages of the upper and lower figures are used for each primary product and by-product, the price difference expressed as a ratio would be **1.7:1** for lime production and **1:1** for cut-stone. Only in the case of cut-stone, therefore, is there parity in the price of the primary product and by-product. However, if the highest figure for the primary product and the lowest figure for the by-product are used (*i.e.*, GBP 19.50 per tonne and GBP 7.16 per tonne for lime production and GBP 12.91 per tonne and GBP 6.12 per tonne for cut-stone) the picture is quite different: the price differences may be as much as **2.7:1** for lime production and **2.1:1** for cut-stone.

94. Moreover, the accuracy of the figures relied upon by the Commission are seriously in doubt. In particular:

    i. It is unclear if the figures relied upon by the Commission for the selling prices of the by-product include the AGL tax (which since 1 April 2009 has stood at GBP 2 per tonne[108]). It is most likely that the selling prices relied upon do include the AGL tax.[109] This means that the price difference would be **3.8:1** for limestone (assuming a selling price of GBP 19.50 per tonne for the primary product and GBP 5.16 per tonne for the by-product), and **3.1:1** for cut-stone (assuming a selling price of GBP 12.91 per tonne for the primary product and GBP 4.12 per tonne for the by-product).

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[107] Final Decision, paragraph 156.

[108] Final Decision, paragraph 50.

[109] However, in the event that quarry operators do not pass the AGL on to customers or only partially pass it on, it would not be possible to use selling prices to see the real economic difference between the price of the primary product and the by-product. This issue is also not appreciated by the Commission.

ii. The figures relied upon by the Commission are internally inconsistent with figures cited elsewhere in the Final Decision:

a. Paragraph 419 (part of the summary of the UK authorities' submissions on the by-products of china clay and ball clay) notes that "*[t]he 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*." Using the highest figure for the primary product and the lowest figure for the by-product here would result in a price difference of as much as **12.5:1** for cut-stone and its by-product.

b. Paragraph 222 (part of the summary of the Applicant's submissions on the exemption for slate) notes that: "*[t]he 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 1000 per tonne for certain specialized 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).*" Using the highest figures for the primary product and the lowest figure for the by-product, the price difference would be as much as **500:1** for high purity calcium carbonate powders, **11.5:1** for class grade limestone used for glass manufacture, and **5.5:1** for agricultural lime.

95. Third, in reliance on the pricing figures in paragraph 156 the Commission concluded that they "*cannot exclude*" the likelihood that the exemption would encourage extraction of these materials for aggregates purposes.[110] However, as will be demonstrated further below the Commission applies here a much higher evidential standard than it applies to the by-products of china clay, ball clay, slate and shale.

96. Fourth, the Commission argue that it is not possible to objectively distinguish between quarries where limestone and stone aggregate are by-products from quarries where they are primary products.[111] However, the Commission err in coming to this conclusion.

i. In the first place, it is incorrect for the Commission to take into account potential enforcement issues in differentiating between quarries that produce aggregates as a primary product and quarries that produce aggregate as a by-product, as this criterion does not form part of the normal taxation principle under the AGL.

ii. In the second place, it is inconsistent with how the Commission assesses the Contested Exemption for the by-products of shale extracted for non-aggregate use. There would equally be problems in distinguishing quarries that extract

[110] Final Decision, paragraph 156.

[111] Final Decision, paragraph 157.

shale aggregate as a primary product and quarries where shale aggregate is a by-product from the extraction of shale for non-aggregate uses. Yet the Commission conclude that the Contested Exemption for the by-product of shale extracted for non-aggregate use does not raise concern. In fact, the Commission refer to the fact that quarries that produce shale aggregate as a by-product and those that produce it as a primary product can simply be distinguished by requiring the quarry to identify for what use it extracts shale in order to implement the exemption: "*[s]hale producers would have to show what uses the [primary] shale they produced had in order to claim an exemption from the AGL for the spoil*."[112] This is clearly entirely inconsistent with how the Commission approaches this issue with respect to the by-products of lime production and cut-stone.

iii. In the third place, even if enforceability was a relevant criterion, limestone quarried for lime production is often objectively distinguishable from limestone quarried primarily for aggregate use. As the Applicant and the UK Government had explained in joint evidence submitted to the Commission, the types of limestone most suitable for lime production (chalk, oolitic limestone and dolomitic magnesian limestones) are least suitable for use as aggregates because of their softness and fineness, and therefore are less often quarried primarily for aggregate use.[113] As such, limestone aggregates in this context are more often chemically inferior waste products of industrial, pharmaceutical or agricultural grade lime powders and granules (waste products that the AGL often makes uneconomical to sell, and forces producers to dispose onsite). However, this evidence is not acknowledged in the Final Decision. What is acknowledged in the Final Decision instead is evidence from the UK authorities which contradicts the Joint Evidence.[114]

iv. In the fourth place, it is entirely possible to resolve any potential enforcement issues through appropriate planning rules. Indeed, the Applicant demonstrated this to the Commission during the formal investigation procedure, providing the Commission with a copy of the Longcliffe Quarry's planning consent, which mandates that not less than two thirds of the limestone quarried must be

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[112] Final Decision, paragraph 459.

