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⁽¹⁾ Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/286**of 1 October 2014****on State aid No SA.20867 (12/C) (ex 12/NN) implemented by Italy in favour of Carbosulcis S.p.A.***(notified under document number C(2014) 6836)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having regard to Article 107(3)(e) of the Treaty on the Functioning of the European Union,

Having regard to the Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) Following receipt of a complaint, the Commission learned that Italy granted State aid to subsidise a mining operator, Carbosulcis S.p.A. ('Carbosulcis'), on the basis of Article 11(14) of Law 80/2005 on urgent measures in the framework of the action plan for economic, social and territorial development ⁽³⁾. By letter dated 6 September 2006 (and reminder of 22 December 2006), the Commission requested additional information, which was provided by letter dated 25 January 2007. By letters dated 22 June and 27 July 2007 the Commission requested further information which was provided in two letters dated 15 October 2007. Italy also submitted information on 28 November 2007.

⁽¹⁾ OJ L 336 of 21.12.2010, p. 24 (the 'Council Decision'). With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ OJ C 20 of 23.1.2013, p. 1.

⁽³⁾ Published in *Supplemento Ordinario* to *Gazzetta Ufficiale*, No 111, 14 May 2005.

- (2) By letters dated 8 September 2008 and 17 June 2009 (with reminders sent on 6 October 2009 and on 21 January 2010), the Commission requested further clarification which was provided respectively by letters of 3 November 2008 and of 6 May 2010.
- (3) Meetings took place with the Italian authorities on 19 September 2010 and 30 March 2011.
- (4) By e-mail of 21 October 2010, the Commission requested additional information, which was provided by letters of 18 and 23 November 2010 and of 10 May 2011.
- (5) By letter dated 20 November 2012, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid granted to Carbosulcis.
- (6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the aid measure.
- (7) Italy submitted its observations by letter dated 21 December 2012. The only third party comments received by the Commission were those submitted by the employees of Carbosulcis. By letter dated 18 March 2013, the Commission forwarded the third parties' comments to Italy, which was given the opportunity to respond; no comments were received.
- (8) Several meetings and exchanges of information took place in 2013 between the Commission and the Italian authorities and finally by letter dated 9 April 2014, Italy submitted a final plan for the closure of the mine (the 'Closure Plan' or the 'Plan') in accordance with the Council Decision. The plan was amended on 17 July 2014.
- (9) The Italian authorities have stressed the urgency of a decision concerning aid intended to finance the irrevocable orderly winding down of activities of the Nuraxi Figus mine operated by Carbosulcis (the 'aid measure' or the 'measure'). Indeed, the closure plan needs to be implemented as a matter of urgency due to the need to ensure a controlled and safe closure, while limiting the social tensions which have been emerging in the region. Therefore, the present decision is confined to assessing the aid measure described in paragraph 8 above.
- (10) On 2 September 2014, Italy waived its rights under Article 342 TFEU in conjunction with Article 3 of Regulation No 1 ⁽⁵⁾ to have the decision adopted in Italian and agreed that the decision be adopted in English.

2. DETAILED DESCRIPTION OF THE CLOSURE PLAN

- (11) Carbosulcis is the only company in Italy that exploits the hard coal extracted from the Nuraxi Figus mine in the Sulcis-Iglesiente area in Sardinia. Nuraxi Figus is the only operational coal mine and the only coal basin in Italy. It consists of a single production unit. The products obtained by the company can only be sold in the domestic market for the purpose of producing electricity ⁽⁶⁾. The total output of Carbosulcis is purchased by the nearby Portovesme thermal power plant. Sulcis coal has an average NCV of 5 100 kcal/kg, an average sulphur content of 6,5 % and an average ash content of 15 %. Therefore it is of low quality and has a low calorific value.
- (12) Whilst the mine was initially conceived to be part of an integrated project to extract coal and produce electricity in a new coal-fired power plant to be built, the project suffered from delay. Since 1996, the mine was exploited on a temporary basis pending the award by the Region of Sardinia of an integrated concession, which was never ultimately granted.

⁽⁴⁾ Cf. footnote 2.

⁽⁵⁾ Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

⁽⁶⁾ Article 3 of Law No 351 of 27 June 1985 laying down rules for the reopening of the Sulcis coalfield 'norme per la riattivazione del bacino carbonifero del Sulcis: è consentito impiegare il carbone del bacino carbonifero del Sulcis nelle centrali termoelettriche e negli impianti di produzione combinata e non di energia elettrica e vapore esclusivamente ubicati in Sardegna, nonché negli impianti industriali, pure ubicati in Sardegna nei quali durante il processo produttivo o di combustione lo zolfo viene fissato, fissato e combinato ovvero combinato con il prodotto che si ottiene'.

- (13) According to the Italian authorities, Italy decided to definitively abandon the initial integrated project and to close the mine in accordance with the Closure Plan.]. Since 1 January 2011, activity in the mine has been limited essentially to maintaining minimum production and to carrying out maintenance works necessary to ensure the plant's safety. Such activities are preparatory to the implementation of the Closure Plan. The Closure Plan provides for the cessation of subsidised coalmining by the end of 2018 and the completion of safety measures for the decommissioning of the mine by the end of 2027.
- (14) Italy emphasised the particular disadvantaged economic and social situation in the Sulcis-Iglesiente area where the unemployment rate is higher than in the rest of the country. Alleged prospects of a potential abrupt closure of the mine have already caused serious social tensions culminating in [protests and] demonstrations.

2.1. Legal basis and granting authority

- (15) The legal basis for the aid measure was Law 99/2009 and Resolution of the Council of Autonomous Region of Sardinia No 53/75 of 20 December 2013. The Region of Sardinia and the Minister of Economic Development are the granting authorities of the aid measure.

2.2. The Closure Plan

- (16) Pursuant to the Closure Plan the decommissioning of the mine is to take place in three phases: (1) completion of the extraction of coal from panel W3 in accordance with the longwall method; securing of galleries and carrying out of additional works to ensure the ongoing safety of underground worksites; (2) provision of incentives to retire and the cultivation of panels in accordance with the shortwall method; (3) completion of the cultivation of the panels and reduction in levels of production, adoption of further incentives to retire and additional measures to help staff find new jobs.
- (17) The production of merchant coal in 2011 amounted to 63 059 tons, whereas in 2018 it is expected that only 30 000 tons will be extracted.
- (18) The objective of the aid measure is to facilitate the closure of the mine by the end of 2018, to cover current production losses in the period 2011-2018 arising from the operation of the mine in accordance with the rules set out in the Council Decision. The measure is further intended to cover exceptional costs arising from the definitive closure of the mine.
- (19) The Plan is designed to implement a gradual phasing-out process in a socially sustainable manner. Italy contends that on the basis of such an approach, 2018 is the earliest date at which the mine can be closed. The number of staff will be gradually reduced from 467 in 2011 to 119 in 2018. Older workers will benefit from incentives to take retirement. Additional measures will be necessary to help younger staff find new jobs.
- (20) At the end of 2018, the remaining workers will be needed to carry out safety and environmental remediation works that will begin upon completion of the regional environmental impact study and is expected to continue until 2027. Once the mining ends; the underground mining equipment will be recovered and the abandoned tunnels filled with ash from the nearby Portovesme thermal power plant.
- (21) The workers who in the course of the implementation of the Closure Plan will lose their jobs in the coal mining industry will require new employment. To this end, the Plan provides for the adoption of labour policies intended to assist re-training of workers and facilitating their transfer to other industries.
- (22) Following the closure of the mine, the time needed for the completion of the Plan will depend on the time it takes to recover the equipment from underground, which is estimated to take over two years.
- (23) The duration of the works will also depend on the time needed to seal the tunnels, by filling them with ash-based sludge from the thermal plant in Portovesme. The duration of such works is estimated at about six years.

- (24) The environmental remediation of the above-ground areas will also be performed. Such remediation shall include the sealing of the tailing ponds, construction of water drainage systems and the planting of native plant species.

2.3. Eligible costs, form of the aid and aid amount

- (25) The measure provides for the granting of aid to cover the positive difference between current production costs and revenues from the coal mine to be closed (production losses). The aid is also intended to cover costs arising from the closure of the mine that are not related to current production (exceptional costs). The aid granted in respect of production losses is intended to cover costs arising between 2011 and 2018 and will end with the cessation of production in 2018.
- (26) It is proposed that the aid take the form of a direct grant and can be split as follows:
- (a) Euro 213 126 607 million of aid already granted and to be granted in the period 2011-2018 to cover production losses. The costs that are eligible to be taken into account are production costs: material expenses (including energy, depreciation and transport costs) and personnel expenses as further detailed in Annex 1, including the financial-economic forecasts (of costs).

Table 1

	2011	2012	2013	2014	2015	2016	2017	2018
Production costs	61 761 625	62 253 732	40 516 662	36 714 704	27 313 944	24 753 204	17 686 600	15 207 600
Revenues	4 582 000	12 912 702	6 251 329	4 709 016	3 474 216	2 898 428	3 951 360	1 481 760
Difference between production costs and revenues	57 179 625	49 341 030	34 265 333	32 005 689	23 839 729	21 854 776	13 735 240	13 725 840
Aid pursuant to Article 3 of the Council Decision	55 000 000	18 700 000	34 265 333	32 005 689	23 839 729	21 854 776	13 735 240	13 725 840

- (b) According to the aid measure, the aid intended to cover the exceptional costs will continue to be required after 2018 until 2027. The aid measure proposes the payment of direct grants with respect to the following categories of exceptional costs:

i. Exceptional expenditure on workers who have lost or who lose their jobs:

- (27) The costs under Point 1(b) of the Annex to the Council Decision include the provision of resignation incentives: under the Plan, two years' salary is to be granted to workers who retire in circumstances where they could still remain in service, and to those who opt to start their own business or otherwise leave the company, after participating in re-training and employment schemes.
- (28) Pursuant to the aid measure/the maximum amount of this type of aid proposed to be granted in the period 2013-2027 will be EUR 45,5 million. This maximum amount would be reached in the event that all excess personnel who could not remain in their position until retirement, were to commence a self-employed activity or otherwise leave the company. The aid would amount to EUR 30 million in the event that all excess personnel are employed in alternative activities.

ii. Costs for the readaptation of workers in order to help them find new jobs outside the coal industry:

(29) The costs under Point 1(d) of the Annex to the Council Decision include the costs of re-training the personnel who have lost or will lose their job in the coal industry.

(30) Under the one-year re-training scheme, such personnel will be re-employable primarily in alternative activities to be implemented at the Carbosulcis site and/or in environmental operations for the clean-up of former mining and industrial areas. Alternatively, they may start their own businesses, or otherwise leave the company and receive a termination bonus equivalent to two years of salary. The training courses will be delivered in:

(a) 2016 (with capacity for 62 workers);

(b) 2019 (with capacity for 54 workers);

(c) 2028 (with capacity for 35 workers).

(31) It is anticipated that the total cost of training personnel who will lose their jobs in the coal industry will be approximately EUR 11,5 million.

(32) These costs include the workers' salaries during their year in training (for a total of some EUR 8,1 million) and the cost of training (approximately EUR 3,4 million).

iii. Residual costs resulting from administrative, legal and tax provisions which are specific to the coal industry

(33) The costs under Point 1(f) of the Annex to the Council Decision include payment of the concession fee for exploiting the mine for the years from 2019 to 2026, totalling approximately EUR 800 000.

iv. Additional underground safety work resulting from the closure of coal production units:

(34) After the production at the mine ceases, safety works such as the closure of the face of the mine or transportation of the machines earlier used for the mining will be performed. According to the Italian authorities, the following detailed safety requirements are essential within the abandonment works: the recovery of the underground machinery, equipment and safety devices; the mine ventilation should be carried out in order to dilute and remove noxious gases; the drainage pumping should be maintained; and the filling of the abandoned tunnels with ash from the Portovesme power plant.

(35) Italy indicates that in the period 2014-2026 a further EUR 28 million will be necessary to cover the non-recurring costs linked to the additional safety works required for closure of the mine.

(36) Over the years in which equipment is being recovered and the abandoned tunnels are being filled with ash, in addition to personnel costs, other costs will be incurred, such as the use of electricity for ventilation and pumping equipment as well as the procurement of services and materials needed to carry out the works.

(37) According to the Italian authorities, the work of recovering the equipment from underground sites and sealing the tunnels by filling them with ash cannot begin before 2018 because the staff and equipment are currently engaged in coal mining activities. The use of ash to seal the tunnels will also be subject to prior authorisation.

(38) Once the mine has closed, the time needed for the completion of the Plan will depend on the time it takes to recover the equipment from underground, which is estimated at over two years. Such equipment may, for example, include:

(a) conveyor belts: about five kilometres to be dismantled and taken to the surface;

(b) pipework: more than 30 km to be dismantled and taken to the surface;

- (c) electric power and telephone lines running tens of kilometres, electrical substations, transformers, circuit breakers, etc.;
 - (d) old equipment, still stored in the tunnels.
- (39) The duration of the Plan will also depend on the time needed to seal the tunnels by filling them with ash-based sludge from the thermal power plant at Portovesme. The process of filling the tunnels will be divided into several stages, summarised below:
- (a) removing old equipment no longer needed, such as discarded machinery, power lines, pipework, etc.;
 - (b) installing the equipment needed to pump the ash and water grout underground (pipework, valves, de-pressurisation systems, sound system and pressure monitoring system);
 - (c) constructing walls to retain sludge and delimit sections to be filled;
 - (d) preparing a ventilation circuit to ensure pressurised ventilation once normal ventilation is interrupted by the filling of the tunnel;
 - (e) preparing the plant for mixing and pumping the grout to be pumped underground;
 - (f) filling each section of tunnel once it has been prepared;
 - (g) after the sludge has dried, preparing the next section for filling.
- (40) By way of indication it is estimated that it will be possible to fill about 7 000 m of tunnel with a section of about 20 m², which will thus be able to hold about 140 000 m³ of sludge consisting of ash from the Portovesme thermal plant mixed with a proportion of water to form a mixture fluid enough to be pumped. The material will be pumped underground at a rate of one section of about 500 m³ a week. The plant can handle a maximum of about 80 m³/h, so that in one shift it will be possible to pump no more than the volume that will fill one section. The following four working days will be used to move back the piping to change the discharge point, perform maintenance on surface equipment, and screen the sludge needed to fill the next section of tunnel. This means that for each working day an average of about 100 m³ of sludge can be transferred underground. It is therefore estimated that sealing the tunnels by filling them with ash will take about six years:
- $140\,000\text{ m}^3 / 100\text{ m}^3\text{ per working day} = 1\,400\text{ working days} = 6\text{ years}.$
- (41) Sealing the tunnels by filling them with ash from the thermal plant will have the following environmental advantages:
- (a) reducing the open-air area needed for dumping special non-hazardous waste;
 - (b) preventing spontaneous combustion in the tunnels;
 - (c) correcting the acidity of any mine water with which the ash comes into contact (the ash has an average CaO content of over 35 %);
 - (d) reducing the probability of subsidence.
- (42) Filling the tunnels with ash will also generate revenue that will help to reduce the aid necessary. The revenue from the disposal of the waste has already been taken into account and subtracted from the volume of aid needed pursuant to Article 4 of the Council Decision, as shown by Annex 2.
- (43) The actual costs under this heading are estimated to come to approximately EUR 40 million.
- (44) The filling of the tunnels with the ash from the thermal power plan, should generate revenue in the amount of approximately EUR 12 million, thereby reducing the amount of aid necessary under letter (g), paragraph 1 of the Annex to the Council Decision to approximately EUR 28 million.

v. Mining damage, provided it has been caused by the coal production units which have been closed or which are being closed:

- (45) The environmental remediation of the above-ground areas consists in the sealing of the tailings ponds, and the environmental remediation of the waste rock dumps and of all the other land areas affected by mining operations.
- (46) For the covering and remodelling of sites, inert materials from coal processing will be used, topped by a layer of topsoil.
- (47) Once the morphological remediation of the sites has been completed, water drainage systems will be constructed.
- (48) The reclaimed sites will be put partly to industrial use, such as a photovoltaic installation and will be partly re-naturalised by the planting of native plant species.
- (49) Other above-ground works at the former mine site will be the refurbishment and securing of the existing built heritage.
- (50) In the period 2014-2026, the aid under letter (h), paragraph 1 of the Annex to the Council Decision will amount to approximately EUR 8,7 million.

vi. Exceptional intrinsic depreciation, provided it results from the closure of coal production units

- (51) The costs under Point 1(l) of the Annex to the Council Decision include the share of asset depreciation which could not be depreciated under normal accountancy rules due to the closure of the mine, and are estimated at EUR 25,8 million.

2.4. Plan of measures to mitigate the environmental impact of coal production

- (52) Italy has drawn up a plan to take measures aimed at mitigating the environmental impact of the production of coal by the production unit to which closure aid is granted.
- (53) The measures aimed at mitigating the environmental impact of coal will be in the field of renewable energy and coal desulphurisation.
- (54) The plan provides for two renewable energy projects. The first renewable energy system will comprise four windmills for a total power capacity of 12MW. The second system will consist of a photovoltaic power station covering about 10 ha with a total power capacity of some 4 MWp. These will be located in the mining site.
- (55) Carbosulcis holds a patent for sulphur removal from coal by leaching. The by-product of this process is humic acids, which can be used in agriculture.
- (56) Accordingly, Italy intends to take measures for the development, on a pilot scale first and on an industrial scale at a later date, of a process to remove sulphur from coal, which produces humic acids. If the process produces the expected results, producing a positive operating margin already during the mine's gradual decommissioning period, it will be possible to reduce the sulphur content of the coal feeding the nearby Portovesme thermal power plant.
- (57) According to Italy, as the project is still at a preliminary stage, the environmental benefits of sulphur removal can currently be estimated only in qualitative terms, and not yet in quantitative terms, as they are linked to two factors which will need to be assessed during the pilot phase of the process. The environmental benefits are mainly linked to the following factors applicable to high sulphur coals:
 - (a) the leaching process should reduce the coal's sulphur content by about 30 %, which will in turn reduce atmospheric SOx emissions when the coal is burnt in the thermal power plant;

- (b) the sulphur removal process produces as by-products humic acids which can be used in agriculture as fertilisers and soil improvers. Carbon sequestration through the application of soil organic matter (SOM) is one of the possible measures to mitigate the effects of climate change by reducing the emission of greenhouse gases into the atmosphere listed by the Intergovernmental Panel on Climate Change, IPCC 2007.
- (58) According to the Italian authorities, the quantitative contribution of this activity to the mitigation of the environmental impact of coal production at the Nuraxi Figus mine can be assessed once the pilot implementation stage has been concluded.

3. ASSESSMENT OF THE MEASURE

3.1. Presence of state aid pursuant to Article 107(1) of the TFEU

- (59) A measure constitutes State aid within the meaning of Article 107(1) of the TFEU if the following conditions are cumulatively fulfilled: the measure (a) confers an economic advantage to the beneficiary; (b) is granted by the State or through State resources; (c) is selective; (d) has an impact on intra-union trade and is liable to distort competition within the EU.
- (60) Undertakings are favoured within the meaning of Article 107(1) of the TFEU if they obtain an economic advantage which they would not otherwise obtain under market conditions. Carbosulcis is the sole beneficiary of the measure and will receive (and has already received) aid by means of State resources transferred directly from the State and the Sardinian Region's budget to offset its operating losses and to cover social and safety costs which constitutes an economic advantage. The market for coal is fully open to competition. Consequently, the financial aid from the State strengthens the position of the beneficiary in relation to its competitors in the EU and has potentially distortive effects on competition and is liable to affect intra-EU trade.
- (61) Consequently, the Commission concludes that the measure in favour of the company constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Lawfulness of the aid

- (62) Italy implemented part of the measure without prior notification and therefore in breach of Article 108(3) TFEU.

3.3. Compatibility of the aid

- (63) The Commission has assessed the compatibility of the measure according to the Council Decision, which sets out the criteria for compatibility of the State aid under examination pursuant to Article 107(3)(e) TFEU.
- (64) The coal produced at the mine Nuraxi Figus falls within the definition of coal set out in Article 1(a) of the Council Decision according to which coal means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe.
- (65) According to Article 2(2) of the Council Decision, 'aid shall cover only costs in connection with coal for the production of electricity, the combined production of heat and electricity, the production of coke and the fuelling of blast furnaces in the steel industry, where such use takes place in the Union'. Carbosulcis produces coal used for the local production of electricity. Therefore this criterion is complied with.
- (66) Italy intends to grant closure aid in the context of a closure plan of the mine. As defined in Article 1(c) of the Council Decision, the closure plan drawn up by the Member State must provide for measures culminating in the definitive closure of coal production units. The Closure Plan submitted by Italy includes the legislative and other measures adopted by Italy described in recitals 11 to 61, including the financial measures planned to accompany the definitive and irrevocable closure of the units concerned, thus leading to an orderly winding down of activities of such units at the planned dates.

- (67) Italy has submitted all relevant data required for the assessment of the Closure Plan pursuant to Article 7(2) of the Council Decision, notably the identification of the coal production unit, the real or estimated production costs for each coal production unit per coal year, the estimated coal production, per coal year, of coal production unit forming the subject of a closure plan and the estimated amount of closure aid per coal year.

3.3.1. *State aid to cover the production costs*

- (68) Pursuant to Article 3(1) of the Council Decision aid to an undertaking intended specifically to cover the current production losses of coal production units may be considered compatible with the internal market only if it satisfies the following conditions:

‘The operation of the coal production unit concerned must form part of a closure plan the deadline of which does not extend beyond 31 December 2018’

- (69) The Italian authorities committed to permanently close the Nuraxi Figus mine, which comprises only one production unit, by 31 December 2018. The mine is operated by Carbosulcis, fully owned by the Region of Sardinia which issued and approved the Closure Plan.