[113] *See* Joint Evidence from the BAA and United Kingdom for case SA. 3475 (2013/C), dated 5 September 2014 (the "**Joint Evidence**"), attached at **Annex A.8**, paragraphs 8.6 and 8.7. The Joint Evidence was submitted in response to certain common questions posed to both the Applicant and the United Kingdom following the tripartite meeting that occurred on 15 July 2014 (*see* Final Decision, paragraph 12).

[114] *See* Final Decision, paragraph 417 ("*[a]ccording 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*").

used for an industrial (*i.e.*, non-aggregate) purpose.[115] However, the Commission does not consider the role of planning rules to control extraction for lime production or for cut-stone, and makes no reference to the Longcliffe planning consent in the Final Decision. This is particularly troubling because the Commission does have regard to planning rules with respect to slate quarrying.[116] This is a further illustration of the inconsistent analysis the Final Decision accords to taxed materials and exempt materials.

97. Overall, the Commission's treatment of the by-products of lime and cut-stone production suffers from a number of inaccuracies. It also suffers from a number of inconsistencies which will be further demonstrated in the sections below on the Contested Exemptions for the by-products of china clay, ball clay, slate and shale. These inaccuracies and inconsistencies are relevant because they lead the Commission to make manifest errors in concluding that the by-products of china clay, ball clay, slate and shale are not in a comparable position to the by-products of lime production and cut-stone, and thereby that the Contested Exemptions for those by-products do not result in selectivity contrary to Article 107(1) TFEU.

(c) Contested Exemption for By-products of China Clay and Ball Clay

98. In reaching the conclusion that the by-products of china clay and ball clay are not in a comparable situation to taxed materials, the Commission make a number of arguments each of which the Applicant submits is erroneous.

99. First, the Commission, at paragraph 426, stresses that the by-products of china clay and ball clay are produced unintentionally:

> "*[t]he 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*"

100. However, the end conclusion made here, that the by-products are extracted unintentionally, is no different to the case for the by-products of lime production and cut-stone. To the extent that lime production and cut-stone production are non-aggregate uses that create waste by-products, the extraction of those waste by-products is equally unintentional. The section of the Final Decision that assesses the by-products of lime and cut-stone production neglects to recognize this fact.[117]

101. Second, the Commission provide a number of arguments for why the exemption cannot have the effect of encouraging extraction of the by-products in the event of a drop in demand for china or ball clay.

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[115] *See* Condition 8 (page 2) of Longcliffe Quarry Planning Consent, dated 24 December 2008 (attached at **Annex A.9**).

[116] *See* Final Decision, paragraph 240.

[117] *See* Final Decision, paragraphs 151-158.

102. In the first place, as apparent from paragraph 426 quoted above, the Commission seek to rely upon the fact that the extraction of china clay and ball clay involves a "costly and complicated" process. This is not elaborated any further in the section of the Final Decision in which the Commission make it assessment. Instead, it is only given fuller treatment in the summary of the UK authorities' submissions, at paragraph 409:

> "*[a]ccording 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*."

103. However, the figures provided are redacted and, in any event, it is not apparent that the UK authorities made any comparative assessment of the costs of production of other types of aggregate to substantiate their claim. Again, therefore, as with the Commission's conclusions on the greater costs associated with slate quarrying discussed above, the assessment severely lacks objectivity. Such unsubstantiated reasoning cannot be relied upon to distinguish the by-products of china clay and ball clay from taxed materials.

104. In the second place, as is also apparent from paragraph 426 quoted above, the Commission seeks to differentiate the by-products of china clay and ball clay from taxed materials on the basis that "*more waste is produced than china clay and ball clay producers are able to find a market for*".[118] It follows, the Commission argues, that the exemption could do little to incentivise the deliberate extraction of china clay and ball clay for aggregate uses. However, the Applicant submits that the fact that the extraction of china clay and ball clay for non-aggregate purposes is wasteful should not be a relevant consideration. It is not part of the environmental logic of the tax to apply more lenient treatment to more wasteful activities than less wasteful activities. Instead, all that matters is whether the exemption can have the effect of shifting demand from fresh extraction to the use of by-products.

105. In the third place, the Commission argues that china clay and ball clay quarries must honour long term contracts, restricting their ability to increase production.[119] As a result they would not be able to increase production purely in order to exploit the availability of the exemption. However, the Commission relied on this factor without considering whether it plays any role for taxed materials, and therefore whether it is truly a factor upon which to distinguish by-products of china clay and ball clay from taxed materials. Indeed, it is in fact the case that long-term contracts are used in the

[118] Final Decision, paragraph 426.

[119] Final Decision, paragraph 427.

production and supply of industrial limestone, yet the by-products of its production are still taxed.

106. In the fourth place, the Commission makes the following conclusions on whether the exemption could encourage fresh extraction of china clay and ball clay:

> "*[u]nlike 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 ...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*."[120]

107. However, in drawing these conclusions the Commission makes no reference to actual pricing data, in contrast to its conclusions on limestone and cut-stone. Furthermore there is only very limited pricing data in the summary of the third party submissions and the UK authorities' submissions on the Contested Exemption for the by-products of china clay and ball clay. The summary of the UK authorities' submission indicates that ball clay has a selling price "*of up to GBP 100 per tonne*", although it does not provide a lower range figure, whilst china clay has a selling price of "*GBP 70 and GBP 400 per tonne*."[121] The summary of the Applicant's submission indicates that china clay prices can range between "*GBP 50 to GBP 5000 per tonne depending on its grade and quality*". Nowhere, however, is it apparent at what price the by-product aggregate can sell for.

108. The Applicant does not have insight into the prices of the by-products for china clay and ball clay, but it is, at the least, unlikely that they are meaningfully lower than the price of the by-product for lime production of GBP 2 per tonne. If the by-product sells for GBP 2 per tonne and the selling price of ball clay is no higher than GBP 100 per tonne, the price difference for ball clay at the higher end would be **50:1**. Similarly, if the by-product sells for GBP 2 per tonne and the selling price of ball clay is GBP 50 per tonne, the price difference would be **25:1** and if the selling price was GBP 400 per tonne it would be **200:1**.

109. Given that the price differences for lime production can be up to **500:1** and **12.5:1** for cut-stone, the Commission errs in concluding that "*there is no proximity in price like in the case of limestone and cut stone. In fact, the price difference is much greater*." In fact the price difference can be much less.

110. Further, given the limited data on the pricing of ball clay and china clay, and the absence of any prices for its by-products, the Commission errs in concluding also that "*there is no risk*" that the exemption might encourage fresh aggregate quarrying by ball clay and china clay quarries. This is particularly so the case given that there is

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[120] Final Decision, paragraph 428.

[121] Final Decision, paragraph 409.

evidence that aggregate is currently deliberately being extracted in china clay quarries.[122]

111. Further still, in relying on pricing data to assess the risk whether the exemption could encourage fresh quarrying it is apparent that the Commission does not apply the same evidential standard to the assessment of the by-products of china clay and ball clay as for the assessment of the by-products for lime and cut-stone production. Indeed, on the one hand, the Commission relied upon partial and anecdotal figures for the price of the primary product and by-product for lime and cut-stone production, that also fail to show a clear proximity in price, yet conclude that the risk the exemption would encourage fresh extraction "*cannot be excluded*". On the other hand, the Commission rely on partial figures for the price of the primary product for ball clay and china clay and are unable to cite figures for the selling price of the by-products yet conclude that "*there is no risk*" the exemption could encourage fresh quarrying.

112. Finally, the Applicant submits that the pricing data derived from the UK's submissions which informs the Commission's assessment of the risk that the exemption could encourage fresh quarrying, in general, lacks reliability. There is no indication that any of the pricing figures cited from the UK authorities' submissions derive from statistically significant sample sizes as opposed to anecdotal evidence from individual quarries. The UK authorities' submissions do not make clear the date to which each pricing figure relates, which is relevant because prices for the same material may fluctuate significantly from year to year. The value of certain primary products or by-products may vary dramatically depending on their quality, geology (such as is the case for limestone and china clay in particular) and distance from their respective market. Yet the UK authorities' submissions make no attempt to take these factors into account. Furthermore, it is apparent that the pricing figures for shale by-product (discussed below at paragraph 127) do include transportation costs, but it is unclear whether transportation costs are included or excluded in the pricing figures for all other materials analysed.

113. Overall, therefore, the Commission has made a manifest error in concluding that the Contested Exemption for the by-products of china clay and ball do not result in selectivity, and therefore do not result in State aid under Article 107(1) TFEU.

(d) Contested Exemption for By-products of Slate Extraction

114. The Commission seek to justify why the Contested Exemption for slate does not lead to selectivity for similar reasons as used to justify the Contested Exemption for the by-products of china clay and ball clay.

115. First, the Commission argue that slate by-product is "*an unavoidable phenomenon when quarrying the high quality slate for decorative and dimension material*".[123] However, as in the case of the by-products of china clay and ball clay, this argument

[122] *See* Cornwall Council (Technical Paper M1) of January 2012, page 6, which refers to there being one active pit "*currently working for secondary aggregates only*" (attached at **Annex A.10**).

[123] Final Decision, paragraph 337.

fails to justify their differential treatment to the by-products of lime and cut-stone production as those by-products are equally an unavoidable phenomenon from the production of limestone for lime production and stone for cut-stone production.