‘The coal production units concerned must be closed definitively in accordance with the closure plan’

- (70) The Closure Plan includes the legislative and other measures adopted by Italy and the Region of Sardinia and described in recitals 11 to 61 put in place to accompany the orderly winding down of the activities of such unit within the planned dates.

‘The aid notified must not exceed the difference between the (foreseeable) production costs and the foreseeable revenue for a coal year. The aid actually paid must be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid is granted’

- (71) As shown above in Table 1, the annual aid for coal production in the closing production unit does not exceed the difference between the (foreseeable) costs and (foreseeable) revenues.

‘The amount of aid per tonne coal equivalent must not cause prices for Union coal at utilisation point to be lower than those for coal of a similar quality from third countries’

- (72) Italy considers that it is not possible to relate payments for Sulcis coal to a commercial reference price, similarly to the Commission’s findings in the case of Hungary (SA.33861(12/N)).

- (73) Italy submits that Sulcis’ low grade coal cannot be procured from third countries and there is no market for coal of such low quality. The selling price paid by Portovesme thermal power plant to Carbosulcis takes account of the fluctuation of the price of the coal that is regularly traded on the world market and the quotation of standard grades of coal are reduced to take account of the particular grade being bought. According to Italy, this makes it impossible to determine a reference price for coal of a similar quality coming from third countries.

- (74) Article 3 of Law No 351 of 27 June 1985 laying down rules for the reopening of the Sulcis coalfield reads as follows: ‘Coal from the Sulcis coalfield may be used in thermal power stations and plants for the production of electric power and steam in combination or otherwise, provided they are located solely in Sardinia, or in industrial plants, likewise located in Sardinia, in which during the production or combustion process the sulphur is fixed, or fixed and combined, or combined with the product obtained’. Thus Sulcis coal can, in theory, only compete with other coals within Sardinia and most importantly cannot be sold on the world market.

- (75) The Commission cannot exclude that it is in fact possible to calculate a reference price for coal of similar quality. Consequently, Italy has committed itself to monitoring annually the price of Sulcis coal as calculated in the context of its sale to Portovesme thermal power plant using the relevant formula provided in the purchase contract to check if the price of Sulcis coal falls below the price of coal of a similar quality from third countries. The amount of aid per ton equivalent will be updated according to the actual sale price for each coal year.

- (76) In line with Commission's precedents ⁽⁷⁾, the Commission therefore considers that this condition is fulfilled in the present case.

'The coal production unit concerned must have been in activity on 31 December 2009'

- (77) The Nuraxi Figus mine was in activity in 2009.

'The overall amount of closing aid granted by a Member State must follow a downward trend: by the end of 2013 the reduction must not be less than 25 %, by the end of 2015 not less than 40 %, by the end of 2016 not less than 60 % and by the end of 2017 not less than 75 % of the aid granted in 2011'

- (78) The Commission concludes from Table 1 above that state aid to be granted follows the downward trend and complies with the minimum level of reduction stipulated in the Council Decision. The degressivity criterion prescribed by the Council Decision is therefore complied with.

'The overall amount of closure aid to the coal industry of a Member State must not exceed, for any year after 2010, the amount of aid granted by that Member State and authorised by the Commission in accordance with Articles 3 and 5 of Regulation (EC) No 1407/2002 for the year 2010'

- (79) No aid was authorised by the Commission in accordance with Articles 3 and 5 of Regulation (EC) No 1407/2002 for 2010. In any event since Regulation (EC) No 1407/2002 expired on 31 December 2010, the specific rules of that Regulation cannot be applied to the present measure ⁽⁸⁾. Therefore there is no amount of aid for 2010 that could be taken as the benchmark for the purpose of Article 3(g) of the Council Decision and this condition is not applicable to the case at issue.

'The Member State must establish a plan to take measures aimed at mitigating the environmental impact of the production of coal by production units to which aid is granted pursuant to this Article, for example in the field of energy efficiency, renewable energy or carbon capture and storage'

- (80) The Italian authorities have provided an environmental protection plan to mitigate the environmental impact of coal production which includes renewable energy installations, and coal desulphurisation.

- (81) Article 3(1)(h) of the Council Decision explicitly mentioned initiatives involving renewable energies as examples of measures which can be included in a mitigation plan. The Commission notes that those Italian measures are directly related to the mine still active in coal production to be closed down.

- (82) As to the coal desulphurisation project, in view of the fact that the viability of the project is uncertain and conditional at the outcome of the pilot to be launched, the Commission cannot establish that this measure will result in a substantial improvement of environmental conditions that can be related to coal production in the same region pursuant to Article 3(1)(h) of the Council Decision.

- (83) In light of the considerations set out in recitals 80 to 81 above, the Commission considers that the renewable energy installations included in the environmental protection plan submitted by the Italian authorities alone already meet the conditions laid down in Article 3(1)(h) of the Council Decision.

- (84) It should be noted that some of the measures referred to by Italy may involve the granting of State aid. The acceptance of these measures as part of the environmental mitigation plan for the purpose of authorising aid to coalmining in application of the Council Decision cannot be construed as a clearance of such measures under Articles 107 and 108 of TFEU. It remains Italy's responsibility to ensure that measures liable to constitute State aid are duly notified to the Commission pursuant to Article 108(3) TFEU.

⁽⁷⁾ Case SA. 18869 (N 92/05) State aid to the coal industry — Hungary, Case SA.33033 National Hard Coal Company Petrosani — Romania, and Case SA.33861 (12/N) Aid to facilitate the closure of coal mines — Hungary.

⁽⁸⁾ Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

- (85) This Decision is without prejudice to Italy's obligations under EU environmental legislation.
- (86) The assessment above demonstrates that all substantive criteria of Article 3 of the Council Decision regarding production aid to be granted under the Closure Plan are complied with.

3.3.2. State aid to cover exceptional costs

- (87) According to Article 4(1) of the Council Decision, State aid granted to coal mines to cover the costs arising from the closure of coal production units and which are not related to current production may be considered compatible with the internal market provided the amount paid does not exceed such costs.
- (88) The exceptional costs notified by the Italian authorities cover:
- the costs arising from the closure of the mine, defined in Points 1(f), (g), (h), and (l) of the Annex to the Council Decision,
 - the social costs and the costs generated by the occupational retraining programs of personnel following the closure of the mine defined in Point 1(b) and (d) of the Annex to the Decision.
- (89) The Commission notes that Italy does not plan grand aid that would exceed the costs arising from the closure of coal production. Moreover, the planned exceptional costs and the categories of costs planned to be covered correspond to eligible categories defined in the Annex to the Council Decision, for the purposes of Article 4. Pursuant to the Closure Plan, the granting of the aid is subject to the presentation of supporting documentation.
- (90) Aid to cover exceptional costs will continue to be required also after the cessation of production in 2018. In any event, aid will be granted until 2027 or prior to the expiry of the Council Decision.
- (91) Theoretically, revenues can accrue from the sale of plants and machinery. However according to Italy this is unlikely given the age of those items at the end of 2018. Furthermore, even if the plants and machineries were still to have some small residual value, it would not be possible to sell them, because of an agreement between Carbosulcis and the municipality of Gonnessa dated 15 February 1990. Article 16 of the agreement provides that Carbosulcis undertakes that upon the cessation of mining activity all the immovable and movable property (offices, services, coal-working plant and machinery etc.) will be conserved in compliance with the original architecture, so that the mine and its plants can be kept as a historical local monument.
- (92) The plants and machineries will therefore all be taken out of service and used to create a museum and industrial archaeology site, and preserved as a historic local monument.
- (93) The Italian authorities contend that the sealing of the mine and the environmental clean-up cannot be expected to lead to an increase in the value of the land, because apart from the areas used for the renewable energy plants, the site will constitute abandoned industrial land and no further use can be foreseen.
- (94) Apart from the areas used for the renewable energy plants, once the land has been cleaned up it will be maintained in its current state, in order to preserve the historical memory of the mining industry, as provided in the agreement between Carbosulcis and the municipality of Gonnessa. In any event, as regards the costs referred to in Point 1(h) of the Annex to the Council Decision, Carbosulcis is not the owner of the land, and does not benefit from any increase in the value of the land ⁽⁹⁾.
- (95) The Italian authorities confirm that the costs covered by the aid are not related to the financing of costs resulting from non-compliance with environmental regulations, such as:

— Directive 2006/21/EC of the European Parliament and of the Council ⁽¹⁰⁾,

⁽⁹⁾ At present, Carbosulcis is the owner of 200 ha where offices and plants are located, whereas the mine extends onto 5940 ha.

⁽¹⁰⁾ Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC — Statement by the European Parliament, the Council and the Commission (OJ L 102, 11.4.2006, p. 15).

- Directive 2004/35/EC of the European Parliament and of the Council ⁽¹¹⁾,
 - Directive 2000/60/EC of the European Parliament and of the Council ⁽¹²⁾,
 - Council Directive 92/43/EEC ⁽¹³⁾,
 - Council 85/337/EEC ⁽¹⁴⁾.
- (96) The aid will not be combined with other State aid within the meaning of Article 107(1) TFEU or with other forms of European Union financing for the same eligible costs (Article 5 of the Council Decision). The Commission would like, in addition, to remind the Italian authorities that in case of co-financing through Structural Funds of the Union, the rules applicable to those Funds must be respected.
- (97) Moreover, pursuant to Article 5 of the Council Decision all aids received by the Nuraxi Figus mine are required to be shown in the profit-and-loss accounts as a separate item of revenue distinct from turnover. Carbosulcis is also required to keep separate accounts for production and closing works (Article 6). It follows that the aid meets the conditions laid down in the Council Decision as to cumulation and separation of accounts of the beneficiary, in case of any other economic activities which are not related to coal mining.
- (98) Italy has submitted very detailed information in the context of the notification of the Closure Plan. In particular, Italy has provided detailed costs estimates for the mine, broken down by individual items, for each year covered by the Closure Plan. The Commission takes the view that the information provided by Italy (including the one contained in Annex 1 and Annex 2 of the present Decision) satisfies also the requirements of Article 7(4) of the Council Decision for the entire period covered by the measure.
- (99) Moreover, pursuant to Article 7(5) of the Council Decision, the Italian authorities have committed to ensuring that the accounts of the mine will be communicated to the European Commission within six months after the end of each reporting period.
- (100) It follows that the aid complies with the relevant conditions laid down in the Council Decision.
- (101) The Commission has therefore concluded that both the Closure Plan and the aid which has already been granted and which is proposed to be granted can be authorised.

4. CONCLUSION

- (102) The Commission regrets that Italy put part of the aid into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (103) However, the Commission has decided that the aid granted to Carbosulcis from 1 January 2011 until 31 December 2027 can be considered compatible with the internal market pursuant to Council Decision.
- (104) The Commission reminds the Italian authorities that, in accordance with Article 108(3) of the TFEU, any plan to refinance, alter or change this measure is required to be notified to the Commission pursuant to Commission Regulation (EC) No 794/2004 ⁽¹⁵⁾. Moreover, notifications pursuant to Article 7(3) of the Council Decision must be submitted if the Closure Plan is amended. Pursuant to Article 7(4), notifications must also be submitted if the aid Italy plans to grant to the coal industry during a coal year exceeds the amounts authorised in the present decision or if the details relevant to the calculation of the foreseeable production costs planned to be aided in the Closure Plan differ from those indicated in the present notification. Italy will need to submit separate annual notifications where there is a discrepancy between the annual measures and the approved Closure Plan. It shall duly inform the Commission of the amount and of the calculation of the aid actually paid each year until the end of the Closure Plan, as laid down in Article 7(5) of the Council Decision.

⁽¹¹⁾ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56).

⁽¹²⁾ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

⁽¹³⁾ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

⁽¹⁴⁾ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 5.7.1985, p. 40).

⁽¹⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

- (105) The Commission also reminds the Italian authorities that, in accordance with Article 7(5) of the Council Decision, they shall inform the Commission of the amount and of the calculation of the aid actually paid during a coal year no later than six months after the end of that year. Where any corrections are made to the amounts originally paid during a given coal year, the Italian authorities shall inform the Commission before the end of the following coal year.
- (106) According to Article 3(3) of the Council Decision, if the mine to which aid is granted is not closed at the date fixed in the Closure Plan as authorised by the Commission, Italy shall recover all aid granted in respect of the whole period covered by the Closure Plan,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Italy to Carbosulcis S.p.A. in accordance with the closure plan submitted 9 April 2014, as amended on 17 July 2014, is compatible with the internal market pursuant to Decision 2010/787/EU.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 1 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX 1

Country: ITALY

Coalfield SULCIS

Company CARBOSULCIS SPA

Underground production unit: NURAXI FIGUS – Monte Sinni mine

	Data 2011	Data 2012	Estimated data 2013	Estimated data 2014	Estimated data 2015	Estimated data 2016	Estimated data 2017	Estimated data 2018
1. GENERAL INFORMATION								
(a) Underground production [tce] '000	[...] (*)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(b) Yield (tce/year/work unit)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(c) Average net calorific value [kcal]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(d) Average registered staff	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
2. COST OF PRODUCTION								
(a) Labour costs [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(b) Cost of materials [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(c) Direct depreciation according to normal accounting rules [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(d) Return on capital [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(e) Costs of transport to the place of delivery [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(f) Company's overheads [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(g) Other expenditure [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(h) Increase fixed assets [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(i) Waste disposal costs [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(h) Costs connected with current production (per tce produced)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

	Data 2011	Data 2012	Estimated data 2013	Estimated data 2014	Estimated data 2015	Estimated data 2016	Estimated data 2017	Estimated data 2018
3. DELIVERIES AND RECEIPTS								
— Information specific to deliveries to thermal power plants:								
— production in the coal reference year [tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
— stock variation [tce]	[...]	[...]	[...]					
(a) Total	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
— Yield:								
— production in the coal reference year [EUR/tce]			[...]	[...]	[...]	[...]	[...]	[...]
— stock variation [EUR/tce]			[...]					
(b) Average sales price [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
4. PROPOSED AID								
(a) Loss of current production [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(b) Loss of current production [EUR]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(c) Proposed aid [EUR/tce]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(d) [EUR]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

N.B. The data given in red are those resulting from the reclassification of the profit and loss accounts for 2011 and 2012

(*) Business secret

ANNEX 2

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	total
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(b)	Other exceptional expenditure on workers who have lost or who lose their jobs;	7 804 000	3 852 000	2 180 000	9 080 000	692 000	9 920 000	6 212 000	960 000	404 000	96 000	212 000	308 000	96 000	96 000	3 660 000	45 572 000
(b ₁)	Retirement incentive (managers)	160 000	160 000	160 000	0	0	0	0	0	0	0	0	0	0	0	0	480 000
(b ₂)	Retirement incentive (technicians)	3 132 000	812 000	580 000	696 000	116 000	4 640 000	232 000	0	116 000	0	116 000	116 000	0	0	0	10 556 000
(b ₃)	Retirement incentive (workers)	4 512 000	2 880 000	1 440 000	1 632 000	576 000	5 280 000	576 000	960 000	288 000	96 000	96 000	192 000	96 000	96 000	96 000	18 816 000
(b ₄)	Incentive to set up own business (technicians)	0	0	0	4 640 000	0	0	1 276 000	0	0	0	0	0	0	0	1 740 000	7 656 000
(b ₅)	Incentive to set up own business (workers)	0	0	0	2 112 000	0	0	4 128 000	0	0	0	0	0	0	0	1 824 000	8 064 000

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	total
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(d)	The costs covered by the undertakings for the reskilling of workers in order to help them find new jobs outside the coal industry, especially training costs;	0	0	0	4 764 800	0	0	3 911 600	0	0	0	0	0	0	0	2 793 600	11 470 000
(d ₁)	Remuneration of technicians during the training course	0	0	0	2 320 000	0	0	638 000	0	0	0	0	0	0	0	995 000	3 953 000
(d ₂)	Remuneration of workmen during the training course	0	0	0	1 056 000	0	0	2 064 000	0	0	0	0	0	0	0	1 037 000	4 157 000
(d ₃)	Cost of the training (compatible with the ESF vademecum on costs)	0	0	0	1 388 800	0	0	1 209 600	0	0	0	0	0	0	0	761 600	3 360 000

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	total
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(f)	Residual costs resulting from administrative, legal or tax provisions which are specific to the coal industry;							100 000	100 000	100 000	100 000	100 000	100 000	100 000	100 000	0	800 000
(f ₁)	Mining royalty							100 000	100 000	100 000	100 000	100 000	100 000	100 000	100 000	0	800 000

(g)	Additional underground safety work resulting from the closure of coal production units;	0	0	200 000	0	0	0	4 480 800	3 836 800	3 495 800	3 370 800	3 363 800	3 237 800	3 127 800	3 086 800	0	28 200 400
(g ₁)	Project and environmental impact assessment of filling galleries with ash	0	0	200 000	0	0	0	0	0	0	0	0	0	0	0	0	200 000
(g ₂)	Making secondary shafts safe	0	0	0	0	0	0	0	0	0	0	70 000	74 000	0	0	0	144 000
(g ₃)	Making main shafts safe	0	0	0	0	0	0	0	0	0	0	0	0	65 000	72 000	0	137 000

		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	total
(g ₄)	Cost of work — technicians	0	0	0	0	0	0	1 160 000	1 044 000	1 015 000	986 000	957 000	899 000	870 000	870 000	0	7 801 000
(g ₅)	Cost of work — workmen	0	0	0	0	0	0	2 160 000	1 632 000	1 320 000	1 224 000	1 176 000	1 104 000	1 032 000	984 000	0	10 632 000
(g ₆)	Costs of mine structure materials and services	0	0	0	0	0	0	950 000	950 000	950 000	950 000	950 000	950 000	950 000	950 000	0	7 600 000
(g ₇)	Cost of materials and services for filling galleries with ash	0	0	0	0	0	0	500 000	500 000	500 000	500 000	500 000	500 000	500 000	500 000	0	4 000 000
(g ₈)	Cost of electricity (ventilation, drainage etc.)	0	0	0	0	0	0	1 250 000	1 250 000	1 250 000	1 250 000	1 250 000	1 250 000	1 250 000	1 250 000	0	10 000 000
(g ₉)	Potential revenues from ash disposal	0	0	0	0	0	0	- 1 539 200	- 1 539 200	- 1 539 200	- 1 539 200	- 1 539 200	- 1 539 200	- 1 539 200	- 1 539 200	0	-12 313 600

(h)	Mining damage, provided that it has been caused by the coal production units which have been closed or which are being closed;		998 931	1 198 931	1 198 931	798 931	798 931	738 648	738 648	738 648	738 648	738 648					8 687 898
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		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	total
(1 ₂)	Special amortisa- tion rate for intangible fixed assets	0	1 098 107	1 098 107	1 098 107	1 098 107	1 098 107	0	0	0	0	0	0	0	0	0	5 490 535
Grand total		7 804 000	10 020 074	8 748 074	20 212 874	6 660 074	15 888 074	15 443 048	5 635 448	4 738 448	4 305 448	4 414 448	3 645 800	3 323 800	3 282 800	6 453 600	120 576 012

COMMISSION DECISION (EU) 2016/287**of 15 October 2014****on State aid SA.26500 — 2012/C (ex 2011/NN, ex CP 227/2008) implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd***(notified under document C(2014) 7369)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) A complaint from Bundesverband der Deutschen Fluggesellschaften e.V. (Federal association of German airlines; hereinafter: 'BDF') of 27 August 2008 informed the Commission of alleged unlawful State aid in favour of Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd (hereinafter 'Ryanair'). The complaint was registered under State aid number CP 227/2008.
- (2) On 9 August 2010, the Commission forwarded the complaint and requested information from Germany. Germany provided the information requested by letter dated 30 September 2010.
- (3) On 8 April 2011 the Commission requested information from Air Berlin and Ryanair. Air Berlin provided the information requested on 10 May 2011. Ryanair provided the information requested on 20 June 2011. By letter dated 11 August 2011, the Commission forwarded a translated version of these comments and annexes to Germany. On 28 September 2011, Germany informed the Commission that it would not provide any comments at that stage.
- (4) By letter dated 26 January 2012, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) ⁽²⁾ (hereinafter 'opening decision') with regard to investment and operating aid in favour of Flugplatz Altenburg-Nobitz GmbH, reduced airport charges for airline companies and marketing agreements with Ryanair.
- (5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the alleged aid measures.
- (6) On 21 February 2012, the Commission requested additional information from Germany. Germany provided its comments on the opening decision and answers to the Commission's request on 24 February 2012, 30 March 2012 and 2 April 2012.

⁽¹⁾ OJ C 149, 25.5.2012, p. 5.

⁽²⁾ With effect from 1 December 2009, Articles 87, and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of Articles are in substance identical. For the purposes of this Decision references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽³⁾ See footnote 1.

- (7) On 13 April 2012, the Commission received comments from two interested parties (Ryanair and Airport Marketing Services ⁽⁴⁾) — hereinafter ‘AMS’.
- (8) On 20 April 2012, as some answers to its request for information from 21 February 2012 were missing, the Commission requested further information from Germany. Germany replied on 11 May 2012.
- (9) On 25 June 2012, the Commission received further comments from interested parties (Ryanair, Ryanair’s subsidiary AMS, and a consultancy firm acting for Ryanair). The Commission transmitted these comments to Germany by letter dated 22 August 2012. Germany requested a translation of the documents and then transmitted its comments on 4 December 2012.
- (10) By letter dated 29 November 2012, the Commission requested further information from Germany. Germany responded on 17 January 2013.
- (11) On 10 April 2013, Ryanair provided further comments ⁽⁵⁾, which were forwarded to Germany on 3 May 2013.
- (12) On 14 November 2013, the Commission requested further information from Germany. Germany answered on 14 January 2014. As the answers from Germany were incomplete, the Commission sent a reminder to Germany on 19 March 2014. Germany answered on 22 April 2014.
- (13) On 20 December 2013, Ryanair provided further comments, which were forwarded to Germany on 8 January 2014. On 27 January 2014, Germany commented on Ryanair’s comments.
- (14) On 17 January 2014 and 31 January 2014, Ryanair provided further comments, which were forwarded to Germany on 7 March 2014. On 7 April 2014, Germany declared not to have any comments regarding Ryanair’s contribution.
- (15) By a letter dated 25 February 2014, the Commission informed Germany of the adoption of the 2014 Aviation Guidelines ⁽⁶⁾ on 20 February 2014 and of the fact that those guidelines would become applicable to the case at hand from the time of their publication in the *Official Journal of the European Union*. It also gave Germany the opportunity to comment on the guidelines and their application within 20 working days of their publication in the Official Journal.
- (16) By letters dated 24 February 2014, the Commission also informed the third parties of the adoption of the 2014 Aviation Guidelines on 20 February 2014 and of the fact that these guidelines would become applicable to the case at hand from the time of their publication in the *Official Journal of the European Union*. It also gave the third parties the opportunity to comment on these guidelines and their application within 20 working days of their publication in the Official Journal.
- (17) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 1994 Aviation Guidelines ⁽⁷⁾ as well as the 2005 Aviation Guidelines ⁽⁸⁾.
- (18) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines to this case within one month of their publication date ⁽⁹⁾.
- (19) On 29 April 2014, the Commission sent a request for information to Germany, which replied on 7 May 2014.

⁽⁴⁾ Airport Marketing Services Limited is a wholly owned subsidiary of Ryanair. Its main activity is to sell advertising space on the Ryanair website.

⁽⁵⁾ Ryanair provided common comments on several aviation cases, including the case at hand.

⁽⁶⁾ Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

⁽⁷⁾ Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the Aviation Sector (OJ C 350, 10.12.1994, p. 5).

⁽⁸⁾ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

⁽⁹⁾ OJ C 113, 15.4.2014, p. 30.

- (20) On 6 May 2014, Deutsche Lufthansa AG provided comments on the case in the context of the adoption of the new guidelines. The non-confidential version of these comments was forwarded to Germany on 8 May 2014. Germany provided its comments regarding this submission on 15 May 2014.
- (21) On 7 May 2014, the complainant provided comments on the case in the context of the adoption of the new guidelines, the non-confidential version of which was transmitted to Germany on 21 May 2014. Germany answered on 28 May 2014.
- (22) On 10 September 2014, the Commission requested further information from Germany and from Ryanair. Germany and Ryanair replied on 16 September 2014.
- (23) On 12 September 2014, Ryanair and a consultancy firm acting on its behalf provided comments on this case, the non-confidential version of which was transmitted to Germany on 19 September 2014. Germany provided its comments regarding this submission on 6 October 2014.

2. BACKGROUND TO THE INVESTIGATION

2.1. THE FIRST CONVERSION OF THE AIRPORT TO LOW-COST AVIATION SERVICES

- (24) Since 1992 the publicly owned company Flugplatz Altenburg-Nobitz GmbH ⁽¹⁰⁾ has owned and operated the Leipzig-Altenburg airport (formerly named Altenburg-Nobitz airport, hereinafter 'AOC') located in the southern part of the *Land* of Thuringia, Germany. AOC was a former Russian military airfield, abandoned at the beginning of the 1990s. Flugplatz Altenburg-Nobitz GmbH then became responsible for the construction and operation of the airfield AOC. According to the articles of incorporation, the objective of the company is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.
- (25) The closest airports to AOC are the following:
- (a) Leipzig-Halle airport, located around 85 km and 1h 10 min travelling time by car from AOC;
 - (b) Dresden airport, located around 113 km and 1h 16 min travelling time by car from AOC;
 - (c) Erfurt airport, located around 140 km and 1h 37 min travelling time by car from AOC;
 - (d) Hof-Plauen airport, located around 122 km and 1h 37 min travelling time by car from AOC.
- (26) Since it started its activity as a civil airport, AOC has handled fewer than 150 000 passengers per annum. Table 1 provides an overview of passenger numbers at AOC since 2000.

Table 1 ⁽¹⁾

Number of passengers at AOC from 2000 to 2013 ⁽²⁾

Year	Total number of passengers ⁽³⁾	Passengers from scheduled flights ⁽⁴⁾
2000	27 876	—
2001	27 345	—
2002	26 811	—
2003	71 006	51 289

⁽¹⁰⁾ Flugplatz Altenburg-Nobitz GmbH currently has the following shareholders: Landkreis Altenburger Land (60 %), Gemeinde Nobitz (5 %), Thüsa Personennahverkehrsgesellschaft mbH (3 %). All shareholders are either public authorities or fully publicly owned and the company itself holds 32 % of its shares. Source: 2012 financial report of Flugplatz Altenburg-Nobitz GmbH. This is the last report which has been made available to the Commission by Germany.

Year	Total number of passengers ⁽³⁾	Passengers from scheduled flights ⁽⁴⁾
2004	93 946	76 742
2005	118 442	101 846
2006	105 213	90 551
2007	147 100	124 411
2008	138 400	126 972
2009	140 800	133 411
2010	119 000	112 985
2011	15 000	9 328
2012	5 400	—
2013	5 000	—

⁽¹⁾ Source: Financial reports from Flugplatz Altenburg-Nobitz GmbH and Germany.

⁽²⁾ Source: Financial reports from Flugplatz Altenburg-Nobitz GmbH.

⁽³⁾ According to Germany, there were no Ryanair flights from 17.12.2004 until 11.1.2005. In 2006, all flight operations were interrupted for two weeks due to construction works.

⁽⁴⁾ The Commission considers that passengers from scheduled flights ('Linienflugverkehr') in the 2003-2011 period are attributable to Ryanair flights.

- (27) Eurowings offered nine flights in 2000; Air Berlin operated 62 flights in 2001, 57 flights in 2002 and thereafter ceased to operate from AOC.
- (28) On 3 March 2003, the operator of AOC, Flugplatz Altenburg-Nobitz GmbH, and Ryanair concluded an agreement for airport services for a duration of 10 years.
- (29) In the peak years (2008-2010), Ryanair offered up to four destinations from AOC. Ryanair first offered daily flights to London and from 2007 flights to Barcelona/Girona. The company also served Edinburgh in 2009 and opened a route to Alicante in 2010. From 1 May 2003, Ryanair was the only company providing scheduled air services to and from AOC.
- (30) Ryanair ceased its services at AOC on 31 March 2011. Since then, no other airline has operated scheduled flights from AOC, as also confirmed by the AOC website.

2.2. THE SECOND CONVERSION OF THE AIRPORT TO GENERAL AVIATION

- (31) Following the recommendations of the consulting firm KE-Consult GbR ⁽¹¹⁾ in 2010 (hereinafter 'the KE-Consult study'), the airport started to develop general aviation activities, focusing on business flights and profiting from the proximity of the growing business region of Chemnitz-Zwickau. The airport stopped the low-cost aviation business and also became a training centre for flying and security staff.

⁽¹¹⁾ Studie über den Verkehrslandeplatz Leipzig-Altenburg und das angrenzende Industriegebiet, KE-Consult, Kurte & Esser GbR, September 2010.

- (32) The main reasons for this conversion are the following ⁽¹²⁾:
- (a) The high dependence of the airport on public contributions, provided mainly by the *Land* of Thuringia and shareholders of Flugplatz Altenburg-Nobitz GmbH: a report drawn up by the company's management in 2011 states that since 1992 approximately EUR 21 million had been invested in the airport, of which EUR 17 million by the *Land* of Thuringia and approximately EUR 4 million by the shareholders of Flugplatz Altenburg-Nobitz GmbH. Nevertheless in both financial years 2009 and 2010 a funding gap ⁽¹³⁾ arose of approximately EUR 270 000. Because of missing shareholders' contributions, the liquidity situation of the airport was jeopardised at the time, which endangered the future of the company.
 - (b) According to the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH, the low-cost aviation business was to benefit the economic development of the region. Nevertheless the return on investment in the airport was negative: the positive fiscal effect created by AOC for the municipalities and the financing public bodies was lower than the contributions paid to the airport ⁽¹⁴⁾.
 - (c) Changes in the shareholders' structure: Stadtwerke Altenburg GmbH (SWA) gave up its participation on 31 December 2010, for which Stadt Altenburg had a preferential buying right.
 - (d) In 2009 the government of the *Land* of Thuringia changed and the new government proved to be more reluctant to provide further contributions to the airport. The new government in particular rejected decisions taken by the former government to provide the airport with marketing contributions for the 2009-2012 period. As the public shareholders refused to pay further marketing contributions to Ryanair, in the 2010/2011 winter season, only one route to/from London was operated with financial support from regional companies. The shareholders and the board of directors of Flugplatz Altenburg-Nobitz GmbH then refused to grant the EUR 420 000 required by Ryanair as its marketing fee for the 2011 summer flight plan. Ryanair then decided to move its regional hub to Magdeburg/Cochstedt and to end its activities at AOC in March 2011.
- (33) A number of conversion options were envisaged by the airport's management. The most viable was the offering of new routes and charter flights for 2012 without any marketing contributions: to that effect, negotiations with Rheinjet for flights to Barcelona were initiated in 2011. Following Ryanair's decision on 26 July 2011 to fly from Leipzig-Halle, the market situation changed for AOC and such new routes were abandoned.
- (34) Therefore, in 2011 new activities were decided for the conversion of the airport:
- (a) development of business travel transport, which should be more profitable because of lower security requirements;
 - (b) establishment of companies interested in the aviation business;
 - (c) establishment of start-up companies,
 - (d) set-up of photovoltaic facilities (a photovoltaic installation was built in 2012), renting of parking places and facilities, events organisation.
- (35) These measures should, according to the management, permit the medium-term own financing of the company through a substantial cost reduction, as up to EUR 520 000 per annum could be saved, which would eventually reduce the funding gap of the airport. The airfield would be maintained and contribute to regional business development.

⁽¹²⁾ Source: Report of the managers of Flugplatz Altenburg-Nobitz GmbH, *Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH*, 9 September 2011.

⁽¹³⁾ 'Deckungslücke'.

⁽¹⁴⁾ This is demonstrated in the KE-Consult study.

3. THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT

3.1. OVERVIEW OF THE PUBLIC CONTRIBUTIONS RECEIVED BY FLUGPLATZ ALTENBURG-NOBITZ GMBH

- (36) Between 1992 and 2010, approximately EUR 21 million was invested in Flugplatz Altenburg-Nobitz GmbH, of which approximately EUR 17 million by the *Land* of Thuringia and approximately EUR 4 million by its public shareholders ⁽¹⁵⁾.
- (37) Over the 2000-2011 period, Flugplatz Altenburg-Nobitz GmbH received two types of public contributions, from its shareholders and from other public organisations, mainly the *Land* of Thuringia ⁽¹⁶⁾. According to Germany and the financial reports of Flugplatz Altenburg-Nobitz GmbH, the *Land* of Thuringia mainly financed infrastructure investments, whereas the shareholders contributed to the financing of operating losses. Table 2 lists the total public contributions received by the airport, which were provided with the following main objectives:
- (a) financing of investments, mainly infrastructure investments;
 - (b) financing of operational activity (loss covering);
 - (c) financing of marketing measures, under various agreements with Ryanair;
 - (d) financing of public remit activities.

Table 2 ⁽¹⁾

Overview of total public contributions received by Flugplatz Altenburg-Nobitz GmbH

(in thousands of EUR)

Financial year	Shareholders' contributions	Other public contributions ⁽²⁾	Total
2000	256	321	577
2001	256	655	911
2002	256	226	482
2003	960	561	1 521
2004	1 280	395	1 675
2005	914	690	1 604
2006	769	404	1 173
2007	1 057	780	1 837
2008	925	2 032	2 957
2009	957	1 416	2 373

⁽¹⁵⁾ Source: Report of the managers of Flugplatz Altenburg-Nobitz GmbH, *Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH*, 9 September 2011.

⁽¹⁶⁾ The articles of incorporation of the airport manager limit the annual capital contribution for each shareholder to five times its share (§ 24, (3)).

(in thousands of EUR)

Financial year	Shareholders' contributions	Other public contributions ⁽²⁾	Total
2010	1 147	367	1 514
2011	302	0	302
Total	9 079	7 847	16 926

⁽¹⁾ Source: Annual financial reports from Flugplatz Altenburg-Nobitz GmbH, at the following pages:

Year 2000: p. 28 & Annex 6, Page 20
 Year 2001: p. 28 & Annex 6, Page 23
 Year 2002: p. 28 & Annex 6, Page 21
 Year 2003: p. 7 & Annex 6, Page 21
 Year 2004: Annex 3, Page 5 & Annex 6, Page 19
 Year 2005: Annex VI, Sheet 13 & Annex III, Sheet 19
 Year 2006: Annex VI, Sheet 12 & Annex III, Sheet 15-16
 Year 2007: Annex VI, Sheet 13 & Annex III, Sheet 15-16
 Year 2008: Annex VI, Sheet 12 & Annex III, Sheet 15-16
 Year 2009: Annex VI, Page 15 & Annex III, Page 14
 Year 2010: Annex VI, Page 15 & Annex III, Page 14
 Year 2011: Annex VI, Page 13 & Annex III, Page 14.

⁽²⁾ These contributions have mainly been provided by the *Land* of Thuringia, although other public bodies may have contributed as well.

3.2. FINANCING OF INFRASTRUCTURE INVESTMENTS IN 2000–2011

- (38) Germany states that, between 2000 and 2011, Flugplatz Altenburg-Nobitz GmbH undertook infrastructure investments for a total of EUR 6 474 035, for which Table 3 provides a detailed breakdown. Among these investments is the extension of the runway in 2003/2004 for a total amount of EUR 687 882 and the construction of a new terminal in 2009 for EUR 1 003 571 (the terminal was only opened in 2010 ⁽¹⁷⁾).

Table 3 ⁽¹⁾

Overview of infrastructure investments and their financing at AOC from 2000 to 2011

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources ⁽²⁾	Total amount of the investment
2000	Weather — acquisition of a central computer, additional equipment, etc.	13 914	9 276	23 190
	Technical acceptance of RT 1000C direction finder	3 590	2 393	5 983
	Water supply (connection, modification) ⁽²⁾	10 205	6 803	17 008
2001	Reconstruction of the runway and parts of the taxiway	72 652	8 072	80 724
	Acquisition of an air starter	34 495	42 949	77 443

⁽¹⁷⁾ <http://www.lvz.de/Mitteldeutschland/News/Aus-fuer-Linienfluege-ab-Altenburg-Ryanair-zieht-sich-komplett-zurueck> 'Aus für Linienflüge ab Altenburg — Ryanair zieht sich komplett zurück'.

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources ⁽²⁾	Total amount of the investment
2002	Boundary fence around airfield area (remainder)	26 144	17 429	43 573
	Planning costs — planned extension of RESA 22 and threshold 22	46 183	5 131	51 314
2003	Extension of RESA 22, reconstruction of the runway (1st payment 2003, 2nd payment 2004)	314 550	187 882	687 882
2004	Extension of RESA 22, reconstruction of the runway (2nd payment 2004)	185 450		
2006	Airport beacon, acquisition of software, acquisition of five radio alarm receivers, installation of emergency exit gate, extension of terminal, purchase of 27 biometric transponders, weather station cable extension,	28 787	12 337	41 124
	acquisition of a fire engine (1st instalment 2006)	193 526	82 940	276 466
2007	Acquisition of a fire engine (2nd instalment 2007)	387 052	165 879	552 931
	Acquisition of a jet sweeper	230 040	153 360	383 400
2008	Safety monitoring network	11 430	4 899	16 329
	Uni-mower	5 514	3 676	9 190
	Acquisition of land	56 144	24 062	80 206
	Reconstruction of the runway — safety upgrade	1 816 538	778 516	2 595 054 ⁽³⁾
2009	Renovation/reconstruction of terminal	702 500	50 672	753 172 ⁽⁴⁾
	Marking work on the apron	4 429	1 898	6 327
	Runway repair in front of threshold 04	336 853	0	336 853
2010	Renovation/reconstruction of terminal	0	250 399	250 399 ⁽⁴⁾
	Marking work on the apron	0	0	0
	Runway repair in front of threshold 04	0	144 366	144 366

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources ⁽²⁾	Total amount of the investment
2012	GripTester (flight safety)	28 770	12 330	41 100
TOTAL		4 508 766	1 965 269	6 474 034

⁽¹⁾ Source: Germany.

⁽²⁾ Own resources from Flugplatz Altenburg-Nobitz GmbH.

⁽³⁾ This amount is currently being examined and in dispute before the federal state administrative court; therefore it may be subject to change.

⁽⁴⁾ Amount subject to change — see footnote 3.

- (39) As described in detail in Section 3.4.2, the extension of the runway and the provision of service areas for rental car companies were an obligation of AOC under the Ryanair services agreement. Financial reports of Flugplatz Altenburg-Nobitz GmbH for the relevant years state that the runway was extended ⁽¹⁸⁾.
- (40) At its meeting of 23 June 2000, the board of Flugplatz Altenburg-Nobitz discussed, in the context of the development of the airport, a non-detailed 10-year investment programme amounting to a total investment of approximately EUR 20 million.

3.3. FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN 2000-2011

- (41) In the 2000-2011 period, Flugplatz Altenburg-Nobitz GmbH accrued annual losses from the operation of AOC, as described in Table 4.

Table 4 ⁽¹⁾

Overview of annual losses of Flugplatz Altenburg-Nobitz GmbH and their financing

(in thousands of EUR)

Financial year	Operating result without public contributions and public remit costs ⁽²⁾	Investments ⁽³⁾	Depreciation	Net financial result ⁽⁴⁾	Net result
2000	– 244	204	1 509	– 19	+ 34
2001	– 591	77	1 469	– 24	– 31
2002	– 214	61	1 393	0	+ 51
2003	– 1 161	509	620	+ 2	– 64
2004	– 1 192	428	612	– 1	0
2005	– 671	92	445	– 12	– 272
2006	– 496	2 613	531	– 26	– 253

⁽¹⁸⁾ In particular, the financial report for 2004 states that the starting and landing distances at the runway were extended and permitted operation of B 737-800 aircraft. According to the agreement between AOC and Ryanair, Ryanair used B 737-300 or other B 737 variant aircraft at AOC.

(in thousands of EUR)

Financial year	Operating result without public contributions and public remit costs ⁽²⁾	Investments ⁽³⁾	Depreciation	Net financial result ⁽⁴⁾	Net result
2007	– 719	1 071	533	– 1	– 301
2008	– 511	664	645	– 2	– 460
2009	– 906	2 354	821	+ 7	– 562
2010	– 1 150	1 296	965	– 2	– 567
2011	– 424	8	907	– 13	– 437

⁽¹⁾ Source: Germany and annual financial reports from Flugplatz Altenburg-Nobitz GmbH.

⁽²⁾ Operating result is calculated as revenues from operational activities — from which total public contributions as stated in Table 2 have been deducted — less direct operating expenses (personnel + materials + other expenses), according to the data provided by the annual financial reports from Flugplatz Altenburg-Nobitz GmbH.

⁽³⁾ The investment amounts mentioned in Table 4 come from the annual financial reports from Flugplatz Altenburg-Nobitz GmbH and differ from the investment amounts provided by Germany in Table 3.

⁽⁴⁾ The net financial result comes from the difference between financial revenues and financial expenses. According to Germany, Flugplatz Altenburg-Nobitz GmbH had no bank loan during that period; financial expenses were mostly linked to interest to be paid on contributions received in the past and not yet used.

- (42) Germany provided the data reported in Table 5 on shareholders' annual contributions dedicated to the coverage of operating losses of Flugplatz Altenburg-Nobitz GmbH ⁽¹⁹⁾; in total, these capital contributions amount to EUR 8,9 million.

Table 5

Shareholders' contributions for operating purposes

(in EUR)

2000	200 000-300 000 [...]*
2001	200 000-300 000 [...]*
2002	200 000-300 000 [...]*
2003	300 000-400 000 [...]*
2004	475 000-575 000 [...]*
2005	700 000-800 000 [...]*
2006	925 000-1 025 000 [...]*
2007	1 250 000-1 350 000 [...]*

⁽¹⁹⁾ The data reported in Table 5, provided by Germany, differ from the data reported in Table 2, provided by the annual financial reports from Flugplatz Altenburg-Nobitz GmbH.

(in EUR)

2008	1 125 000-1 225 000 [...]*
2009	1 125 000-1 225 000 [...]*
2010	1 325 000-1 425 000 [...]*
2011	425 000-525 000 [...]*
Total	8 897 000

[...]* Covered by the obligation of professional secrecy.

- (43) Since the beginning of the period in question, financial reports from Flugplatz Altenburg-Nobitz GmbH indicate that the financial situation of the airport is highly dependent on shareholder contributions. The 2002 financial report states that the existence of the company would be in danger without financial contributions from shareholders and that further shareholder contributions were needed. Several other financial reports (years 2003 and 2004) also state that the company can only survive thanks to the shareholder capital contributions ⁽²⁰⁾. The annual outlook in the financial report for the year 2003 already foresees that shareholder capital contributions will be needed in the next financial period. In 2006, an imminent insolvency could only be avoided through shareholder contributions, according to the financial statement of 2006.
- (44) Germany states that the public remit costs relate to personnel costs for air traffic control, fence control, administration, check-in, training and pilots and were financed both by own capital of Flugplatz Altenburg-Nobitz GmbH and the *Land* of Thuringia, as set out in Tables 6 and 7.