116. Second, the Commission provide a number of arguments for why "*there is no risk*" that the exemption can have the effect of encouraging extraction of the by-products in the event of a drop in demand for high quality architectural slate products.[124]

117. In the first place, the Commission refer to the high costs involved in quarrying slate compared to other quarries extracting taxed materials, just as they did in respect of the Contested Exemption for slate:

> "*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*."[125]

118. However, as discussed above (at paragraph 64 and 65) the Commission's reliance on the UK authorities' data is flawed. Indeed, the UK authorities' data in fact indicates that extracting slate deliberately for use as an aggregate is economically rational and can even be highly profitable.

119. In the second place, the Commission argue that there is no proximity between the price of the primary product and the price of the by-product:

> "*[a]s 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 1000 per tonne*."[126]

120. Given the selling prices for the by-product are redacted, the degree of price proximity is unclear. Nevertheless, data from the UK authorities is mentioned unredacted elsewhere in the Final Decision: paragraph 145 refers to a selling price up to GBP 8 per tonne, paragraph 262 of up to GBP 6.42 per tonne or GBP 7.36 per tonne, and paragraph 265 of around GBP 15 per tonne for decorative slate aggregates. Furthermore, the Undated UK Submission suggests a selling price £31.70-£54.40 per tonne.[127] This means that if the primary product sells for GBP 1000 per tonne and the

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[124] Final Decision, paragraph 337.

[125] Final Decision, paragraph 444.

[126] Final Decision, paragraph 444.

[127] Undated UK Submission, paragraph 3.16 (attached at **Annex A.7**).

by-product GBP 8 per tonne, the difference in price would be **125:1**. But if the primary product sells for GBP 200 per tonne and the by-product for GBP 54.40 per tonne, the price difference would be **3.7:1**.

121. These price differences are not significantly different from those discussed above with respect to lime production and cut-stone. The Commission, therefore, errs in concluding on this basis that slate by-products are not in a comparable position to the by-products of lime production and cut-stone.

122. Further, given in particular the range of values for the by-product and general weaknesses with the data provided by the UK authorities (as discussed above at paragraph 112), the Commission errs also in assuming that "*there is no risk*"[128] that the exemption would encourage fresh quarrying.

123. Further still, just as in the case of the by-products of china clay and ball clay, where the Commission also claimed there was "*no risk*" the exemption would encourage fresh quarrying (as discussed at paragraph 111 above), the Commission clearly are not applying the same evidential standard to slate by-products as to by-products of lime production and cut-stone.

124. In the third place, the Commission argue that only a small amount of the material extracted in quarrying slate can be used for high quality architectural slate products, meaning that there is often more slate by-product created than quarry operators can find a market for.[129] However, for the same reasons that this argument is objectionable with respect to the Contested Exemption for the by-products of china clay and ball clay, it is also contestable here too.

125. The Commission has, therefore, made a manifest error in concluding that the Contested Exemption for the by-products of slate does not result in selectivity, and thereby does not result in State aid under Article 107(1) TFEU.

(e) Contested Exemption for the By-Product of Shale Extraction for Non-Aggregate Use

126. The Final Decision accepts that the Applicant's evidence, referred to by the General Court in its 2012 Judgment, does demonstrate that shale is deliberately extracted for aggregate use (which contrasts, notably, from the Commission's view of the Applicant's evidence on clay and slate).[130] As a result, the Final Decision concludes that the general exemption for shale contained in the AGL is selective and results in State aid under Article 107(1) TFEU.[131] It also finds that shale by-product resulting from either the deliberate quarrying of shale for aggregate use or the deliberate quarrying of a taxed material is in a comparable position to taxed materials and therefore the exemption for such shale by-product is also selective and results in State

[128] Final Decision, paragraph 337.

[129] Final Decision, paragraph 444.

[130] *See* Final Decision, paragraphs 441 and 349-350.

[131] Final Decision, paragraph 366.

aid under Article 107(1) TFEU.[132] However, the Commission does not find that shale by-product resulting from the quarrying of shale for non-aggregate use is selective.

127. It reaches this conclusion on the basis of the low risk that the exemption would encourage the fresh extraction of shale. As explained at paragraph 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*"

128. However, it is unclear how the Commission is able to reach this conclusion. The Commission fail to disclose the selling price of shale as a primary product for a non-aggregate use, so the price difference between the primary product and by-product is entirely unknown. Its conclusion is also particularly perplexing given that the Commission does accept that shale can and is deliberately extracted for aggregate use. The Commission therefore fails to substantiate why the exemption is "*highly unlikely*" to encourage fresh quarrying.