Table 6

Financing of public remit costs at Flugplatz Altenburg-Nobitz GmbH ⁽¹⁾

(in EUR)

Year	Total public remit costs	Equity	Financing by the <i>Land</i> of Thuringia
2000	276 420	106 031	170 389
2001	278 773	127 043	151 730
2002	292 270	134 801	157 469
2003	412 325	247 279	165 046
2004	461 067	293 713	167 354
2005	685 406	529 734	155 672
2006	683 415	527 017	156 398

⁽²⁰⁾ Flugplatz Altenburg-Nobitz GmbH, Jahresabschlusses zum 31. Dezember 2002, Lagebericht 2002, p. 4.

(in EUR)

Year	Total public remit costs	Equity	Financing by the Land of Thuringia
2007	732 355	597 858	134 497
2008	700 772	599 954	100 818
2009	718 416	347 598	370 818
2010	657 982	313 933	344 049
2011	598 056	261 654	336 402
TOTAL	6 497 257	4 086 615	2 410 642

(¹) Source: Germany. Germany mentions that public remit costs exceed the amounts mentioned in Table 6, but does not provide any further information on the exact amount.

Table 7 (¹)

Distribution of the Land of Thuringia's financing according to the type of public remit cost

(in EUR)

Year	Air traffic control	Airport control services	Total financing by the Land of Thuringia
2000	170 389	0	170 389
2001	151 730	0	151 730
2002	157 469	0	157 469
2003	165 046	0	165 046
2004	167 354	0	167 354
2005	155 672	0	155 672
2006	156 398	0	156 398
2007	134 497	0	134 497
2008	100 818	0	100 818
2009	100 818	270 000	370 818
2010	94 049	250 000	344 049
2011	86 402	250 000	336 402
TOTAL	1 640 642	770 000	2 410 642

(¹) Source: Germany.

3.4. AIRPORT CHARGES AND PAYMENTS TO RYANAIR UNDER THE AIRPORT SERVICES AND MARKETING AGREEMENTS

3.4.1. The schedule of airport charges at AOC

- (45) Table 8 summarises the key terms of the standard schedules of airport charges applied at AOC during the 2002-2010 period ⁽²¹⁾.

Table 8

Schedule of airport charges applicable at AOC between 2002 and 2010 ⁽¹⁾

Prices without VAT	Landing charges for aircraft with more than 6 001 kg/ per 1 000 kg	Passenger charges/per passenger
Schedule of airport charges from 1 January 2002	EUR 7,78	EUR 2,67
Schedule of airport charges from 18 September 2006	EUR 7,45	EUR 3,00

⁽¹⁾ Source: Germany.

- (46) In January 2011, a new schedule of airport charges was established, with the key terms described at Tables 9 and 10.

Table 9

Schedule of airport charges applicable to aircraft since 2011 ⁽¹⁾

Schedule of airport charges from January 2011 (Prices without VAT)	Up to 30 min turnaround time	Over 30 min turnaround time
For passenger flights with planned rotations ⁽²⁾	EUR 0	EUR 7,45
For passenger flights without planned rotations and freight flights	EUR 7,45	

⁽¹⁾ Source: Germany.

⁽²⁾ The German word used for the planned rotations is 'Linienflugbetrieb'.

Table 10

Schedule of airport charges applicable to passengers since 2011 ⁽¹⁾

Schedule of airport charges from January 2011 (Prices without VAT)	Number of passengers less than 50 000	Number of passengers between 50 000 and 100 000
Charge per passenger	EUR 6,00	EUR 4,20

⁽¹⁾ Source: Germany.

⁽²¹⁾ The charges in Tables 8 and 9 apply to aircraft which are included in a specific list called 'Bonusliste', which lists different aircraft types according to their technical characteristics in terms of pollutant emissions: aircraft with the best environmental performance are included in the list and new aircraft are automatically included in the list.

3.4.2. The Ryanair airport services agreement of 3 March 2003

- (47) On 3 March 2003, Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Ryanair ('Ryanair Limited') signed an agreement for airport services for a duration of 10 years. The agreement entered into force with the daily scheduled service to London-Stansted, which was to start on 1 May 2003.
- (48) According to this agreement, Ryanair pays AOC:
- (a) a fee for the operation of passenger air services according to AOC's scale of charges in effect on the day of the service;
 - (b) an amount equal to passenger security taxes and state fees ('DE tax') at the rate in force at the time of operation of the flight. The original charge amounts to 'Four euro and fifty one cents (EUR 4,08)' ⁽²²⁾. The agreement also specifies the intention of both parties to try to reduce the DE tax if the passenger volume through the airport grows. Ryanair is to collect the original charge as a minimum charge in any event.
- (49) Germany states that Ryanair paid the fees for the operation of the services according to the AOC standard fee regulation in force at the time, corresponding to a fixed landing fee of [...] * per aircraft and a passenger fee of [...] * per passenger (without VAT) ⁽²³⁾ (fees paid in June 2009).
- (50) This airport services agreement of 3 March 2003 stipulates that AOC is obliged in return to:
- (a) provide a runway meeting specific technical specifications by 31 December 2003, to be completed and extended by 31 May 2004;
 - (b) provide terminal and infrastructure services ([...] *) and services in terms of sales, marketing and public relations (services set out in Annex A to the service agreement);
 - (c) provide handling and related services (services set out in Annex B to the service agreement);
 - (d) ensure the operation of a bus service at standard local fares between AOC and Leipzig-Bahnhof and between AOC and Dresden-Bahnhof;
 - (e) operate a reservations facility (service set out in the Appendix to Annex B to the service agreement).
- (51) In addition to the obligation of Flugplatz Altenburg-Nobitz GmbH to provide the runway, Annex A to the agreement sets out several other services to be provided by AOC:
- (a) terminal and infrastructure services: [...] * and other 'reasonable requirements of Ryanair on an ad hoc basis to ensure that Ryanair can maintain a 25-minute turnaround';
 - (b) services in terms of sales, marketing and public relations: [...] *.
- (52) The fees referred to at recital 48 paid by Ryanair include several services as set out in Annex B 'Handling and related services to be provided by ground handling agents' to the airport services agreement of 3 March 2003, such as ⁽²⁴⁾: baggage loading and unloading (no cargo); toilet and water service upon request [...] *; [...] * and supply and application of de-icing materials when required by Ryanair with fluid charged at [...] * per litre; passenger check-in, boarding and disembarkation and checking of travel documents.

⁽²²⁾ The Commission notes the difference between the number expressed in words and in figures.

⁽²³⁾ Germany provided the invoice sent by Flugplatz Altenburg-Nobitz GmbH to Ryanair regarding June 2009. Despite further requests from the Commission, Germany has not provided any further information regarding the exact fees per passenger and per aircraft paid by Ryanair throughout the period 2003-2011.

⁽²⁴⁾ This is only an enumeration of certain measures. The full list of services is contained in Annex B.

- (53) According to the Appendix to Annex B, 'Reservations Facility', to the airport services agreement of 3 March 2003, the handling agent has to establish and operate a passenger service desk, keep reservation staff adequately trained, and pay for computer hardware and telephone, fax, IT and telecommunication devices in air transport (SITA) and all equipment maintenance and replacement costs incurred by the handling agent in the running of the passenger desk. However, [...]*

3.4.3. The marketing services agreements

- (54) Flugplatz Altenburg-Nobitz GmbH signed in total three marketing services agreements, the first one with Ryanair and the two following ones with Airport Marketing Services Limited (AMS), and a side letter supplemental to the last agreement of 25 January 2010.

Table 11

Marketing agreements between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS

Agreement	Duration	Purpose	Fees to be paid by AOC to Ryanair
Agreement of 7.4.2003 between AOC and Ryanair	15.4.2003-30.4.2013	English language advertisements for the internet and sales promotion and public relations to promote the marketing of air-based tourism in the Altenburg area	— A success fee based on the number of departing passengers, to be deducted from the charges for airport services paid by Ryanair — A success fee based on a certain percentage of any increase in fees at the airport
Agreement of 28.8.2008 between AOC and AMS	28.8.2008-27.8.2010	Marketing services involving the use of ryanair.com website as primary tool: 150-word paragraph/s within the 'Top five things to do' section of the AOC destination page	[...]* for 2008 [...]* for 2009 ⁽¹⁾ (both amounts excluding VAT)
Agreement of 25.1.2010 between AOC and AMS	25.1.2010-end of one year after the date of launch of the first service	Marketing package to be provided for one year	[...]* per annum ⁽¹⁾ (excluding VAT)
Side letter of 21.9.2010 between AOC and AMS	21.9.2010-31.3.2011	Supplementary agreement to the original agreement of 25.1.2010	[...]* for the winter period 2010

⁽¹⁾ The agreement refers to the current AMS rate.

3.4.3.1. The marketing agreement of 7 April 2003

- (55) Under the first marketing agreement concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Ryanair on 7 April 2003, valid as from 15 April 2003 for 10 years, Ryanair is to undertake marketing efforts to promote the Altenburg area. The agreement gives Ryanair the final say as regards all decisions on promotion and advertising, except in relation to AOC's website.

(56) In consideration of the tasks undertaken by Ryanair, Flugplatz Altenburg-Nobitz GmbH is to pay the following fees:

- (a) a 'success fee' per departing passenger, to result in a net charge to be paid by Ryanair per passenger in respect of landing, local air traffic control, lighting, parking (not including overnight parking), ramp and passenger handling, infrastructure and passenger service charge for the passenger air services. AOC is to calculate the net charge per passenger according to the passenger load sheets and to present the calculation to Ryanair at the end of each week. Ryanair is to calculate the success fee and present the calculation to AOC in a 30-day period after the end of each month; the calculation is to be based upon the services of the preceding calendar month. Ryanair may deduct its success fee from AOC's monthly bills of the landing fees.

Table 12

Net charge per passenger to be paid by Ryanair to AOC

(in EUR)

Number of rotations of the services	Net charge per departing passenger including all charges (except security) Year 1-5	Net charge per departing passenger including all charges (except security) Year 6-10
[...]*	[...]*	[...]*
[...]*	[...]*	[...]*
[...]*	[...]*	[...]*

(b) a 'success fee' based on a certain percentage of any increase in fees at the airport, consisting in:

- 100 % of any increase in the security tax levied by the government up to a maximum of 10 % over the existing published rate in a five-year period, and
- 100 % of any increase in the existing published fees or additional fees, charges or taxes introduced in the published charges of the airport up to a maximum of 10 % of the existing total published fee paid by Ryanair, in a five-year period.

3.4.3.2. *The marketing agreement of 28 August 2008*

- (57) A second marketing services agreement was concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services on 28 August 2008. According to the agreement, AOC intends to actively promote the city's and the region's facilities and increase the share of inbound passengers on Ryanair's services and hence maximise the airport's non-aeronautical revenues. The agreement is linked to Ryanair's commitment to operate a route from AOC to London Stansted in the summer (daily) and in the winter (four times a week) and one to Girona, three times a week only in the summer.
- (58) The agreement has an initial duration of two years. AOC pays EUR [...]* for year 1 and EUR [...]* for year 2. In return, AOC receives [...]*. The agreement does not include any further indication as regards the duration, placement or other details of the link.
- (59) Flugplatz Altenburg-Nobitz GmbH has the right to choose its preferred time slots for the marketing measures. However, due to limited availability, these slots cannot be guaranteed. Flugplatz Altenburg-Nobitz GmbH also has the right to choose websites that can be connected via a link on to the Ryanair website. However, this right is limited by the fact that websites cannot include flights, car rental or accommodation and/or any other services that are also offered on the Ryanair website. Moreover, Ryanair has the final say and can refuse to allow publication of the website. Flugplatz Altenburg-Nobitz GmbH also has to check that the services have been provided in line with the agreement.

3.4.3.3. *The marketing agreement of 25 January 2010*

- (60) A third marketing services agreement was concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services on 25 January 2010. According to the agreement, AMS is to offer tourism-related marketing services on the Ryanair website, so that AOC can advertise its business and tourist attractions. The agreement is subject to Ryanair's commitment to operate summer routes — commencing in summer 2010 and for the IATA summer season only ⁽²⁵⁾ — from AOC to London Stansted (seven times a week), Girona (three times a week) and Alicante (twice a week).
- (61) The agreement has an initial duration of one year. AOC pays EUR [...] * for one year for the following package of marketing services: [...] *. The rights and duties of AOC as regards time slots, nature of websites and the final say of Ryanair are identical to those described in the previous agreement.

3.4.3.4. *The side letter of 21 September 2010*

- (62) The side letter of 21 September 2010 was signed between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services. The agreement is supplemental to the original marketing services agreement of 25 January 2010, as AOC wishes to purchase further advertising services ⁽²⁶⁾ for the amount of EUR [...] * for the winter 2010 period only. The side letter expires on 31 March 2011.
- (63) Advertising services to be provided by AMS according to the side letter consist of 'the presence of a link to a website designated by Flugplatz Altenburg-Nobitz GmbH displayed on www.ryanair.com UK home page for 12 days for the duration of this side letter'.
- (64) According to Germany, payments under this side letter were made by private companies, after they agreed with maintaining Ryanair operations at AOC.

4. **GROUND FORS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE AND THE INITIAL ASSESSMENT BY THE COMMISSION**

- (65) In its opening decision, the Commission raised the following questions regarding the measures under assessment:
- (a) Measure 1: Financing of infrastructure investments in 2000-2011. Whether payments made for the airport infrastructure during the period 2000-2011 amounting to EUR 6 474 034 in total — including the extension of the runway as stipulated in the agreement of 3 March 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair — constitute State aid and, if this is the case, whether this State aid is compatible with the internal market.
- (b) Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011. Whether public shareholders acted in line with the market economy investor principle when they granted annual operating aid during the period 2000-2011 for a total amount of EUR 9,079 million to Flugplatz Altenburg-Nobitz GmbH and, if not, whether this State aid is compatible with the internal market.
- (c) Measure 3: Airport charges and payments to Ryanair under the airport services and marketing agreements. Whether Flugplatz Altenburg-Nobitz GmbH, in accepting a reduction in the revenues for airport services through the mechanism of the marketing fees to be paid to Ryanair/AMS for the period from 1 May 2003 until 31 March 2011, acted as a market economy investor and, if these reductions constitute State aid, whether this aid is compatible with the internal market. In receiving reduced airport charges, the public operator of the airport, Flugplatz Altenburg-Nobitz GmbH, forwent revenues. The marketing payments to Ryanair and AMS were made by the public operator of the airport, except for the last marketing agreement, the side letter of 21 September 2010, for which payments were made by private companies. In this respect, the Commission will exclude from the scope of its analysis this last marketing agreement signed with AMS on 21 September 2010, as its financing was provided by private regional companies which had agreed to the maintaining of Ryanair's activity at the airport.

⁽²⁵⁾ The IATA summer season started on 28 March 2010 and ended on 30 October 2010.

⁽²⁶⁾ Paragraph 3.2 of the agreement of 25 January 2010 leaves open the possibility for AMS to provide additional marketing services upon agreement between the parties.

5. COMMENTS FROM GERMANY

5.1. FINANCING OF INFRASTRUCTURE INVESTMENTS IN 2000–2011 (MEASURE 1)

- (66) Germany explains that public contributions to infrastructure investments at the airport directly derived from the logic on which the conversion of the airport was based. Its conversion from a military airfield into a civil airport was justified by the economic development of the regions of eastern Thuringia and western Saxony⁽²⁷⁾. Paragraph 2(1) of the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH indeed specifies that the objective of the company is to improve the business-related infrastructure in order to strengthen the eastern Thuringia and western Saxony regions from an economic perspective. A report drawn up by the company's managers⁽²⁸⁾ values annual revenues deriving from foreign passengers transiting through the airport at EUR 10,7 million for the whole region of Central Germany.
- (67) According to Germany, the provision of infrastructure is part of the State's powers within the framework of its competence for spatial planning, regional development and regional transport policy. These kinds of infrastructure investments are therefore based not only on exclusively economic reasons for the benefit of an undertaking, but are also part of the State's role in serving the general interest.
- (68) Germany adds that the *Land* only has the right⁽²⁹⁾ to finance specific activities which are in its direct interest and which would not be feasible without public subsidies. Overcompensation is avoided through an *ex post* control of the correct use of the funds provided⁽³⁰⁾.
- (69) According to Germany, it is well known that especially regional airports can often not cover their costs and investments through airport charges and that therefore public co-financing can be necessary. In particular, Germany argues that the infrastructure investments had to be financed by public authorities in order to meet the necessary legal requirements in terms of security and safety. AOC, as a regional airport, is not in a position to generate sufficient income through airport charges to finance all infrastructure investments. The company could also not have complied with its legal obligations, including security requirements for the aviation business, without public subsidies.
- (70) Germany points out that the reconstruction works on the terminal in 2009 were carried out because of safety requirements, in order to comply with the requirement for separate handling of Schengen and non-Schengen passengers. According to Germany, alternatives to this reconstruction were considered, but, in view of the higher number of passengers and the high costs required for these alternative options, the long term solution of reconstructing the terminal was pursued.
- (71) Germany states that the total amount of EUR 6 474 034 invested in infrastructure in the period 2000-2011⁽³¹⁾ exclusively related to non-economic activities. According to Germany, these infrastructure investments do not constitute State aid and are not subject to State aid rules under Article 107 TFEU. Germany further explains that this amount of investments into non-economic activities can be divided into security investments and investments in public and aviation safety. Germany points out that security and policing activities, fire protection measures, public and operational safety, meteorological services and flight security fall within the public policy remit. Germany points out further that a substantial amount of the funds received served to secure the safety of the infrastructure and its renovation, not to construct new infrastructure.
- (72) Germany further states that, out of the total amount of investments of EUR 6 474 034, 30 % was financed from Flugplatz Altenburg-Nobitz GmbH's equity and the remainder through the *Land* of Thuringia. Germany points out that the financing of these infrastructure investments was provided as non-refundable grants and not through loans. The conditions for these grants result from the requirements listed in the *Thüringer Landeshaushaltsordnung*⁽³²⁾.

⁽²⁷⁾ Germany states that more than EUR 16,5 million was invested in the development of the industrial area, which currently employs some 250 people on approximately 58 ha.

⁽²⁸⁾ Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH, 9 September 2011.

⁽²⁹⁾ Paragraph 23 of the *Thüringer Landeshaushaltsordnung*.

⁽³⁰⁾ In this regard, Germany provides the example of a subsidy decided and paid in 2009, which was subject to an *ex post* control and partial reimbursement in 2012.

⁽³¹⁾ See Table 3.

⁽³²⁾ The *Thüringer Landeshaushaltsordnung* is the budget code of the *Land* of Thuringia. Section 23 of the budget code provides for requirements that must be met in order to receive financial contributions from the budget of the *Land*. The *Land* of Thuringia must have a substantial interest in the implementation of the project for which the contributions are provided and which could not be or could not be adequately implemented without them. Conditions for receiving contributions are furthermore elaborated in the *Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung (ANBest-P)*, which are the general terms and conditions for contributions to development projects.

- (73) Germany also states that conversion projects have also been financed in other *Länder* wholly through public funding, in line with Article 107(3)(c) TFEU, in order to promote regional economic development. Germany also refers to a previous Commission decision ⁽³³⁾ stating that the construction or extension of regional airports in structurally weak areas is compatible with the Treaty on European Union.

Dedicated infrastructure for Ryanair

- (74) Regarding the investments required by Ryanair in its service agreement (a landing runway meeting specific technical characteristics, to be provided by 31 December 2003 and to be completed and extended by 31 May 2004 ⁽³⁴⁾), Germany states that this specific prolongation has not been carried out in full and it was not considered a contractual obligation but a prerequisite for any airline to be able to land at AOC. Germany states that the length of the runway at AOC has been adapted over the years from 2 185 m (7 July 2003) to subsequently 2 235 m (9 September 2004) to finally 2 435 m (9 December 2008). However, the runway was open to all users. According to Germany, the fact that this runway was only used by Ryanair does not change the assessment.
- (75) Germany also rejects the argument advanced by the complainant that the runway was extended especially for Ryanair's Boeing 737-800 (107 planes in 2007), since this aeroplane is actually also widely used by other airlines, for example by Deutsche Lufthansa (132 planes in 2007). Furthermore, Germany points out that the suggestion made by the complainant that until 2007 public funds of EUR 28 million have been invested for the modernisation of the airport is erroneous. The complainant would be referring to information in which only estimations about the possible costs were being made. Real investments amounted to EUR 16,7 million according to Germany.
- (76) In addition, Germany argues that the obligations required by Ryanair in the service agreement, Annexes A, B and in the Appendix to Annex B are general obligations that an airport has to fulfil in order to be able to provide the service requested by airline companies: Germany states that the services referred to at recitals 50-53 are normal obligations of any airport and that its infrastructure is open to all users. Germany adds that some services mentioned in Annex A to the service agreement, such as press conferences, journalists' trips and travel agency evenings, have not been provided.

State aid assessment

- (77) Between 1993 and 1997, the *Land* of Thuringia invested EUR 12,25 million in the airport's infrastructure. For the years 1998 to 2011, the *Land* of Thuringia approved fund contributions of EUR 4,5 million to Flugplatz Altenburg-Nobitz GmbH. These funds were provided on the basis of published aid schemes of the *Land* of Thuringia, the notification of which was not deemed necessary. According to Germany, aid under these schemes is open to all airport operators in Thuringia. Under these aid schemes, public funds are to be granted for infrastructure investments which are necessary for air traffic, are open for use to all potential users and serve the general public interest. These funds are also limited to appropriate and necessary amounts and Germany points out that, since 1997, airports have also been sharing part of the infrastructure costs. Therefore, Germany states that no distortion of competition could arise from these schemes.
- (78) As regards infrastructure investments made between 12 December 2000 — the date of the Court judgment in the *Aéroports de Paris* case — and 9 December 2005 — the date on which the 2005 Aviation Guidelines became applicable — Germany considers that the criteria applicable are unclear: with the application of the 1994 Aviation Guidelines, the infrastructure cannot be considered State aid from the outset. Germany argues in this regard that the 1994 guidelines were applicable until the 2005 guidelines came into force and the *Aéroports de Paris* judgment does not change this. Therefore, since the 1994 guidelines are binding on the Commission under the principle of legitimate expectations, these should be applied to the infrastructure investments up until 2005. Therefore the measure cannot be classed as State aid: although infrastructure payments were made through public funding, this funding relates to public policy remit activities and does not pertain to an economic activity.

⁽³³⁾ SA 16588 (N 644i/2002) — Deutschland — Errichtung oder Ausbau von Regionalflughäfen.

⁽³⁴⁾ See recital 50(a).

- (79) As regards infrastructure investments made after 9 December 2005, Germany considers, firstly, that these do not constitute aid for the reasons mentioned in recitals 66 to 73. Should the Commission nevertheless come to the conclusion that these investments do constitute aid, then Germany claims that it is compatible with the internal market under Article 107(3)(c) TFEU as it fulfils all the requirements of point 61 of the 2005 Aviation Guidelines:
- (a) As to the first requirement, Germany claims that the infrastructure investments aim at a clear objective of common interest, which is to provide transport infrastructure and regional development in a structurally weak region. In this regard, AOC was the first military airport to be converted for civil use after the reunification of Germany. AOC is also of importance for companies situated in the nearby industrial area. Incoming tourism should furthermore help in improving regional tourism and creating jobs.
 - (b) As to the second requirement, Germany claims that the infrastructure investment is necessary and proportional to the objective set. Germany reiterates that all investments were made to renovate and update the airport. Since the operator, Flugplatz Altenburg-Nobitz GmbH, did not have sufficient funds, public funding was needed.
 - (c) As to the third requirement, Germany is of the opinion that the medium-term prospects for use of the existing infrastructure were satisfactory, at least until 2009. According to three studies carried out in 2007 ⁽³⁵⁾, the operator of the airport was to improve its annual results and achieve an almost balanced operating income by the year 2015, together with the strengthening of the nearby industrial area. One study ⁽³⁶⁾ refers especially to the profitability of low-cost carrier traffic and sets out a possible scenario that AOC could reach 500 000 passengers by 2015, which is even described as a conservative estimate. This proves, according to Germany, that Flugplatz Altenburg-Nobitz GmbH and its shareholders always acted as private investors.
 - (d) As to the fourth requirement, Germany explains that all potential users of the infrastructure have access to it in an equitable and non-discriminatory manner.
 - (e) As to the fifth requirement, Germany states that the development of trade is not affected to an extent that is contrary to the common interest. AOC is an airport with fewer than 150 000 annual passengers, hence a category D airport, and there is no distortion of competition vis-à-vis other airports.
- (80) Lastly, Germany considers that the measure does not threaten to distort, or distort competition in the internal market since the infrastructure is open to all users on a non-discriminatory basis. In addition, as a category D airport according to the 2005 Aviation Guidelines, the airport annually counts fewer than 150 000 passengers and as such does not compete with other airports. Competition between AOC and the other airports at Dresden, Erfurt-Weimar and Hof is negligible. Moreover, as the share of AOC only accounts for 0,1 % of the entire traffic of all German airports listed in the ADV ⁽³⁷⁾, Germany states that this airport is not in competition with any European airports, which means that there is no effect on competition in the internal market and on trade between Member States. In this regard, Germany points out that AOC handles only 2 % of the workload units handled at, for example, Leipzig/Halle airport.

Conclusions from the 2010 KE-Consult study on the future development prospects of the airport and its region

- (81) When it became apparent that the scenario predicted in the 2007 studies would not materialise, the airport asked the consulting firm KE-Consult to draw up a study on AOC and the adjoining industrial area; the study was submitted in 2010. It concludes that further developments of the airport as a low-cost airport would not be commercially viable and recommends focusing on general aviation. Therefore, in September 2011, the management board of Flugplatz Altenburg-Nobitz GmbH submitted a new development plan for the airport,

⁽³⁵⁾ 'Plausibilitätsprüfung über die Wirtschaftlichkeit der Flugplatz Altenburg-Nobitz GmbH unter Berücksichtigung des Wirtschafts- und Finanzplanes für die Jahre 2007 bis 2010' (31 August 2007) and 'Kapitalflussrechnungen FAN für die Geschäftsjahre 2007 bis 2015' (16 November 2007) by BDO — Deutsche Warentreuhand Aktiengesellschaft Wirtschaftsprüfungsgesellschaft; 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klophaus, September 2007; 'Planentwurf für den Zeitraum 2011–2015: Wirtschafts-, Vermögens-, Finanz- und Investitionsplan' by Flugplatz Altenburg-Nobitz GmbH, 15 November 2007.

⁽³⁶⁾ 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klophaus, September 2007.

⁽³⁷⁾ *Arbeitsgemeinschaft Deutscher Verkehrsflughäfen* — Professional association of German airports.

which was agreed by the supervisory board and the shareholder's meeting. AOC will not be open to low-cost airlines or to any commercial aviation business, but to general aviation and should become profitable through this new business development by 2015.

- (82) The KE-Consult study recognises that shareholders of Flugplatz Altenburg-Nobitz GmbH continuously subsidised the company. Given this constantly increasing need for subsidies, the limit of economic efficiency had been reached for shareholders.
- (83) The KE-Consult study was conducted to explore possible development prospects for AOC on the basis of the airport's regional, political, economic and fiscal impact. In this respect, various scenarios were elaborated on the discontinuation, the unchanged continuation or the expansion of low-cost carrier aviation as well as the development of the industrial park around the airport.
- (84) Only the 'general aviation' scenario, which implies the discontinuation of low-cost carrier aviation at AOC, can meet the requirements for microeconomic and fiscal equilibrium. This is the only scenario where the airport only needs the shareholders' obligatory annual additional contribution of EUR 227 000 per shareholder but no other payments. This scenario shows a macroeconomic benefit. Up to 2015, this scenario would cost EUR 0,83 million for the shareholders and can be covered by the mandatory contributions of EUR 227 000 per year. No further subsidisation by shareholders would be necessary after 2015, as long as depreciation continues to fall. The regional economic efficiency is much higher than in all other scenarios. The 2015 fiscal balance for Thuringia and its municipalities is also positive.
- (85) All other scenarios, in which low-cost carrier aviation is continued or expanded, are economically not sustainable through the shareholders' mandatory contributions. The fiscal effect for Thuringia would amount to between EUR 115 000 and EUR 375 000 per year, depending on the scenario. In all low-cost carrier scenarios, the positive fiscal effect resulting from AOC and the municipalities would be lower than the contributions needed by the airport and therefore the fiscal income-costs balance is negative.
- (86) The additional macroeconomic impact of low-cost carrier aviation will only be achievable if investments of EUR 6,7 to 10 million are provided, in addition to the shareholders' mandatory contributions. The regional economic efficiency in the low-cost carrier scenarios is lower than in the general aviation scenario. Compared with the general aviation scenario, the level of necessary contributions is 11 to 15 times higher in the low-cost carrier scenarios, while the added value effects are only two to three times higher. Whereas the fiscal income-costs balance is positive in the general aviation scenario, it is negative in all low-cost carrier scenarios.
- (87) Furthermore, several framework conditions were taken into account:
 - (a) Uncertainty due to monopoly users and external influences: aviation development at AOC is dependent to a large extent, at least in relation to low-cost carrier traffic, on the contracts with relevant airlines and on external influences such as the British tourist tax or the German air traffic tax, which can have an enormous negative impact on the volume of low-cost carrier traffic.
 - (b) Non-approval of further continual subsidies: fair and subsidy-free competition would be jeopardised and this would not be in accordance with the air traffic plan for Germany and the agreements of the political coalition at *Land* level.
 - (c) Lack of sustainability: in the low-cost carrier scenarios, no improvement of the fiscal and microeconomic balances can be seen. The low-cost carrier business model would only incur an increasing need for subsidies until 2015 and beyond.
- (88) The KE study therefore concludes that continuation or expansion of low-cost carrier traffic at AOC cannot be recommended to shareholders and to the *Land* of Thuringia.

5.2. FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN 2000-2011 (MEASURE 2)

- (89) The financial reports of Flugplatz Altenburg-Nobitz state that the airport could not ensure operational activity without public contributions to cover losses. The system set up by the company consisted in annual business plans established every year for the year to come and approved by the shareholders' meeting and then updated during the year in question with the current data registered by the airport ⁽³⁸⁾. This system thus allowed the airport to update the public financial contribution needed to cover the losses.
- (90) Germany states that the losses registered since the beginning of the 2000s, which resulted in shareholders' contributions, were not exclusively caused by infrastructure investments: depreciation does not fully explain the losses and financial costs did not account for them either, as the airport had no credit financing. The annual losses of Flugplatz Altenburg-Nobitz GmbH were only partially linked to depreciation costs and Germany also does not directly link these to Ryanair.
- (91) Concerning the claims made by the complainant as cited in the opening decision, Germany rejects these claims in their entirety. According to Germany, the complainant does not take into account the single-till approach ⁽³⁹⁾ at AOC. Germany states that in 2009 non-aviation income was at the same level as aviation income. In this regard, Germany rejects the claim that the growing number of passengers implied increasing losses for Flugplatz Altenburg-Nobitz GmbH due to secret payments made to Ryanair. Germany states that the losses incurred were caused by many different factors, which were unrelated to Ryanair.
- (92) Germany in particular rejects the claim that the Ryanair route from AOC to London-Stansted had been in direct competition with the Air Berlin route from Leipzig-Halle to London-Stansted, and that this was the reason why Air Berlin discontinued the Leipzig-Halle to London-Stansted route. Germany emphasises that the discontinuation of Air Berlin operating the route to London-Stansted was due to the fact that Leipzig-Halle no longer subsidised Air Berlin and that a ban on night flights was introduced.
- (93) Germany considers that annual shareholders' payments to Flugplatz Altenburg-Nobitz GmbH do not constitute State aid, since the requirements of the market economy investor principle are met, according to which all economic advantages afforded to Landkreis Altenburger Land, the main shareholder, have to be taken into account ⁽⁴⁰⁾. Germany refers to the 2007 study conducted by Prof. Dr Klopheus ⁽⁴¹⁾ (hereinafter 'The Klopheus study'), which mentions 'lost subsidies' of Landkreis Altenburger Land: shareholders' payments had a positive economic impact on Landkreis Altenburger Land due to additional tax payments. Total 2006 tax revenues gained through the operation of AOC amount to EUR 7,9 million, of which EUR 1 million is mainly to the benefit of Landkreis Altenburger Land. This sum was to triple by 2015 if the annual number of passengers increased to 500 000. Since the return through tax payments is higher than annual shareholders' payments, Germany concludes that Landkreis Altenburger Land acted as a private investor.
- (94) Regarding the argument as to a possible closure of the airport instead of further shareholders' contributions, Germany confirms that Landkreis Altenburger Land acted as a private investor: if the airport had been closed, the airport operator would have been liable to reimburse around EUR 7 million to the Land of Thuringia as this would have been a premature termination of infrastructure usage. In avoiding this reimbursement, shareholders also acted as private investors.

The Klopheus study

- (95) The Klopheus study from 2007 draws the following conclusions. It states that the direct, indirect, induced and catalyst effects of AOC for the economy and attractiveness of the region, especially in terms of jobs, are positive and significant. Future prospects for AOC are also positive, according to the study, as AOC has the potential to become the Ryanair base for central Germany, which is what Flugplatz Altenburg-Nobitz GmbH is striving for. Therefore, with so many Ryanair planes stationed at AOC, passenger numbers could potentially grow to 1 million per year in the medium term. This would allow AOC to become a regional airport offering the chance

⁽³⁸⁾ Germany provided the Commission with business plans established for the years 2000-2005 ('Wirtschaftsplan') and their corresponding updates established the following year ('Nachtrag zum Wirtschaftsplan').

⁽³⁹⁾ The single-till approach means that all profits, aviation (namely passenger charges) and non-aviation revenues (such as rent for shops at the airport, parking charges), must be taken into account and not only the number of passengers and the resulting passenger charges.

⁽⁴⁰⁾ Germany refers to Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 59 ('Charleroi judgment').

⁽⁴¹⁾ 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klopheus, September 2007.

to Altenburger Land to change its international profile and thus improve its economic and business structures. The study states that AOC, as a low-cost airport, will bring significant overall economic benefits.

- (96) According to the study's calculations, by 2015 AOC would be expected to provide 658 jobs (a 95,3 % growth compared with 2006). In addition, 881 indirect jobs (157,6 % growth) and 438 induced jobs (184,4 % growth) would be created. The study furthermore emphasises the importance for regions to be nationally and internationally accessible, which has an enormous influence on the economic development of the region concerned.
- (97) In this respect, according to the study, not only public contributions for the renovation and expansion of AOC and the related marketing costs, but also tax incomes for the *Land* of Thuringia and its municipalities should be considered. The study concludes that, not only microeconomic aspects, but also macroeconomic effects should be considered.

5.3. AIRPORT CHARGES AND PAYMENTS TO RYANAIR UNDER THE AIRPORT SERVICES AND MARKETING AGREEMENTS (MEASURE 3)

- (98) Germany claims that neither the airport charges nor the marketing services agreements constitute State aid. Germany stresses that there is no link between the airport services agreements and the marketing services agreements, which should be assessed separately; marketing services agreements do not imply a reduction of revenues for the airport, but provide for advertising services.

The Ryanair services agreement

- (99) Germany states that the airport took into consideration positive economic expectations arising from the development of the aviation business through Ryanair. In taking the decision to do business with the airline, the shareholders' meeting of 22 April 2003 considered the data ⁽⁴²⁾ set out in Table 13 and concluded that, even in a conservative scenario (one daily flight with a 70 % load factor), a total annual result of [...] * could be achieved with Ryanair.

Table 13

Expected revenues from Ryanair activities at AOC ⁽¹⁾ (2003)

	(in EUR)
Fee per passenger	[...] *
Number of passengers per aircraft, with a load factor of 70 % ⁽²⁾	104
Monthly revenues expected	[...] *
Monthly expenses for planned investments	12 138
Monthly result expected	[...] *
Annual result expected	[...] *

⁽¹⁾ Conservative scenario of one daily flight.

⁽²⁾ Germany bases its forecasts on the assumption that the aircraft used by Ryanair in 2003 had a passenger capacity of 148.

⁽⁴²⁾ *Umsatzaufstellung Ryanair* — This table was produced by Flugplatz Altenburg-Nobitz GmbH on the basis of various assumptions in terms of number of daily flights (1 to 10) and passenger load factor (70 % to 90 %).

- (100) Monthly expenses taken into account in Table 13 include personnel costs, de-icing of the runway and snow clearing services. The Commission notes that the document presented to the shareholders' meeting of 22 April 2003 shows a total of annual investments of EUR 902 155. This sum was not taken into account in the forecasts shown in Table 13.
- (101) Germany states that, according to the schedule of airport charges in force at the time, Ryanair paid a landing charge of [...] per aircraft and a passenger charge of [...] per passenger ⁽⁴³⁾, charges that apply to all potential airline companies and that Flugplatz Altenburg-Nobitz GmbH considers to be reasonable taking into account the traffic and income generated by Ryanair for AOC.
- (102) Germany states that the services to be provided by AOC under Annex A of the agreement of 3 March 2003 with Ryanair were not provided. The services included in Annex B and in the appendix to Annex B 'Reservations Facility' of the agreement of 3 March 2003 were provided at no extra charge for Ryanair.

Ryanair marketing agreements

- (103) Germany explains that, according to the airport services agreement of 3 March 2003, Ryanair paid airport services fees to AOC according to the standard schedule of airport charges, for a total amount of EUR [...] from 2003 until 2011. According to the marketing agreement of 7 April 2003, AOC paid Ryanair a contribution for marketing services for a total of EUR [...] from 2003 until 2011. The difference in both payments results in a net payment by Ryanair to AOC of EUR [...] throughout the 2003-2011 period. As the total number of passengers in this period was 408 291 ⁽⁴⁴⁾, Germany concludes that Ryanair paid a net fee to AOC of approximately EUR [...] per departing passenger.

Table 14

Invoices from and to Ryanair in the 2003-2011 period ⁽¹⁾

(in EUR)

Year	Incoming invoices from Ryanair	Outgoing invoices from the airport	Number of passengers
2003	[...]*	[...]*	25 750
2004	[...]*	[...]*	37 160
2005	[...]*	[...]*	50 714
2006	[...]*	[...]*	44 580
2007	[...]*	[...]*	60 678
2008	[...]*	[...]*	62 876
2009	[...]*	[...]*	66 367
2010	[...]*	[...]*	55 641
2011	[...]*	[...]*	4 525
Total	[...]*	[...]*	408 291

⁽¹⁾ Information provided by Germany.

- (104) Germany states that, further to Ryanair's announcement that it would discontinue the routes from AOC in March 2011, the airport operator did not pay any further marketing contributions in February and March 2011.

⁽⁴³⁾ These amounts stem from the monthly invoice sent by Flugplatz Altenburg-Nobitz GmbH to Ryanair in June 2009. Nevertheless, despite the request from the Commission, Germany did not provide any information on the monthly passenger and aircraft fees to be paid by Ryanair throughout the period 2003-2011.

⁽⁴⁴⁾ In this regard, Germany provides passenger numbers which are different from the passenger numbers in the financial reports of the airport operator — see Table 1.

- (105) Germany explains that marketing payments under the agreement of 21 September 2010 between Flugplatz Altenburg-Nobitz GmbH and Ryanair were paid by private companies after they agreed to the maintaining of Ryanair operations at AOC. A report from the managers of the company in 2011 ⁽⁴⁵⁾ states that the winter aviation season 2010/2011, which comprised only one route to London, had only been made possible through the support of regional companies.
- (106) Germany argues that Ryanair provided publicity for AOC and the region on its website. This website is the second most popular European website after the Google website and is therefore priced accordingly. An adword on Google costs per click between EUR 0,05 and EUR 2,00. Germany calculates that 100 000-150 000 annual Ryanair passengers at AOC with an adword price of EUR 1 per click generate an advertising price of EUR 100 000-150 000 per year, assuming that each passenger makes only one click. Since passengers usually make not only one click but several and since there are passengers who already clicked without booking, the German authorities come to the conclusion that the marketing agreement concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair is based on a reasonable price that does not provide any advantage to Ryanair.
- (107) According to Germany, Ryanair organised the advertising measures described in Table 15.

Table 15

Marketing payments by AOC to Ryanair

Period	Amount	Objective
2003	EUR 50 000-150 000 [...]*	Print advertisements in the <i>Leipziger Volkszeitung</i>
2004	EUR 25 000-125 000 [...]*	Print advertisements in the <i>Leipziger Volkszeitung</i>
May 2007-March 2008	EUR 75 000-175 000 [...]*	Newspaper ads, direct mailing and other publicity measures
May 2008-March 2009	EUR 50 000-150 000 [...]*	Newspaper ads, direct mailing and other publicity measures
Total (2003-March 2009)	EUR 225 000-325 000 [...]*	

- (108) Germany claims that the success fees do not constitute an advantage for Ryanair, since they are a market-compliant payment for marketing activities undertaken by Ryanair. According to Germany, marketing measures were successful since passenger numbers rose from 25 000 (2002) to 140 000 (2009), which led to a rise in overall income from EUR 316 000 to EUR 1,12 million, while income from airport charges rose from EUR 132 000 to EUR 530 000 and income from parking rose from zero to EUR 263 000.
- (109) Germany claims that payments under the marketing services agreements do not constitute State aid, for the following reasons:
- (a) Germany stresses that, contrary to the assertions of the Commission in the opening decision ⁽⁴⁶⁾, the relevant ministry had no say in the conclusion of the agreements, except where infrastructure measures were concerned. Paragraph 43 of LuftVZO ⁽⁴⁷⁾ does not mean that approval by the ministry was necessary.
- (b) The fact that the local chamber of commerce backed AOC ⁽⁴⁸⁾ only shows that the private market was in favour of the Ryanair connections.

⁽⁴⁵⁾ Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH, 9 September 2011.

⁽⁴⁶⁾ See Commission's opening decision, recitals 133-134.

⁽⁴⁷⁾ Luftverkehrs-Zulassungs-Ordnung — German Air Transport Licensing Regulation — See Commission's opening decision, recital 134.

⁽⁴⁸⁾ See Commission's opening decision, recital 137.

- (c) Germany states that marketing payments made by Flugplatz Altenburg-Nobitz GmbH to Ryanair do not constitute start-up aid under the 2005 Aviation Guidelines, but are simply commercial contractual agreements falling outside the field of State aid.

6. COMMENTS FROM INTERESTED PARTIES

6.1. COMMENTS FROM RYANAIR

Imputability to the state

- (110) Ryanair argues that State aid to airports should not be imputable to Ryanair. A presumption of transfer of State aid by airports to airlines would be in breach of EU law. This presumption discriminates against public airports, while competition rules should apply without distinction to public and private undertakings. Ryanair claims that the evidence used by the Commission in order to show imputability to the state is not sufficient. The evidence may reflect the public authorities' interest in the airport's commercial relations and future, but does not prove any actual involvement of any of the public authorities in the airport's negotiations and agreements with Ryanair. Evidence that the ministries of the *Land* of Thuringia were actually opposed to the agreements with Ryanair would indicate that, at the very least, a more robust examination by the Commission of the imputability of the Ryanair agreements to the state is required.
- (111) Ryanair submits that the question is not whether the state should have invested its money elsewhere but whether the state confers an advantage on an airline which it would not have obtained otherwise. Ryanair has merely negotiated terms with public airports similar to what it was able to obtain at comparable private airports.