129. In addition, the evidential standard applied here is clearly inconsistent with that applied to the same assessment for lime production and cut-stone and their by-products. On the basis of partial and anecdotal evidence the Commission concluded that the risk that the exemption would encourage fresh quarrying "*cannot be excluded*" for lime production and cut-stone. Yet here, the Commission cannot even provide data for the selling price of the primary product, and qualify their conclusion "*on the basis of the available information*" yet conclude that the risk the exemption would encourage fresh quarrying is "*highly unlikely*." If it is "*highly unlikely*" the Commission must equally accept therefore that the risk "*cannot be excluded*." But it does not reach that conclusion.

130. Finally, the Commission inexplicably add at the end of paragraph 458:"*[i]n any event such increase of fresh quarrying of shale for non-aggregate use would not be contrary to the objective of the AGL*."[133] To the contrary, the very effect of the exemption would be to deliberately increase fresh quarrying for aggregate use, and would also lead to stock piles for taxed by-product materials in a comparable position that suffer a decrease in demand. As the General Court made patently clear, both consequences would not be justified by the shift in demand objective of the AGL.

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[132] Final Decision, paragraphs 366 and 455-457.

[133] Final Decision, paragraph 458.

131. For these reasons, the Commission has made a manifest error in concluding that the Contested Exemption for the by-product of shale for non-aggregate use does not result in selectivity, and thereby does not result in State aid under Article 107(1) TFEU.

(f) Contested Exemption for Aggregates Consisting Mainly of Industrial By-products

132. The AGL contains an exemption for aggregates consisting *wholly* or *mainly* (*i.e.*, 50%) of the spoil, waste or by-products of any industrial combustion process or from the smelting or refining of metal.[134] In the Opening Decision the Commission took the view that such industrial waste/by-products are not in a comparable situation to taxed materials. In light of this, the Opening Decision decided not to open the formal investigation procedure with respect to aggregates consisting *wholly* of industrial waste/by-products. (The Applicant has challenged this particular decision in its Application for Annulment in Case T-101/14.) However, the Opening Decision did raise doubts as to whether the exemption should extend to aggregates consisting *mainly* of industrial waste/by-products. In the Final Decision the Commission conclude that the exemption for aggregates consisting *mainly* of industrial waste/by-products does not constitute a selective advantage.

133. In reaching this conclusion the Commission argues, to the extent that aggregates consisting *mainly* of industrial waste/by-products contain industrial waste/by-products, they are in a different position to taxed materials, just as the Commission had concluded in the Opening Decision with respect to aggregates consisting wholly of industrial waste/by-products.[135] However, the Applicant challenges this finding in paragraphs 61-67 of its Application for Annulment in Case T-101/14. The Application for Annulment in Case T-101/14 is attached to this Application at **Annex 5**, and the reasoning at paragraphs 61-67 is incorporated to this Application here by reference. To the extent that the Applicant's challenge in Case T-101/14 is upheld on this ground, the Final Decision's reliance on the Opening Decision's reasoning will not be able to justify the exemption at issue here for aggregates consisting mainly of industrial by-products.

134. The Commission also refers to the fact that "*[t]he 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*."[136] To the extent that the Commission's reasoning why the by-products of lime production and cut-stone should be taxed whereas the by-products of other materials should be exempt is flawed, as discussed above in the previous sections, it is unjustified for the Commission to seek to rely on this reasoning in respect of the Contested Exemption for aggregates consisting mainly of industrial by-products.

135. For these reasons, Commission has made a manifest error in concluding that the Contested Exemption for aggregates consisting mainly of industrial by-products does

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[134] Under section 17(4)(c)(i) and (ii) of the Finance Act 2001.

[135] Final Decision, paragraph 471, citing paragraph 124 of the Opening Decision.

[136] Final Decision, paragraph 474.

not result in selectivity, and therefore does not result in State aid under Article 107(1) TFEU.

SECOND PLEA: FAILURE TO MAKE A GENUINELY DILIGENT AND IMPARTIAL EXAMINATION

136. In accordance with settled case-law, the Commission is under a duty to conduct a diligent and impartial examination of the case before it.[137] The Applicant submits that the Final Decision is vitiated by the Commission's failure to respect this duty.

137. First of all, a key question in the examination of most of the Contested Exemptions above is whether the availability of the exemption would encourage the fresh quarrying of the material in question for aggregate use. This question had originally been posed by the General Court during the hearing to its 2012 Judgment, and the General Court had cause to note that neither the Commission nor the United Kingdom had been able to provide a sufficient answer with respect to clay, slate, china clay, ball clay and shale aggregates.[138] In light of this it is not unreasonable to expect that this question deserved, perhaps more than any other question, a genuinely diligent and impartial examination in the subsequent formal investigation procedure. Unfortunately, however, this is not the case.