The application of the market economy investor principle

- (112) Ryanair submits that it is not an indirect recipient of State aid. As long as the terms of a commercial relationship between Ryanair and an airport can be justified under the market economy investor principle (hereinafter: 'MEIP'), any recovery obligation cannot extend to Ryanair. Ryanair argues that the MEIP should be applied to any case of an alleged grant of State aid to Ryanair by publicly owned airports. Indeed, according to the airline, there is no economic or legal justification for the exclusion of public airports from the MEIP and the Commission has applied the MEIP to agreements involving financing of major public infrastructure in other modes of transport, such as public seaports. The airport is exercising an economic function in entering into agreements. In addition, private and public sector airports compete in the market and contracts between airlines and airports can be profitable for the latter.
- (113) Ryanair thinks that an efficiency assessment should not take into account cash injections for public remit investments, should consider incremental costs and not sunk costs and should, lastly, be made against the benchmark of a typically well-run airport. Ryanair argues that if a regional airport believes that an agreement will help improve its efficiency, a deal could be profitable even if it appears to involve below-cost pricing at the time of signing. Inefficient and underutilised airports can be expected to become profitable only once they achieve economies of scale and network externalities, the time frame for which can last 25 to 30 years. Low-fare airlines are ideally positioned to provide a significant increase in revenues to regional airports, usually without any need for new infrastructure or other investments. In support of this, Ryanair cites the UK Civil Aviation Authority's decision of 27 May 2011 recognising low-fare airlines' less costly reliance on airport services.
- (114) Ryanair argues that sunk costs should be disregarded in the application of the MEIP, both in a comparator analysis and in a cost analysis. Ryanair states that a private investor operating AOC from 1992 onwards would have to consider both the infrastructure and the fixed operating costs of the airport as sunk costs. Realistically, there was no way to recover such costs, given the AOC's low commercial appeal and very limited market power.

Under such circumstances, the acceptance of any alternative scenario offering better, or simply less onerous, prospects to the airport owner(s) than the counterfactual of doing nothing or closing the airport at a potentially significant cost, would be fully consistent with the market economy investor principle.

- (115) Ryanair also stresses that the specific costs linked to Ryanair have to be considered separately from the costs incurred by the airport, but may be overall lower than the revenues deriving from the positive network externalities generated by Ryanair's activities at the airport.

The studies by a consultancy firm acting for Ryanair

- (116) Ryanair states that the fee agreement with AOC fulfils the requirements of the market economy investor principle. To that end, Ryanair provided the Commission with two reports prepared by a consultancy firm. These studies compare the deal in question with other fee agreements signed between Ryanair and airports which are either majority privately owned and funded, or operating as market economy investors in a situation that is sufficiently similar to AOC.
- (117) Ryanair explains the method applied in the reports for comparing the airports as follows: the analysis was only made based on other Ryanair contracts, because Ryanair has different operating modes compared with most other carriers, namely no use of air bridges, buses or lounges, no transfer flights, turnaround time of 20 minutes and mostly carry-on luggage. In addition, only airports that are operated according to a market economy investor logic were included in the scope of the study. Airports that may have received substantial State aid support were ruled out. As a result, around 15 airports in Ryanair's network meet these criteria and were included in the scope of the study.
- (118) The first report considers [...] to be the most appropriate comparator airport. The report states that 'ideally, the comparator airport that is selected for the purposes of the analysis would be of a similar size to Altenburg Airport. Although it has not been possible to find a comparator airport that is very similar to Altenburg Airport across all relevant dimensions, [...] Airport is sufficiently similar for the purposes of the analysis presented here'. The second report extended the comparator set to [...] airports and compared charges at these airports between 2003/2004 and 2010/2011, on both a per passenger and a per turnaround basis.
- (119) The reports conclude that the overall level of charges paid by Ryanair to AOC is on average higher than, or in line with, the comparable level of charges paid by the airline over the period under investigation at the comparator airports. This suggests that the charges paid by Ryanair at AOC under the various agreements are compatible with a level of charges that would have been offered to Ryanair by an airport-owning market economy investor in similar circumstances.
- (120) Ryanair claims that airport charges should be regarded at levels corresponding to the marginal costs rather than looking at the average variable costs or average total costs.
- (121) Ryanair stresses that AOC's agreements with Ryanair and AMS should be assessed separately and both companies cannot be considered a single beneficiary of the alleged State aid. The agreements were separate, negotiated independently, relate to different services and were not subject to any linkage that would justify their consideration as a single source of alleged State aid. The conclusion of a marketing agreement with AMS was not a condition for the operation of routes by Ryanair to and from an airport. Based on their own perception of their marketing needs, many airports served by Ryanair do not conclude agreements with AMS. Ryanair stresses that the purchase of marketing services at market rates should be considered separately from a related airport-airline contractual agreement.

- (122) Ryanair further explains that there is no suggestion that an airline committing to deliver a similar number of passengers and/or aircraft rotations would not have received similar 'reduced fees'. The Commission also does not examine whether an airline offering similar commitments would have obtained a similar level of fees from a comparable private airport.
- (123) As to the value of marketing, Ryanair claims that marketing space on Ryanair's website is a limited resource and demand for that space is high, including from businesses other than airports. The website currently records approximately 4,5 billion page views per year. Even legacy airlines now realise the value of their website for marketing and advertising. On the other hand, many airports make the commercially rational choice to build up a brand by advertising on *ryanair.com* or on other airline websites. This increased brand recognition can benefit airports in a number of mutually reinforcing and complementary ways. AOC is far less renowned internationally than either Aéroports de Paris or Heathrow Airport, and it therefore needs to invest in advertising to improve its brand recognition and maximise the share of inbound passengers.
- (124) Ryanair provides an analysis prepared by the consultancy firm comparing the prices charged by AMS for web marketing services with prices charged for similar services by other travel-related websites. The analysis benchmarks the prices charged by AMS in its first 2005 rate card against comparable services provided by travel websites at that time, and also compares prices in AMS' current (2013) rate card with the prices of comparable services sold by other travel-related websites. The analysis concludes that, in both periods, prices charged by AMS for advertisements on *ryanair.com* were either lower than the average, or within the mid-range of rate card prices charged by websites in the comparator sets. This conclusion confirms, according to Ryanair, that public airports' arrangements with AMS meet the market economy operator test.
- (125) Ryanair also provides evidence of the services provided to the airport through various screenshots which show that services provided under contracts with AMS were monitored. These screenshots were generally provided to the airport contracting with AMS to demonstrate the activation of the purchased services on *ryanair.com*. Ryanair stresses the value of the AMS services provided to airports and is of the opinion that benefits to airports of entering into deals with AMS should be seriously quantified.
- (126) Without prejudice to Ryanair's position that the AMS agreement and the air services agreement (hereinafter 'ASA') should be treated separately, Ryanair provides a market economy operator profitability analysis carried out by the consultancy firm encompassing both the air services agreement concluded between Ryanair and the airport and marketing agreements concluded between AMS and the airport. According to Ryanair, this analysis should help the Commission in its approach to considering the ASA jointly with the AMS agreements, by considering how AMS could be incorporated within a joint AMS-ASA profitability analysis.
- (127) The consultancy firm concludes that the cash-flow approach is an appropriate method for incorporating the value of AMS within a joint AMS-ASA profitability assessment. This approach captures the aggregated incremental profits that accrue to the airport as a result of signing the ASA, as well as the benefits of advertising through the AMS agreement. Under this approach, expenditure by the airport on AMS could be treated as an incremental operating expense within the discounted cash flow profitability analysis. This approach also takes into account the benefits of both marketing activities arising from the AMS agreements and through the ASA, for the duration of the agreement and beyond the scheduled end of the ASA, as marketing activities contribute towards enhancing brand value, and are likely to generate future business and profits.
- (128) As a conclusion from this study, Ryanair stresses that, in so far as the Commission continues to treat ASA and AMS agreements together, it should apply the principles set out by the consultancy firm to the case at issue, in order to properly apply the market economy operator profitability analysis to the investigation of both ASA and AMS agreements.

- (129) Furthermore, Ryanair submitted a series of notes prepared by the consultancy firm, and an analysis prepared by Professor Damien P. McLoughlin.

Identifying the market benchmark in comparator analysis for MEO ⁽⁴⁹⁾ tests ⁽⁵⁰⁾

- (130) The consultancy firm believes that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed. The consultancy firm argues that market benchmark prices obtained from comparator airports are not tainted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEO tests, as:

- (a) comparator analyses are widely used for MEO tests outside the field of State aid;
- (b) companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;
- (c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face only limited competition from State-owned airports within their respective catchment areas (less than one third of commercial airports within the catchment areas of the comparator airports are fully state-owned, and none of them were subject to State aid investigations, as at April 2013);
- (d) even where comparator airports face competition from state-owned airports within the same catchment area, there may be reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);
- (e) MEO airports will not set prices below incremental cost.

Principles underlying profitability analysis for MEO tests ⁽⁵¹⁾

- (131) The consultancy firm argued that the profitability analysis undertaken in its reports and submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents. The principles underlying the profitability analysis are:

- (a) the assessment is undertaken on an incremental basis;
- (b) an *ex ante* business plan is not necessarily required;
- (c) for an uncongested airport, the single-till approach is an appropriate pricing methodology;
- (d) only those revenues associated with the economic activity of the operating airport should be considered;
- (e) the entire duration of the agreement, including any extensions, should be considered;
- (f) future financial flows should be discounted in order to assess profitability of the agreements;
- (g) the incremental profitability of Ryanair agreements for the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

⁽⁴⁹⁾ Market economy operator.

⁽⁵⁰⁾ Ryanair State aid cases, prepared for Ryanair by the consultancy firm, 9 April 2013.

⁽⁵¹⁾ See footnote 50.

Analysis of Professor Damien P. McLoughlin ⁽⁵²⁾ — Brand-building: why and how small brands should invest in marketing

- (132) This paper aims to set out the commercial logic underlying regional airports' decisions to buy advertising on *ryanair.com* from AMS. It argues that there are a large number of very strong, well-known, and frequently used airports. Weaker competitors must overcome consumers' static buying behaviour to expand their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

Comments regarding payments to AMS

- (133) Ryanair disagrees with the Commission's assessment that payments to AMS represent a cost for the airport, as this approach disregards the value of AMS services to the airport. Ryanair furthermore believes that the purchase of valuable marketing services at market rates should be considered separately from a related airport-airline contractual arrangement for the purposes of the market economy operator analysis. To support its analysis, Ryanair submits a study by the consultancy firm comparing benchmark prices charged by AMS as against prices for comparable services offered by other travel websites ⁽⁵³⁾. The study concludes that prices charged by AMS were either lower than the average or within the mid-range of prices charged by comparator websites. Ryanair concludes from this that AMS prices are in line with market prices and the decision by a public airport to purchase AMS services is in line with the market economy operator test. Ryanair further provides evidence of the services provided to airports under AMS contracts, to show the value of these services to airports.
- (134) Ryanair asks the Commission to reassess its approach regarding AMS contracts so far. Ryanair believes that AMS arrangements should be considered separately from Ryanair's airport services arrangements and be subject to a separate market economy operator test. Should the Commission insist on including AMS arrangements and Ryanair airport services arrangements in a joint market economy operator test, the value of AMS services to the airport should not be disregarded.
- (135) The report by the consultancy firm of 20 December 2013 on AMS prices refers to the conclusions of earlier reports submitted outlining the importance of advertising for small brands, which confirm that Ryanair is a strong pan-European brand capable of attracting a premium for its advertising services. The AMS rates are compared with a sample taken at the same time of website advertising prices with reference to advertisements of equal size for the 2004-2005 period, i.e. when the AMS rate card was first introduced, and for 2013. *ryanair.com* has more than twice as many monthly visitors as the next most popular travel site, and visitors are more likely to enter into other e-commerce transactions. These unique characteristics combined with high brand awareness allowed the airline to charge a premium.
- (136) The comparison took place between advertisements of equal size determined by available data and placed on the homepage of each website. Only rate card prices were compared due to the lack of transparency relating to special offers and discretionary discounts, which are however standard commercial practice. A rate card price is quoted in terms of price per thousand impressions, namely the price to be paid for every thousand times the advertisement is viewed by visitors to the website. Prices for web advertisements vary according to their size, measured in pixels, and location on a webpage. The primary homepage advertising service offered on *ryanair.com* from 2004 to 2005 was a banner of 468 by 60 pixels. Banners are usually located in the centre top section of a webpage. For the period 2004-2005, the 2005 AMS rate card price for advertising in the form of banners was compared with that of 54 European travel websites.

⁽⁵²⁾ Prepared for Ryanair, 10 April 2013.

⁽⁵³⁾ 'Are prices set by AMS in line with the market rate?' Prepared for Ryanair, 20 December 2013.

- (137) For 2013, two other types of advertisement are considered: skyscrapers of 120 by 600 pixels and mid page units of 300 by 250 pixels. Skyscraper advertisements are tall and located along the side of a webpage, while mid page units usually sit within online editorial content, making them highly visible. The AMS rate card prices for skyscraper advertisements and mid page units are compared with those of 22 travel websites and 135 other websites. For both periods and across sectors, AMS rates are found to be lower than or within the range of prices charged by websites in the comparator sets.

How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?

- (138) Ryanair submitted a report prepared by the consultancy firm concerning the principles that it believes should apply to a market economy operator profitability test encompassing both the air services agreements concluded between Ryanair and airports and the marketing agreements concluded between AMS and the same airports ⁽⁵⁴⁾. Ryanair emphasises that this does not prejudice its position that AMS agreements and air service agreements should be subject to separate market economy operator tests.
- (139) The report states that AMS-associated income should be included on the revenue side in a joint profitability analysis where AMS expenditure is included on the cost side. The report proposes a cash-flow-based method in which expenditure on AMS is treated as an incremental operating expense. The report submits that marketing activities contribute to creating and enhancing brand value, which in turn is likely to generate business and profits over the duration of the marketing agreement, and also beyond. An agreement with Ryanair would attract other airlines to the airport. This would in turn attract commercial operators and increase the airport's non-aeronautical revenues ⁽⁵⁵⁾. In so far as the Commission undertakes a joint profitability analysis, these benefits should be taken into account by treating expenditure on AMS as an incremental operating expense, with incremental profits calculated net of AMS payments.
- (140) In addition, a terminal value should be included in projected incremental profits at the end of the air services agreement in order to record value accruing beyond expiry of the agreement. The terminal value can be adjusted by a conservative assumption as to the probability of the agreement being renewed with Ryanair or similar terms being agreed with other airlines. This will allow an estimation of a lower bound for the benefits arising jointly out of the AMS and air services agreements, taking into account the uncertainty of incremental profits beyond the expiry of the air services agreement.
- (141) To support this approach, the report submits a summary of the results of studies on the effect of advertising on brand value. These studies recognise that advertising can build brand value and improve customer loyalty. In particular, advertising on *ryanair.com* increases brand exposure for an airport. Specifically, smaller regional airports aiming to increase their traffic base can build their brand value by entering into advertising agreements with AMS ⁽⁵⁶⁾.
- (142) The report suggests that the cash-flow approach is to be preferred to a capitalisation approach under which AMS expenditure would be treated as capital expenditure on an intangible asset (namely the brand value of the airport). Marketing expenditure would be capitalised as an intangible asset and then amortised over its useful asset life, with a residual value at the end of the scheduled expiry of the air services agreement. This approach would, however, not capture additional benefits to the airport resulting from signing the air services agreement with Ryanair. Furthermore, estimating intangible asset value is difficult due to brand expenditure and the length of useful asset life.

⁽⁵⁴⁾ 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?' Prepared for Ryanair, 17 January 2014.

⁽⁵⁵⁾ According to a report by York Aviation (2007) '*Social benefits of low fare airlines in Europe*', Ryanair made Eindhoven Airport attractive as a base for other low-cost carriers.

⁽⁵⁶⁾ Specific reference is made to a report by Professor McLoughlin (2013) which was submitted by Ryanair on 13 April 2013 titled '*Brand building: why and how small brands should invest in marketing*'.

- (143) Finally, the cash-flow approach is argued to be in line with State aid and non-State aid precedents from the Commission. Here, the case of BayernLB ⁽⁵⁷⁾ is cited, where the Commission indicated it would use a dividend discount valuation model to estimate cash flows and then assign a terminal value based on projected dividend growth, as is the margin squeeze case relating to Telefónica ⁽⁵⁸⁾, where the Commission incorporated a terminal value into its discounted cash flow analysis.

6.2. COMMENTS FROM AIRPORT MARKETING SERVICES (AMS)

- (144) Airport Marketing Services defines itself as a subsidiary of Ryanair with a real commercial purpose, created in order to develop an activity that does not belong to the core business of Ryanair. It is used by Ryanair as an intermediary to sell advertising space on its website. In principle, AMS's marketing agreements with airports are negotiated and concluded separately from Ryanair's agreements with the same airports.
- (145) AMS states that it has not been the beneficiary of State aid and that the airport acted in line with the market economy investor principle towards AMS. AMS argues that the market economy investor principle is met since the rates at which advertising space is provided by AMS, and the volumes in which it is acquired, do not discriminate between public and private advertisers. Both public and private bodies compete to access the limited advertising space on *ryanair.com*.
- (146) AMS states that marketing agreements were negotiated with commercial value at market price following a business rationale. Many airports, both regional and hub, choose to advertise on Ryanair's or other websites to increase their brand recognition. This increased brand recognition can benefit airports in a number of ways. For example, it may attract inbound passengers from the airline on whose site the airport is advertising. Inbound passengers generate non-aeronautical income, since foreign passengers are far more likely to spend money at an airport for souvenirs, local products, car rental, restaurants, etc.: revenues which account for almost half of airports' income from non-aeronautical activities.
- (147) This is particularly the case for AOC, which had no regular passenger traffic when Ryanair started operating its Altenburg-London route. Activities likely to generate non-aeronautical revenues had not been developed at that time. Marketing activities were therefore particularly important to maximise the share of inbound passengers in the total number of passengers committed to by Ryanair, and to encourage the establishment of non-aviation commercial activities at the airport.
- (148) The Ryanair website has especially valuable features for marketing: it is one of the most popular travel websites in the world; the Ryanair brand and website address are well known; its contents are attractive with a bounce rate of [...] only; the average duration of each visit to the website is extremely long and it specifically targets potential passengers to that airport. These website characteristics are reflected in the marketing fees charged to AOC.
- (149) AMS states that its marketing fees were established at market price. AMS does not discriminate between airport and non-airport clients. Prices charged by AMS are based on objective criteria and are transparently indicated on its website ⁽⁵⁹⁾. Prices charged by AMS to AOC were consistent with its rate card. By way of comparison, a one-page advertisement by the airport in the *Daily Telegraph* newspaper would cost about EUR 2 385 000 for 45 days (GBP 46 000 per day). In addition, the advertisements provided by AMS on Ryanair's website are 'fixed', whereas those provided on numerous other internet sites tend to 'rotate'.

⁽⁵⁷⁾ European Commission (2005) NN72/05 Capital increase BayernLB, Germany, paragraphs 27-29.

⁽⁵⁸⁾ Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 — *Wanadoo España v Telefónica*), paragraphs 360 and 363.

⁽⁵⁹⁾ www.airportmarketingservices.com

- (150) The two-year duration of service provision pursuant to the 2008 marketing agreement with AMS allowed the airport to pay for the advertising services based on website traffic in 2007. Similarly, the 2010 marketing agreement was based on assumptions regarding website traffic in 2009. Historical data available show that the number of visitors to Ryanair's website has increased significantly in recent years.
- (151) AMS comes to the conclusion that it has not benefited from State aid and that Flugplatz Altenburg-Nobitz GmbH acted in line with the market economy investor principle towards AMS.

6.3. COMMENTS FROM LUFTHANSA

- (152) Lufthansa notes that the 2010 and 2011 annual reports of Flugplatz Altenburg-Nobitz GmbH reveal annual losses amounting to respectively EUR 567 000 and EUR 437 000, showing that the company is still not profitable despite public support. According to Lufthansa, shareholders' annual contributions are made in two different forms:
- (a) The budget plan of Landkreis Altenburger Land of 2014 states that Flugplatz Altenburg-Nobitz GmbH received annual additional contributions of EUR 228 000 under Section 24 of its Articles of Association.
- (b) Flugplatz Altenburg-Nobitz GmbH also received non-repayable contributions amounting to EUR 2 406 000 between 2009 and 2011. According to the annual reports, these contributions are safeguarding the company's solvency. These contributions are also provided for 2014, according to the budget plan of Landkreis Altenburger Land (EUR 350 000 for 2014). All in all, shareholders' contributions amounted to EUR 409 000 for 2014 and EUR 174 000 for 2013.
- (153) Concerning the current investigations, Lufthansa observes that the infrastructure has obviously been built exclusively for Ryanair, as agreed in the agreement with Ryanair. Lufthansa states that a private investor would only have acted in this way if Ryanair had committed itself in return to serve the airport for a certain number of years.
- (154) Lufthansa also claims that public rescue aid was provided to Flugplatz Altenburg-Nobitz GmbH between 2003 and 2011, because the airport charges were not sufficient to cover operating costs. Lufthansa defines the company as 'a firm in difficulty' according to the Community guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ⁽⁶⁰⁾, which were not complied with, since the aid was not notified. This aid is therefore incompatible with the internal market.
- (155) With regard to airport charges and marketing support, Lufthansa observes that substantial aid was provided to Ryanair in the form of advantageous charges and marketing support. Lufthansa claims that these advantages are incompatible with the internal market, since the compatibility criteria of the 2005 guidelines could not be applied as these do not apply in cases where permanent and continual operating aid is provided. The 2014 guidelines can also not be applied since they concern only start-up aid to airlines which has been notified or granted after the entry into force of the guidelines. Even if the 2014 guidelines could be applied, the criteria for compatibility of start-up aid to airlines would not be fulfilled.

6.4. COMMENTS FROM BUNDESVERBAND DER DEUTSCHEN FLUGGESELLSCHAFTEN

- (156) Regarding the application of the 2014 guidelines, Bundesverband der deutschen Fluggesellschaften ('BDF') does not agree with the application of the 2014 guidelines to non-notified operating aid granted before the publication of the guidelines, since such an application would be contrary to the aim of preventing the distortion of competition and creating a level playing field in the internal market. According to BDF, such an application would constitute an advantage for those undertakings which acted in conformity with the guidelines in force before 4 April 2014. The new guidelines would legalise illegal behaviour retroactively in the opinion of BDF. The start-up aid to Ryanair and the investment aid to Flugplatz Altenburg-Nobitz GmbH should therefore be evaluated as non-notified aid on the basis of the law applicable at the relevant time.

⁽⁶⁰⁾ OJ C 249, 31.7.2014, p. 1.

7. COMMENTS FROM GERMANY ON INTERESTED PARTIES' COMMENTS

7.1. COMMENTS FROM GERMANY ON THE COMMENTS FROM RYANAIR

- (157) As regards the report of the consultancy firm, Germany observes that it implies that Germanwings may have served AOC. However, Germany certifies that Germanwings has never served the airport.
- (158) With regard to the comments from Ryanair, Germany states that the authorities of the *Land* of Thuringia were not involved in the negotiations between the airport and Ryanair/AMS on the conclusion of the agreements.
- (159) Regarding the marketing agreements between Ryanair and AOC, Germany fully backs Ryanair's position, according to which these marketing agreements comply with the market economy investor principle and therefore do not involve State aid. In particular, Germany agrees with the conclusion of the last report of the consultancy firm provided by Ryanair on 20 December 2013 and states that payments made to AMS/Ryanair were appropriate to the service provided, in the context of a normal service agreement on a business matter.

7.2. COMMENTS FROM GERMANY ON THE COMMENTS FROM LUFTHANSA

- (160) Germany submits that the comments from Lufthansa do not add any new information to the ongoing investigations and that the Commission already has all relevant information in this case.
- (161) Germany rejects a number of statements from Lufthansa which are erroneous according to Germany.
- (a) According to Germany, AOC was not built and operated exclusively for Ryanair. In this regard Germany refers to its comments and to the long-term investment plan for Flugplatz Altenburg-Nobitz GmbH.
 - (b) Also, Germany emphasises that the infrastructure is open for anyone to use on a non-discriminatory basis. Since 2001, Air Berlin and Air Omega have also used the airport regularly.
 - (c) The results of Flugplatz Altenburg-Nobitz GmbH were improved through the contracts with Ryanair. Therefore, a private investor would also have concluded these agreements.
 - (d) Such decisions are usual for undertakings like Flugplatz Altenburg-Nobitz GmbH. For example, it was also checked in 2008 and 2009 whether a pilot training company could start using AOC, but the contract was not concluded because the infrastructure requirements of the company could not be met at that time. Another example is the decision taken in December 2010 not to conclude new agreements with Ryanair.
 - (e) The business model of Flugplatz Altenburg-Nobitz GmbH was changed to general aviation on the basis of the KE-Consult study. This reduced the amount of public contributions needed.
- (162) Furthermore, Germany states that, as the supervisory board of Flugplatz Altenburg-Nobitz GmbH decided in December 2013 to include a private investor, public contributions can be reduced further. Moreover, given the new orientation of the airport, which will no longer be served by charter or scheduled flights, AOC should soon fall outside the application of State aid rules.
- (163) Germany argues that, according to the 2005 guidelines, AOC belongs to airport category D, with a maximum of 150 000 passengers per annum. Therefore, the airport is too small to compete with other airports, let alone distort competition. There is, accordingly, no effect on trade between Member States. Germany rejects the allegations of Lufthansa regarding alleged aid granted to Ryanair. Germany also rejects the claim that aid was granted to Ryanair through airport charges and marketing support and refers to its earlier comments in this regard.
- (164) Lastly, Germany refers to a press release from the European Commission dated 19 January 2005 ⁽⁶¹⁾ which confirms that an aid scheme for the construction and development of regional airports in structurally and economically weak regions is compatible with the internal market.

⁽⁶¹⁾ http://europa.eu/rapid/press-release_IP-05-58_de.htm?locale=FR

8. ASSESSMENT

8.1. EXISTENCE OF AID

- (165) Pursuant to Article 107(1) TFEU ‘... any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’
- (166) The criteria provided for in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measures in question constitute aid within the meaning of Article 107(1) TFEU, all of the following conditions need to be fulfilled. Specifically, the financial support must:
- (a) be granted by the state or through state resources;
 - (b) favour certain undertakings or the production of certain goods;
 - (c) distort or threaten to distort competition; and
 - (d) affect trade between Member States.

Concept of undertaking and economic activity

- (167) According to settled case-law, the Commission must first establish whether Flugplatz Altenburg-Nobitz GmbH is undertaking within the meaning of Article 107(1) TFEU. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ⁽⁶²⁾. Any activity consisting in offering goods or services on a given market is an economic activity ⁽⁶³⁾.
- (168) In its *Leipzig/Halle Airport* judgment the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity ⁽⁶⁴⁾. Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) TFEU, and the Treaty rules on State aid can therefore apply to advantages granted by the state or through state resources to that airport operator ⁽⁶⁵⁾.
- (169) Regarding the moment in time as from which the construction and operation of an airport becomes an economic activity, the Commission would point out that the gradual development of market forces in the airport sector does not allow a precise date to be determined. However, the European Courts have recognised the evolution in the nature of airport activities. In *Leipzig/Halle Airport*, the General Court held that from 2000 onwards the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in *Aéroports de Paris* (12 December 2000), the operation and construction of airport infrastructure must be considered an economic activity.
- (170) As assessed in recitals 168 and 169, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low-cost carriers and charter operators, airports that are not located in the same catchment areas and even in different Member States may also be in competition with each other to attract those airlines.

⁽⁶²⁾ Case C-35/96 *Commission v Italy* [1998] ECR I-3851; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013; Case C-55/96 *Job Centre* [1997] ECR I-7119.

⁽⁶³⁾ Case 118/85 *Commission v Italy* [1987] ECR 2599; Case 35/96 *Commission v Italy* [1998] ECR I-3851.

⁽⁶⁴⁾ *Leipzig/Halle* judgment, in particular paragraphs 93-94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012], not yet published; see also Case T-128/89 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by Case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297 and Case T-196/04 *Ryanair v Commission* (hereinafter: ‘*Charleroi judgment*’) [2008] ECR II-3643.

⁽⁶⁵⁾ Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancave* [1993] ECR I-637.

- (171) The Commission notes that the airport infrastructure in question in the present Decision is to be operated on a commercial basis by the airport operator, Flugplatz Altenburg-Nobitz GmbH. Since the airport operator will charge users for the use of this infrastructure, the latter is commercially usable. It follows that the entity using this infrastructure constitutes an undertaking for the purposes of Article 107(1) TFEU.

Public policy remit

- (172) However, not all the activities of an airport operator are necessarily of an economic nature ⁽⁶⁶⁾. The Court of Justice ⁽⁶⁷⁾ has held that activities that normally fall under state responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include, for example, security, air traffic control, police, customs, etc. The financing of these activities has to be strictly limited to offsetting the costs to which they give rise and may not be used instead to fund other economic activities ⁽⁶⁸⁾.
- (173) Therefore, the financing of activities falling within the public policy remit, or of infrastructure directly related to these activities in general does not constitute State aid ⁽⁶⁹⁾. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are considered in general to be of a non-economic nature ⁽⁷⁰⁾.
- (174) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is settled case-law that there is an advantage if public authorities relieve undertakings of the costs inherent to their economic activities ⁽⁷¹⁾. Therefore, if in a given legal system it is normal that airlines or airport operators bear the costs of certain services, whereas some airlines or airport operators providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may benefit from an advantage, even if these services are themselves considered to be non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport operators or airlines are required to bear the cost of the provision of some activities that might be non-economic in themselves but are inherent in the deployment of their economic activities.
- (175) Germany explains that the public subsidies for infrastructure investments mentioned at recital 71 are exclusively linked to non-economic activities: Germany includes within these non-economic activities security investments and investments into public and aviation safety. In particular, Germany points out that security and policing activities, fire protection measures, public and operational safety, meteorological services and flight security are part of the public policy remit.
- (176) The relevant legal framework in Germany is in particular defined by §8 *Luftsicherheitsgesetz* (Air Security Law), which regulates airport security measures, and §27c(2) *Luftverkehrsgesetz* (Air Traffic Law), which regulates measures ensuring operational safety, air traffic control and air safety measures.
- (177) The Commission is of the view that measures pursuant to §8 *Luftsicherheitsgesetz*, measures pursuant to §27c(2) *Luftverkehrsgesetz*, meteorological services, and the fire brigade can, in principle, be considered to constitute activities falling within the public policy remit.

⁽⁶⁶⁾ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

⁽⁶⁷⁾ Commission Decision N309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.

⁽⁶⁸⁾ Case C-343/95 *Calì & Figli v Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N309/2002 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.

⁽⁶⁹⁾ Commission Decision N309/2002 of 19 March 2003.

⁽⁷⁰⁾ See, in particular, Case C-364/92 *SAT v Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

⁽⁷¹⁾ See, among others, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.

- (178) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport ⁽⁷²⁾. Subject to a more detailed review with respect to specific activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as of the runway and aprons.
- (179) Regarding fire protection, the Commission observes that the payment of costs is subject to regional responsibilities and these costs are usually paid by the relevant regional authorities. The payment of these costs is limited to the extent necessary to cover them.
- (180) As regards air traffic control and air safety measures, §27(d) *Luftverkehrsgesetz* provides that the costs related to the measures in §27(c) *Luftverkehrsgesetz* are covered by the State for a number of specific airports. Airports are eligible for cost coverage as ‘recognised airports’ pursuant to §27(d) *Luftverkehrsgesetz* if the Federal Ministry of Transport has recognised the necessity of air traffic control and air safety measures for security reasons and transport policy related interests ⁽⁷³⁾. German airports which have not been recognised are not eligible for cost coverage pursuant to §27(d) *Luftverkehrsgesetz* and have therefore in principle to bear the costs related to the measures provided for in §27(c) *Luftverkehrsgesetz* themselves. These costs are inherent in the operation of the airports. Since some airports have to bear these costs themselves whereas other airports do not, the latter might be granted an advantage, even if control and air safety measures can be considered to be non-economic. The Commission notes that AOC is not one of the airports covered by §27d of that law, and finds that investments linked to air traffic control and air safety measures cannot qualify as public policy remit costs.
- (181) With respect to measures pursuant to §8 *Luftsicherheitsgesetz*, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) *Luftsicherheitsgesetz* only the costs related to the provision and maintenance of premises and surfaces necessary for the performance of the listed activities pursuant to §5 *Luftsicherheitsgesetz* may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to Flugplatz Altenburg-Nobitz GmbH thus relieved this undertaking of costs it had to bear pursuant to §8(3) *Luftsicherheitsgesetz*, that public financing is not exempt from scrutiny under EU State aid rules.
- (182) To conclude, as regards infrastructure investments and operating expenses incurred between 2000 and 2011, the Commission accepts that expenses directly related to fire protection and the provision of meteorological services qualify as public policy remit expenses, in so far as the payment of these costs is strictly limited to what is necessary to perform these activities. As regards investments and operating costs linked to measures taken pursuant to §8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs.
- (183) With respect to investments linked to air traffic control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz*, and noting that AOC is not one of the airports covered by §27d of that law, the Commission finds that investments and operating costs linked to air traffic control and air safety measures cannot qualify as public policy remit costs. Investments and operating costs related to ensuring the operational safety of the airport do not, finally, qualify as public policy remit costs. In particular, this means that the investments for the modernisation and extension of the runway, as well as the installation of guard lights, etc., cannot be qualified as falling within the public policy remit.

⁽⁷²⁾ Commission decision of 20 February 2014 in State aid case SA.35847 (2012/N) — *Czech Republic — Ostrava Airport*, not yet published in the Official Journal, recital 16.

⁽⁷³⁾ §27(d)(1) *Luftverkehrsgesetz*: ‘Flugsicherungsdienste und die dazu erforderlichen flugsicherungstechnischen Einrichtungen werden an den Flugplätzen vorgehalten, bei denen das Bundesministerium für Verkehr, Bau und Stadtentwicklung einen Bedarf aus Gründen der Sicherheit und aus verkehrspolitischen Interessen anerkennt’.

- (184) In any case, regardless of the legal classification of those costs as falling within the public policy remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, if the state paid for those costs, the airport operator would be relieved of costs that it should normally have incurred.
- (185) Therefore, the Commission considers that the public funding provided to Flugplatz Altenburg-Nobitz GmbH in relation to the financing of infrastructure investments and operating losses relieves it from bearing costs that are inherent in its economic activity, with the exception of the public remit costs as set out in recitals 182 and 183. Financing from the *Land* of Thuringia set out in Table 7 to cover air traffic control and airport control services therefore cannot qualify as public remit activities, contrary to the opinion of Germany. Likewise, part of the infrastructure investments set out in Table 3 do not fall within the public policy remit, contrary to the opinion of Germany: this is in particular the case with the modernisation and extension of the runway.

8.1.1. Measure 1: Financing of infrastructure investments in 2000-2011

State resources and imputability to the State

- (186) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ⁽⁷⁴⁾. Local authority resources are subject to the application of Article 107 of the TFEU on state resources ⁽⁷⁵⁾.
- (187) In the present case, contributions to infrastructure investments in favour of Flugplatz Altenburg-Nobitz GmbH are financed out of the budget of public bodies, either its public shareholders ⁽⁷⁶⁾, the *Land* of Thuringia or other public bodies, regional and local authorities. Hence they involve state resources and are also imputable to the state.

Economic advantage

- (188) In order to verify whether an undertaking benefited from an economic advantage arising from the granting of funds on preferential terms, the Commission applies the criterion of the 'market economy investor principle'. According to that principle, funds put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be classed as State aid ⁽⁷⁷⁾.
- (189) In the present case, the Commission has to assess whether the conditions for the public subsidies provided to Flugplatz Altenburg-Nobitz GmbH confer an economic advantage, which the recipient undertaking would not have obtained under normal market conditions.
- (190) For the measure in question, the public contributions were granted to Flugplatz Altenburg-Nobitz GmbH 'for free' with no interest charged or repayment obligation ⁽⁷⁸⁾. Therefore the contributions to infrastructure investments from the German public authorities relieved the company of the burden of completely financing the infrastructure itself either through bank loans or through equity funds. Therefore, those contributions confer an economic advantage on the airport.

Selectivity

- (191) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the contributions to infrastructure investments were paid only to Flugplatz Altenburg-Nobitz GmbH. Thus, those contributions are selective measures within the meaning of Article 107(1) TFEU.

⁽⁷⁴⁾ Case C-482/99 *France v Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.

⁽⁷⁵⁾ Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.

⁽⁷⁶⁾ See footnote 10.

⁽⁷⁷⁾ Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3), paragraph 11. That communication deals with the manufacturing sector, but is applicable to the other economic sectors. See also Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.

⁽⁷⁸⁾ Reimbursements occurred only in the specific cases when the public contribution in question had not been fully used for the investment it was intended for.

Distortion of competition and effect on trade

- (192) If aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be deemed to be affected by that aid. In accordance with settled case-law ⁽⁷⁹⁾, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings in markets open to competition.
- (193) As set out above, the operation of an airport constitutes an economic activity and competition takes place between airports to attract passengers and airlines. Flugplatz Altenburg-Nobitz GmbH competes with other undertakings on a market open to competition. The economic advantage received strengthens its position vis-à-vis its competitors in the European market for airport service providers.
- (194) Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between Member States.

Conclusion

- (195) For the reasons set out above, the Commission concludes that the contributions by the German regional and local public authorities for the infrastructure investments of AOC in the period after 12 December 2000 constitute State aid within the meaning of Article 107(1) TFEU.

8.1.2. Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011

State resources and imputability to the state

- (196) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ⁽⁸⁰⁾. Local authority resources are subject to the application of Article 107 of the TFEU on state resources ⁽⁸¹⁾.
- (197) In the present case, the contributions to operating losses in favour of Flugplatz Altenburg-Nobitz GmbH are financed out of the budget of public bodies, either its public shareholders ⁽⁸²⁾, the *Land* of Thuringia or other public bodies, regional and local authorities. Hence they involve state resources and are also imputable to the state.

Economic advantage

- (198) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of state intervention ⁽⁸³⁾. Only the effect of the measure on the undertaking is relevant, but not the reason for nor the purpose of the state intervention ⁽⁸⁴⁾. Whenever the financial situation of the undertaking is improved as a result of state intervention, an advantage exists.
- (199) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' ⁽⁸⁵⁾. In the present case, in order to determine whether the public financing of Flugplatz Altenburg-Nobitz GmbH grants the company an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the capital injections with that of an MEO who is guided by prospects of profitability in the long term ⁽⁸⁶⁾.

⁽⁷⁹⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽⁸⁰⁾ Case C-482/99 *France v Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.

⁽⁸¹⁾ Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.

⁽⁸²⁾ See footnote 10.

⁽⁸³⁾ Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

⁽⁸⁴⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

⁽⁸⁵⁾ Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397, paragraph 69.

⁽⁸⁶⁾ Case C-305/89 *Italy v Commission* ('*ALFA Romeo*') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 84.

- (200) Germany argues that the effect of the public contributions in question should be measured by taking into account the total economic advantages provided to the region, and that therefore the main shareholder of Flugplatz Altenburg-Nobitz GmbH, Landkreis Altenburger Land, acted as a private investor in normal market conditions. According to Germany, the benefits for Landkreis Altenburger Land were greater than the contributions paid taking into account the benefits for the region. Germany even recognises that the shareholders' contributions could be classed as 'lost subsidies' ⁽⁸⁷⁾ for the airport. However, the potential benefits for the region cannot be taken into consideration when assessing the market economy investor principle. The assessment must disregard any positive repercussions on the economy of the region in which the airport is located, since the Court of Justice has made clear that the relevant question for applying the MEO principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectorial considerations, would have subscribed the capital in question' ⁽⁸⁸⁾.
- (201) In the case at issue, public financing was granted to Flugplatz Altenburg-Nobitz GmbH 'for free', with no interest charged or repayment obligation. Public bodies provided financing to the operator of the airport, without requiring anything in return from this operator, thus relieving it of the burden of financing itself through bank loans or equity funds.
- (202) The annual capital injections by the shareholders served to cover Flugplatz Altenburg-Nobitz GmbH's annual losses. Ultimately therefore, the annual capital injections served to cover part of the normal operating expenses of the airport, thereby relieving the undertaking of an economic burden it would normally have to bear. Germany has not explained why an MEO would continue injecting capital into an undertaking that constantly generated losses, without requiring anything in return.
- (203) In view of the above, the Commission considers that an MEO would not have taken the decision to cover the increasing losses of Flugplatz Altenburg-Nobitz GmbH year after year. Therefore, the contributions to operating losses from the German regional authorities and public bodies relieved Flugplatz Altenburg-Nobitz GmbH of the burden of covering all of its own operating losses and conferred an economic advantage on Flugplatz Altenburg-Nobitz GmbH, which it would not have obtained under normal market conditions.

Selectivity

- (204) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the contributions to operating losses were paid only to Flugplatz Altenburg-Nobitz GmbH. Thus, those contributions are selective measures within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

- (205) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as being affected by that aid. In accordance with settled case-law ⁽⁸⁹⁾, for a measure to distort competition it is sufficient that the recipient of the aid is in competition with other undertakings in markets open to competition.
- (206) As set out above, the operation of an airport constitutes an economic activity and airports compete to attract passengers and airlines. Therefore, Flugplatz Altenburg-Nobitz GmbH is in competition with other undertakings on a market open to competition. The economic advantage received by the company strengthens its position vis-à-vis its competitors in the European market for airport service providers.
- (207) Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States.

Conclusion

- (208) For the reasons set out above, the Commission concludes that the contributions by the German regional authorities and public bodies towards operating losses of Flugplatz Altenburg-Nobitz GmbH granted after 12 December 2000 constitute State aid within the meaning of Article 107(1) TFEU.

⁽⁸⁷⁾ 'verlorene Zuschüsse' — see communication from Germany, 30.3.2012.

⁽⁸⁸⁾ Case 40/85 *Belgium v Commission* [1986] ECR I-2321.

⁽⁸⁹⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

8.1.3. Measure 3: Airport charges and payments to Ryanair under the airport services and marketing agreements

- (209) The Commission excludes from the scope of its analysis the last marketing agreement signed with AMS on 21 September 2010, the 'side letter', because its financing was granted by private regional companies which had made a commitment to maintain Ryanair activities at the airport ⁽⁹⁰⁾.

Concept of undertaking and economic activity

- (210) In accordance with Article 107(1) TFEU, State aid rules apply only if the recipient is an 'undertaking'. The Court of Justice of the European Union has consistently defined undertaking as any entity engaged in an economic activity, regardless of its legal status or ownership or how it is financed ⁽⁹¹⁾. Any activity consisting in supplying goods and services in a market is an economic activity ⁽⁹²⁾.
- (211) Ryanair offers scheduled passenger air transport services in the market. It clearly carries on an economic activity.
- (212) AMS is a wholly owned subsidiary of Ryanair. Consequently, Ryanair can be presumed to have exercised decisive influence over the behaviour of AMS. Moreover, the 2008 and 2010 marketing agreements were signed on behalf of AMS by Mr Eddie Wilson, who at the time was a Director of AMS and concurrently a Director of Ryanair ⁽⁹³⁾. The marketing agreements in question state in their preamble that 'AMS has exclusive licence to offer marketing services on the travel website www.ryanair.com, the website of the Irish low fares airline Ryanair'. For the purpose of the application of State aid rules, AMS and Ryanair are therefore considered to be a single undertaking within the meaning of Article 107(1) TFEU.