138. With respect to certain materials (namely clay,[139] and perlite, pumice and vermiculite[140]) this question is not discussed at all, and for others (namely PSV rock, armour rock for sea defences, walling rock, and primary high quality aggregates) it is only given passing treatment.[141] In the case of limestone, cut-stone, china clay, ball clay, slate, and shale the question is given fuller treatment, by considering the proximity in the price of the material for its non-aggregate use compared to its aggregate use, in order to examine whether the availability of the exemption could encourage fresh extraction to sell the material for its aggregate use. But the Commission still fails to conduct a genuinely diligent and impartial examination. In particular:

    i. It is apparent that the Commission has relied heavily on pricing data provided from the UK authorities. In the sections entitled "*Assessment by the Commission*" the Commission simply refers to data provided by the UK authorities without any indication that the Commission has tested whether it is

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[137] Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62; Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 90; and Case T-266/02 *Deutsche Post v Commission* [2008] ECR II-1233, paragraph 92.

[138] 2012 Judgment, paragraph 78 ("*following a specific question put by the General Court at the hearing, the Commission and the United Kingdom did not explain whether the exemption of clay, slate, china clay, ball clay and shale aggregate necessarily creates greater demand for those aggregates in the construction industry, or even an economic incentive to extract more ('primary') aggregates from those exempt materials*").

[139] *See* Final Decision, sub-section 5.6.6.

[140] *See* Final Decision, sub-section 5.6.1.

[141] *See* Final Decision, paragraph 162.

reliable, accurate or representative. In certain cases, such as in its assessment of the by-products of china clay and ball clay,[142] the Commission does not identify any pricing data at all and it is necessary to turn to the summary of the UK authorities' submissions to work out what data they have relied upon. This suggests that the Commission has treated the UK authorities' data entirely uncritically.

ii. Despite the fact that the Commission has received pricing data from a range of third parties, the Commission has made no attempt to cross-check, reconcile or aggregate these sources of data with the data it received from the UK authorities, in order to form a more robust and accurate view of the likelihood that the availability of the exemption for a particular material could encourage fresh extraction.

iii. Further to this, the Commission has made no apparent attempt to provide an objective comparison of the proximity in the prices for one material compared to another, such as by using ratios of the proximity of the price of the respective primary product to the by-product (as the Applicant, by contrast, has sought to do throughout this Application).

iv. It is not clear that the UK authorities' pricing data (and data on production costs also) relied upon by the Commission is accurate, reliable, or representative: (i) rarely is the source of the data identified, so that it is entirely unclear whether the data derives from a statistically representative sample of quarries, such as national averages, or just anecdotal evidence; (ii) in places, it is indeed apparent that the Commission has relied solely on anecdotal evidence from an individual quarry; [143] (iii) rarely does the Commission identify the year to which the data relates (yet prices for the same material may fluctuate considerably over time, rendering any comparison of different materials by using prices from different years meaningless); (iv) it is unclear whether the data for taxed materials such as the by-products of lime production and cut-stone includes the AGL;[144] and (v) it is unclear in most cases whether or not the data includes transport costs.[145]

v. It is evident that the Commission has been selective in the pricing data it has relied upon. This is apparent from the fact that in places the Commission rely upon data that is inconsistent with data referred to elsewhere within the Final Decision.[146] This raises serious concerns as to whether the Commission has also been selective in what data has been included in the Final Decision and

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[142] *See* paragraph 106 above.

[143] *See e.g.*, the discussion above with respect to the costs of production for slate at paragraphs 64 and 120.

[144] As discussed at paragraph 94 above.

[145] Transport costs are explicitly referred to at paragraph 458 of the Final Decision with respect to the by-products of shale but not elsewhere in respect to any other materials.

[146] As discussed further at paragraph 94 above.

what has been kept out. This is in fact evident in at least one case: the Applicant has found inconsistencies between data relied upon by the Commission in respect of slate and data in the Undated UK Submission that is not cited in the Final Decision.[147]

139. Furthermore, the Commission fails to apply a consistent approach in examining this question in a number of ways. This includes: (i) taking into account data for the costs of production for slate and china clay and ball clay but not examining such data for other materials,[148] (ii) taking into account evidence on long term contracting for china clay and ball clay but not for other materials;[149] (iii) taking into account evidence on the impact of planning rules for slate but not for other materials;[150] and (iv) applying an inconsistent evidential standard.[151]

140. Second, it is apparent that the Commission did not engage in a genuinely diligent examination of the facts during the formal investigation procedure. In particular, during a tripartite meeting between the Commission, the United Kingdom and the Applicant, on 15 July 2014, the Commission criticized the Applicant for having failed to clarify inconsistencies between its evidence and the evidence of the United Kingdom. However, the evidence the United Kingdom had submitted to the Commission had never been disclosed to the Applicant, so the Applicant had never been in a position to comment on that evidence.[152] (Indeed, even subsequently, the Commission refused to disclose any of the United Kingdom's submissions.)

141. Furthermore, to seek to resolve risks that data received by the Commission would be insufficiently interrogated the Applicant had suggested that the United Kingdom's submissions be made available to the Applicant on a counsel-only basis, or alternatively to appoint a joint independent assessor (which the case-law recognizes the Commission is entitled to use[153]) to provide technically and commercially

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[147] As noted above at paragraphs 64 and 120.

[148] *See* further above paragraph 63 with respect to slate and paragraph 102 with respect to china clay and ball clay.

[149] *See* further above at paragraph 105.

[150] *See* further above at paragraph 96.

[151] *See* further above with respect to slate at paragraph 71-71; the by-products of lime production and cut-stone at paragraph 95; china clay and ball clay at paragraph 111; the by-products of slate extraction at paragraph 123; and by-products of the extraction of shale for non-aggregate uses at paragraph 130.

[152] *See* BAA Letter to the Commission, dated 11 September 2014, paragraph 12 (attached at **Annex A.11)**. Note that following the tripartite meeting, the United Kingdom did agree, independently from the Commission, and at the Applicant's request, to disclose to the Applicant one of its submissions to the Commission (the Undated UK Submission), but no other submissions were disclosed to the Applicant thereafter either by the United Kingdom or by the Commission.

[153] Case T-106/95 *FFSA v Commission* [1997] ECR II-229, paragraph 102; and Cases T-371/94 and T-394/94 *British Airways and British Midland Airways v Commission* [1998] ECR II-2405, paragraph 72.

accurate advice and evidence to the Commission.[154] However, neither proposal received any response from the Commission.

142. For these reasons, the Applicant submits that the Final Decision is vitiated by the Commission's failure to make a genuinely diligent and impartial examination.

THIRD PLEA: FAILURE TO STATE REASONS IN ACCORDANCE WITH ARTICLE 296 TFEU

143. The Applicant also submits that the Final Decision is vitiated by a failure to state reasons in accordance with Article 296 TFEU.

144. The statement of reasons required under Article 296 TFEU must be appropriate to the measure at issue. The Commission is required to disclose in a clear and unequivocal fashion the reasoning it follows in such a way as to enable the addressee to have sufficient information to know whether the decision may be vitiated by an error.[155]

145. However, the Commission has breached this duty by failing to consistently apply the concept of the normal taxation principle and the objective of the national measure in issue. Both concepts are key to assessing whether a national measure differentiates between economic operators who are in a comparable legal and factual situation. In certain parts of the Final Decision, the Commission appears to treat the shift in demand logic as the primary objective of the AGL,[156] yet in other parts the Commission accords centrality to the polluter pays principle.[157] Similarly, in certain parts of the Final Decision, the Commission accepts that what use a material is put to

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[154] *See* BAA Letter to the Commission, dated 11 September 2014, paragraphs 5 and 6 (attached at **Annex A.11**).

[155] Joined Cases C-43/82 and C-63/82 *Vereniging ter Bevordering van het Vlaamsche Boekwezen VBVB and Vereniging ter Bevordering van de Belangen des Boekhandels VBBB v Commission* [1984] ECR 19; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others, Brugg Rohrsystene GmbH, LR af 1998 (Deutschland) GmbH and ABB Asea Brown Boveri Ltd v Commission* [2005] ECR I-5425, paragraph 462; Case T-61/99 *Adriatica di Navigazione SpA v Commission* [2003] ECR II-5349, para. 47 and Case C-182/99 P Salzgitter AB v Commission [2003] ECR I-10761, paragraph 71; Case C-521/09 P *Elf Aquitaine SA v Commission*, [2011] ECR I-8947, paragraph 148.

[156] *E.g.*, with respect to slate at paragraph 447 of the Final Decision ("*[t]he Commission therefore concludes that the exemption from the AGL for spoil from slate extraction ...can increase the use as aggregate 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*").

[157] *E.g.*, with respect to PSV rock, armour rock for sea defences, walling rock, and primary high quality aggregates at paragraph 165 of the Final Decision ("*[m]oreover, 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*").

is relevant to defining a taxable aggregate for the purposes of applying the normal taxation principle,[158] but in other parts denies its relevance.[159]

146. For these reasons, the Applicant submits that the Final Decision is vitiated by the Commission's failure to state reasons in accordance with Article 296 TFEU.

PART IV: FORM OF ORDER SOUGHT

147. The Applicant respectfully asks the Court:

i. to annul Commission Decision C(2015) 2141 final of 27 July 2015 SA.34775 (2013/C) (ex 2012/NN) – Aggregates Levy - with respect to its conclusion that the Contested Exemptions do not give rise to State aid within the meaning of Article 107(1) TFEU and its conclusions on the normal taxation principle and objective of the AGL; and

ii. to order the Commission to pay the costs of the Applicant in the present proceedings.

Lode Van Den Hende, Advocaat **Alexander White, Solicitor**

26 October 2015

[158] *E.g.*, with respect to by-products from the extraction of shale for non-aggregate uses at paragraph 459 of the Final Decision ("*[s]hale 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*").

[159] *E.g.*, with respect to PSV rock, armour rock for sea defences, walling rock, and primary high quality aggregates at paragraph 167 of the Final Decision ("*[t]he 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*").

Schedule of Annexes

Annex no.	Document	Document date	Author	Addressee	Number of pages	Page number of first page	Page number of last page	Page and paragraph in the Application
A.1	The contested measure of which annulment is sought: Commission Decision C(2015) 2141 final of 27 July 2015 (not yet published in the Official Journal) in Case SA.34775 (2013/C) (ex 2012/NN) – Aggregates Levy (the "**Final Decision**")	27 July 2015	European Commission	United Kingdom	116	2	117	Page 3, paragraph 1 (and throughout)
A.2	Extract from the Finance Act 2001 (sections 16-30) as it stood prior to the 1 April 2014 amendments[160]	11 May 2001 (date of enactment)	UK Government	-	23	119	141	Page 3, footnotes 1-2, 4-5 Page 4, footnotes 6-8 Page 5, paragraphs 5, 10-11 Page 6, footnotes 11-12 Page 11, paragraphs 34-35 Page 18, paragraph 53 Page 19, paragraph 58 Page 26, paragraph 76

[160] The Finance Act 2001 was enacted on 11 May 2001, entered into force on 1 April 2002, and has been amended a number of times since. In particular, it was amended on 1 April 2014 in order to temporarily remove those provisions that were subject to the formal investigation procedure (*see* paragraph 30 of the Final Decision). In order for the Court to see the provisions that were subject to the formal investigation procedure, the Applicant has included extracts of the Finance Act 2001 as they stood prior to 1 April 2014. However, one of the Contested Exemptions subject to this Application (for clay and shale used in ceramic construction products) was added as part of the 1 April 2014 amendments, and this is therefore annexed separately at **Annex A.3**.

Annex no.	Document	Document date	Author	Addressee	Number of pages	Page number of first page	Page number of last page	Page and paragraph in the Application
								Page 29, paragraph 90 Page 39, footnote 131
A.3	Extract from the Finance Act 2001 (section 18(2)(d)) as amended on 1 April 2014	11 May 2001 (date of enactment)	UK Government	-	3	143	145	Page 3, footnote 3 Page 25, paragraph 75
A.4	Commission Decision C(2013) 4901 final of 31 July 2013 which was published in the Official Journal of the European Union on 28 November 2013 in Case SA.34775 (ex N863/2001) – Aggregates Levy, addressed to the United Kingdom (the "**Opening Decision**")		European Commission	United Kingdom	22	147	168	Page 5, paragraphs 11-12 Page 14, paragraph 44 Page 20, paragraph 58(ii) Page 21, paragraph 61 Page 26, paragraph 76 Page 27, paragraph 80 Page 28, paragraph 86 Page 40, paragraph 132-3
A.5	BAA's application for annulment with respect to the Opening Decision (decision of the European Commission of 31 July 2013 C(2013) 4901 final published in the Official Journal of the European Union on 28 November 2013 in Case SA.34775 (ex N863/2001) – Aggregates Levy) (the "**Application for Annulment in Case T-101/14**"), (annexes not included)	10 February 2014	BAA	General Court	20	170	189	Page 5, paragraphs 12 Page 39, paragraphs 132-133

Annex no.	Document	Document date	Author	Addressee	Number of pages	Page number of first page	Page number of last page	Page and paragraph in the Application
A.6	Schedule 1 of the Aggregates Levy (General) Regulations 2002 (the "**2002 Regulations**")	1 April 2002	UK Government	-	4	191	194	Page 11, paragraph 35 Page 20, paragraph 58(i) Page 26, paragraph 76
A.7	UK submission to the Commission (the only submission of the United Kingdom that was disclosed to BAA) (the "**Undated UK Submission**")	Undated (but most likely dates from 1 October 2013 - see page 1, paragraph v)	United Kingdom	European Commission	59	196	254	Page 22, paragraph 64(ii) Page 37, paragraph 120 Page 42, paragraph 138(v)
A.8	Joint evidence submitted in response to certain common questions posed to both the Applicant and the United Kingdom following the tripartite meeting that occurred on 15 July 2014(the "**Joint Evidence**")	5 September 2014	BAA, United Kingdom	European Commission	5	256	260	Page 32, paragraph 96(iii)
A.9	Longcliffe Quarry Planning Consent	24 December 2008	Derbyshire County Council	Longcliffe Quarries Ltd	20	262	281	Page 32, paragraph 96(iv)
A.10	Cornwall Council Technical Paper M 1 China Clay	January 2012	Cornwall Council	-	70	283	352	Page 36, footnote 122
A.11	BAA Letter to the Commission	11 September 2014	Herbert Smith Freehills LLP on behalf of BAA	European Commission	3	354	356	Page 43, footnote 152 Page 43, footnote 154