State resources

- (213) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ⁽⁹⁴⁾. Local authority resources are subject to the application of Article 107 of the TFEU on state resources ⁽⁹⁵⁾.
- (214) In the case at hand, at all material times the state has exercised indirect or direct control over the resources under consideration. Since the moment Flugplatz Altenburg-Nobitz GmbH started doing business with Ryanair, the company has been owned by a majority of public shareholders. Currently, it is fully owned by public shareholders: all shareholders are either public authorities or fully publicly owned and the company itself holds 32 % of its shares.
- (215) Thus, the Commission considers that all resources of Flugplatz Altenburg-Nobitz GmbH must be considered state resources.

Imputability to the State

- (216) The Court of Justice has ruled that, even if the state is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the state. Therefore, the mere fact that a public undertaking is under state control is not sufficient for measures taken by that undertaking, such as the agreement of 3 March 2003 concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair and the subsequent marketing agreements, to be considered imputable to the State ⁽⁹⁶⁾.

⁽⁹⁰⁾ See recital 105.

⁽⁹¹⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4) part 2.1 and associated case-law, in particular Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

⁽⁹²⁾ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75.

⁽⁹³⁾ See <http://corporate.ryanair.com/investors/biographies/> accessed on 23 June 2014.

⁽⁹⁴⁾ Case C-482/99 *France v Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.

⁽⁹⁵⁾ Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.

⁽⁹⁶⁾ *Stardust Marine* judgment, paragraphs 52 and 57.

(217) According to the Court of Justice, indicators from which imputability can be inferred, are ⁽⁹⁷⁾:

- (a) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities;
- (b) the fact that the undertaking had to take account of directives issued by public authorities;
- (c) the integration of the public undertaking into the structures of public administration;
- (d) the nature of the public undertaking's activities and the exercise of these activities in the market in normal conditions of competition with private operators;
- (e) the legal status of the undertaking;
- (f) the intensity of the supervision exercised by the public authorities over the management of the undertaking;
- (g) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

(218) Germany argues that the Ministry of Construction and Transport of the *Land* of Thuringia had no right to influence the conclusion of the contracts with Ryanair/AMS. According to Germany, the relevant ministry and the government of the *Land* of Thuringia were only involved in the decision-process regarding the infrastructure investments in the airport. Germany rejects the Commission's arguments as to the supervisory role of the Ministry of Construction and Transport of the *Land* of Thuringia and therefore the presumed imputability to the State of the measure in question.

(219) Germany also rejects the Commission's argument according to which the setting of airport fees must, under German aviation law §43a LuftVZO, receive prior approval by the supervisory authority before they can be put into effect. According to Germany, even without the approval of the supervisory authority, the setting of airport fees could be adopted by Flugplatz Altenburg-Nobitz GmbH, since the supervisory authority only has to check that the fees do not exceed a certain level.

(220) In August 2010, the Gera Chamber of Commerce, a public body, campaigned in favour of the continuation of the low-cost concept at AOC and urged the government of the *Land* of Thuringia to negotiate with Ryanair on destinations and marketing measures ⁽⁹⁸⁾. According to Germany, this argument supports the market economy investor analysis, according to which maintaining and supporting Ryanair routes was economically justified.

(221) However, the Commission considers that the competent ministries of the *Land* of Thuringia were involved in the conclusion of the Ryanair contracts. Before Flugplatz Altenburg-Nobitz GmbH concluded the contract on airport services with Ryanair, the competent ministries of the *Land* of Thuringia apparently took part in the negotiations. A press article states that negotiations took longer because the ministries of the *Land* of Thuringia tried to block the deal ⁽⁹⁹⁾. At the same time, the Minister for the Economy of the *Land* of Thuringia, Schuster, claimed that the *Land* was in a position to approve the necessary measures. He is quoted as saying that if Ryanair needed an

⁽⁹⁷⁾ Ibid.

⁽⁹⁸⁾ <http://www.altenburg-tourismus.de/reiseveranstalter/pressemitteilungen.htm> Osterländer Volkszeitung of 24 August 2010, p. 13: 'Er forderte deshalb die Landesregierung auf, umgehend mit Ryanair über den Aufbau von drei bis fünf Linienverbindungen zu verhandeln und parallel in den Zielländern die Tourismus-Werbung aufzubauen'.

⁽⁹⁹⁾ Dresdner Neue Nachrichten of 5.3.2003: 'Der Regionalflughafen Altenburg-Nobitz war in den vergangenen Jahren mit mehreren Millionen Euro Fördermitteln modernisiert worden und hatte sich immer wieder um die Ansiedlung eines Billig-Fliegers bemüht. Die Verhandlungen mit Ryanair waren über viele Monate geführt worden. Als letztes Hindernis erwies sich der hinhaltende Widerstand Erfurter Ministerien, die diese Ansiedlung zu blockieren versuchten.'

extended runway, the extension would be granted. The article also explains that the start of Ryanair at AOC could reduce passenger numbers at Dresden and Leipzig-Halle airport ⁽¹⁰⁰⁾.

- (222) The Ministry of Building and Transport of the *Land* of Thuringia is the supervisory authority of Flugplatz Altenburg-Nobitz GmbH. In addition, under German aviation law, §43 LuftVZO, the setting of airport fees must receive prior approval by the supervisory authority before they can be put into effect. Moreover, the AOC Schedule of Charges of 18 September 2006 provides for signature by a representative of the Ministry of Building and Transport.
- (223) The involvement of the ministries at political level can be seen from the discussion in the Parliament of the *Land* of Thuringia. Not only technical questions but also the overall economic viability of the airport were discussed, as recorded in the detailed minutes of the discussion ⁽¹⁰¹⁾.
- (224) The marketing agreements with Ryanair were also discussed at the level of the district council ('*Kreistag*'). A press article states that the *Kreistag* approved the payment of EUR 670 000 for marketing measures regarding the setting-up of a new flight connection by Ryanair ⁽¹⁰²⁾. The head of the district ('*Landrat*') is quoted as saying that without the marketing payments the scheduled services would have been stopped.
- (225) Finally, the Commission notes that the involvement of Gera Chamber of Commerce — a public and self-administering body incorporated under public law — in the conclusion of Ryanair's agreements confirms the exercise of public influence over the decision-making process regarding those contracts.
- (226) To conclude, looking at the supervision by the Ministry of Construction and Transport of the *Land* of Thuringia, the involvement of the ministries at political level, the various discussions which took place in the Parliament of the *Land* of Thuringia and the involvement of public entities, it appears that public bodies were in a position to control the activities of Flugplatz Altenburg-Nobitz GmbH, and that they were involved in important decisions concerning the economic exploitation of the airport. In particular, when business at the airport was beset by problems, public authorities were involved in discussions about the future of the airport. Controversial discussions took place at the political level in the *Land* of Thuringia, and the change of government at *Land* level contributed to the decision to convert the airport in 2010 and to discontinue low-cost traffic at the airport ⁽¹⁰³⁾.
- (227) Therefore, the Commission takes the view that the decision concerning the implementation of the agreement of 3 March 2003 and the marketing agreement of 7 April 2003 concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Airport Marketing Services thereafter are imputable to public authorities.

⁽¹⁰⁰⁾ <http://www.radio-lotte.de/nachricht/14036> 'Thüringen will mit Millioneninvestitionen die irische Billigfluglinie Ryanair an den Flughafen Altenburg-Nobitz lotsen. Nach Aussagen der "Leipziger Volkszeitung" stehen dafür rund 28 Millionen Euro aus einem Infrastruktur-Sonderprogramm zur Verfügung. Thüringens Wirtschaftsminister Schuster sagte, man sei auch flexibel genug, erforderliche Maßnahmen bereits in diesem Jahr zu bewilligen. Wenn Ryanair beispielsweise eine längere Start- und Landebahn benötige, dann werde diese Verlängerung erfolgen. Sollte Ryanair sich für Altenburg-Nobitz entscheiden, würde Dresden und Leipzig/Halle ein weiterer Passagierverlust drohen. Der einstige Militärflugplatz liegt geografisch in der Mitte. Der Dresdner Flughafen hat in diesem Jahr bislang rund 15 Minus gemacht, Leipzig/Halle rund zwölf Prozent'.

⁽¹⁰¹⁾ Thüringer Landtag, 4th term, plenary minutes 4/11, 28 January 2005, 11th Session, Friday, 28 January 2005, Prospects for Flughafen Altenburg-Nobitz, p. 1097.

⁽¹⁰²⁾ <http://www.neues-deutschland.de/artikel/161087.ein-flughafen-an-jeder-muelltonne.html> 'Zuvor hatte der Kreistag beschlossen, dem irischen Billigflieger Ryanair für die Einrichtung einer zusätzlichen Flugverbindung 670 000 Euro Marketingzuschüsse zu Gewähren. "Ohne diese Beschlussfassung wäre der Linienflugbetrieb faktisch am Ende gewesen und der Flugplatz hätte seine Bedeutung zwangsläufig verloren", rechtfertigte der Landrat und Aufsichtsratsvorsitzende der Betreibergesellschaft Flugplatz Altenburg-Nobitz GmbH die Finanzspritze. Zu den bisherigen Verbindungen von und nach Stansted (London), Edinburgh (Schottland) und Girona (Barcelona) soll ab März 2010 zweimal in der Woche eine Verbindung nach Alicante hinzu kommen.'

⁽¹⁰³⁾ See recital 32(d).

Economic advantage

- (228) In order to determine whether the airport services and marketing agreements granted Ryanair/AMS an advantage, the Commission has to examine whether in similar circumstances an airport operating under normal conditions of the market economy and guided by prospects of profitability in the longer term would have entered into the same or similar commercial arrangement as Flugplatz Altenburg-Nobitz GmbH. The existence of an advantage can normally be excluded if: (a) the price charged for the airport services corresponds to the market price; or (b) if it can be demonstrated through an *ex ante* analysis that the agreements with the airline incrementally contribute to the profitability of the airport and are part of an overall strategy leading to profitability in the long term.
- (229) According to the *Charleroi* judgment ⁽¹⁰⁴⁾, when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of the agreements on AOC taking into account all relevant features of the measures in question.
- (230) The Court declared in the *Stardust Marine* judgment that, ‘... in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State’s conduct, and thus to refrain from any assessment based on a later situation’ ⁽¹⁰⁵⁾.
- (231) In order to be able to apply the market economy operator test, the Commission has to take itself back to the time when the agreements between AOC and Ryanair/AMS were concluded (i.e. 2003 for the airport services and first marketing agreement, 2008 for the second marketing agreement and 2010 for the third one). The Commission must also base its assessment on the information and assumptions which were available to the airport when the agreements were signed.

Market price analysis

- (232) The Commission has to determine whether the price conditions applied to Ryanair/AMS by Flugplatz Altenburg-Nobitz GmbH correspond to the market price. In this regard, Germany argues that the airport services agreement signed between AOC and Ryanair on 3 March 2003 was market-compliant and that the airport fees applicable to Ryanair were in line with those stipulated in the schedule of airport charges described at Section 3.4.1. The schedules are applicable to all potential airlines flying to/from the airport. The fact that Ryanair was the only airline active at Altenburg-Nobitz airport in the 2003-2011 period is irrelevant according to Germany.
- (233) Germany is of the opinion that the marketing services agreements concluded with Ryanair and AMS have to be considered separately. However, the Commission notes that AMS is a wholly owned subsidiary of Ryanair; therefore the Commission considers that both types of agreements with Ryanair and AMS have to be considered together. Secondly, regarding possible separate consideration of the Ryanair airport services agreement and the marketing agreement of 7 April 2003, the marketing agreement itself mentions that the success fee is to be deducted from the airport services fees to arrive at the net charge to be paid by Ryanair. The agreement itself opts for a net result of the airport services fees to be paid by Ryanair on the one hand and the marketing fees to be paid by the airport on the other.
- (234) In any case, the Commission has to consider the overall price paid by the airline in order to determine whether it paid the market price. Indeed, Ryanair paid airport fees to Flugplatz Altenburg-Nobitz GmbH during the years 2003-2011 when it served AOC, and received payments for marketing services from the airport. As mentioned in recital 49, the German authorities state that AOC collects from Ryanair a fixed landing fee of [...] * per aircraft and a passenger fee of [...] * per passenger. An extra handling fee does not seem to apply since the fees paid by Ryanair also include handling ⁽¹⁰⁶⁾. However, these fees are reduced by the marketing ‘success fee’, so in the end Ryanair only pays the airport a fixed fee of [...] * ⁽¹⁰⁷⁾ per departing passenger. Ryanair thus receives a discount from the official fees as they are set out in the AOC schedule of charges and described in Section 3.4.1.

⁽¹⁰⁴⁾ Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 59 (*Charleroi* judgment).

⁽¹⁰⁵⁾ Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 71 (*Stardust Marine* judgment).

⁽¹⁰⁶⁾ See recital 52.

⁽¹⁰⁷⁾ For the first 5 years and fewer than four rotations — see Table 12.

- (235) In order to establish whether the price charged by an airport to an airline corresponds to the market price, an appropriate benchmark has to be identified. Nevertheless the Commission has strong doubts as to whether an appropriate benchmark can be identified in this case to establish the true market price for the services provided by Ryanair/AMS. In any event, the Commission considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts or any other incentive), across a sufficient number of suitable 'comparator airports', whose managers behave as market economy operators. In view of the difficulty in this case of finding comparator airports, the Commission considers an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of the agreements between AOC and Ryanair/AMS.

Ex ante analysis to demonstrate the profitability of the airport

- (236) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the market economy investor test if they contribute incrementally, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, for the duration of the arrangement and with a reasonable profit margin ⁽¹⁰⁸⁾ on the basis of sound medium-term prospects ⁽¹⁰⁹⁾.
- (237) The Commission will therefore take into account all expected costs incurred incrementally by the airport in relation to the airline's activity at the airport ⁽¹¹⁰⁾. Such incremental costs may include all types of expenses or investments, such as incremental personnel, equipment and investment costs arising from the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs.
- (238) The Commission will base its *ex ante* incremental analysis on the original time schedule planned in the contract, even though the contract actually ceased before the deadline initially planned.
- (239) The Commission will consider three incremental analyses to assess the profitability of all four agreements concluded between the airport and Ryanair/AMS:
- (a) An incremental analysis of the airport services agreement and the marketing services agreement, both concluded in 2003 for a ten-year period.
 - (b) An incremental analysis for joint consideration of the 2003 airport services agreement, the 2003 marketing services agreement and the 2008 marketing services agreement: the 2008 marketing agreement concluded with AMS introduced fixed payments for marketing services while the 2003 marketing services agreement concluded with Ryanair was still in force.
 - (c) An incremental analysis for joint consideration of the 2003 airport services agreement, the 2003 marketing services agreement and the 2010 marketing services agreement: the 2010 marketing agreement concluded with AMS replaced the 2008 contract and introduced one fixed payment for marketing services; the 2003 marketing services agreement concluded with Ryanair was still in force.

— Airport services and marketing agreements of 2003

- (240) The Commission will first examine whether the Ryanair airport services agreement of 3 March 2003 and the first marketing agreement signed with Ryanair on 7 April 2003 contribute incrementally to the profitability of the airport. It will do this by means of an *ex ante* analysis, which will cover the 2003-2013 period, as both agreements were to run for 10 years.

⁽¹⁰⁸⁾ A reasonable profit margin is a 'normal' rate of return on capital, that is to say, a rate of return that a typical company would require for an investment of similar risk. The return is measured as an Internal Rate of Return ('IRR') for the anticipated cash flows arising from the arrangement with the airline.

⁽¹⁰⁹⁾ This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.

⁽¹¹⁰⁾ *Charleroi* judgment, paragraph 59.

- (241) In order to assess the contribution of both of Ryanair's agreements to the profitability of the airport, the Commission will establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH would have been able to expect with the information at its disposal when it started to do business with Ryanair in 2003. The Commission will base its assessment on the data provided by Germany in the table drafted by the airport and presented at the shareholders' meeting of 22 April 2003, showing that doing business with Ryanair would bring in additional annual income of [...] (111).
- (242) Incremental costs include:
- (a) costs for marketing services,
 - (b) investment costs directly linked to the Ryanair agreements,
 - (c) incremental operational costs directly caused by the Ryanair agreements.
- (243) The costs for marketing services are, as stipulated in the 2003 marketing agreement, reflected in the net charge to be paid by Ryanair per departing passenger.
- (244) Regarding incremental investments costs, the Commission notes that the extension of the runway was an obligation of AOC under the agreement between the airport and Ryanair. Although Germany states that the runway was not extended to the extent required in the Ryanair agreement, the extension is confirmed by the annual financial reports of Flugplatz Altenburg-Nobitz GmbH for the years 2003 and 2004. These state that in the context of the Ryanair services agreement, it became necessary to extend the runway in order that Ryanair might operate at the airport. Therefore the Commission will include the extension of the runway in 2003 and 2004. As Germany produced no *ex ante* forecast of the cost involved, the Commission will consider the effective overall amount of EUR 687 882 (112) paid for both extensions, the first of which was completed in 2003 and the second in 2004 (113). According to Germany, the runway was not extended as far as required by Ryanair, but to a lesser extent. This assumption is favourable to Ryanair.
- (245) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 provided by Germany in its table from 22 April 2003, which amounts to EUR 145 650 per year. This amount will be updated per year in line with inflation (2 % per year).
- (246) With regard to the incremental revenues expected from this new activity with Ryanair, the Commission will take into account the following revenues:
- (a) Aeronautical revenues: revenues expected per departing passenger from Ryanair's activity should amount to [...] in the first five years and [...] in the last five years. These amounts are stipulated in the marketing agreement of 7 April 2003 as the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations (114). The Commission will consider a weighted average fee of [...] for the year 2008 (115).
 - (b) Non-aeronautical revenues: Germany has not provided any information regarding provisional *ex ante* data on non-aeronautical revenues (116). The Commission notes that the airport did not take into account any non-aeronautical revenue per passenger in its forecasts of 22 April 2003. Germany provided the Commission with *ex post* data on non-aeronautical revenues during the 2006-2011 period, as set out in Table 16. In the absence of any relevant *ex ante* information, exceptionally the Commission will base its analysis on the average of the data provided by Germany, which amounts to EUR 1,50-2,00 [...] per passenger. As this average is calculated over the 2006-2011 period, the Commission will consider it as a reference value for 2009. A 2 % inflation rate will then be applied to this average. These EUR 1,50-2,00 [...] non-aeronautical revenues relate to both departing and landing passengers.

(111) See recital 99.

(112) See Table 3 at recital 38.

(113) As the Commission has not received the breakdown between 2003 and 2004, it will assume that half of the own resources contribution (EUR 187 882) was paid per year.

(114) In 2003, a single rotation between London Stansted and Altenburg was agreed.

(115) The agreement plans [...] for the first five years, with the expiry date of 30 April 2008. After that, the fee becomes [...] for the period 1 May 2008-30 April 2013. A weighted average gives [...] for the whole year of 2008.

(116) Despite several requests from the Commission, Germany has not provided any data regarding *ex ante* non-aeronautical revenues and refers to Table 13 — see recital 99.

Table 16

Ex post non-aeronautical revenues ⁽¹⁾

(in EUR)

	2006	2007	2008	2009	2010	2011
Non-aeronautical revenues	30 000-40 000 [...]*	80 000-90 000 [...]*	280 000-290 000 [...]*	290 000-300 000 [...]*	330 000-40 000 [...]*	25 000-30 000 [...]*
Number of passengers	105 213	147 100	138 400	140 800	119 000	15 000
Non-aeronautical revenues per passenger	0,10-0,50 [...]*	0,30-0,80 [...]*	1,80-2,20 [...]*	2,00-2,20 [...]*	2,50-3,00 [...]*	1,50-2,00 [...]*

(¹) Data provided by Germany. The number of passengers corresponds to data in Table 1.

- (247) The Commission will assume a number of passengers according to what Flugplatz Altenburg-Nobitz GmbH should have expected in 2003. In 2003, one daily flight was agreed from Altenburg-Nobitz to London. Taking into account an 80 % capacity load factor, which is a more optimistic approach than the one used by the airport in its projections from April 2003 (70 %), daily passengers amount to 118 ⁽¹¹⁷⁾, which gives an annual additional number of passengers linked to Ryanair of 43 216 ⁽¹¹⁸⁾.
- (248) Germany did not provide any discount rate or weighted average capital costs for the airport. The Commission will therefore, on the basis of its 2008 communication on reference rates ⁽¹¹⁹⁾ which states a reference rate of 4,80 % for Germany, take a 4,8 % discount rate into account for the period 1 January 2003 to 31 July 2003.
- (249) Table 17 shows the resulting incremental business plan, incorporating all the assumptions described. Such a plan should have been considered by Flugplatz Altenburg-Nobitz GmbH before starting to do business with Ryanair, in order to ascertain that agreements with Ryanair incrementally contribute to the airport's profitability. The net present value (hereinafter 'NPV') of the cash flows is positive. This proves that the Ryanair services agreement in conjunction with the first marketing agreement of 2003 would have been profitable for the airport from an *ex ante* perspective.

⁽¹¹⁷⁾ Germany reports a flight capacity of 148 passengers in its table from 22 April 2003.

⁽¹¹⁸⁾ The Commission will base all calculations on a standard number of 365 days per year.

⁽¹¹⁹⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6.) — Associated table on reference/discount rates and recovery rates for the 15 EU Member States (from 1.8.1997 to 1.5.2004).

Table 17

Ex ante business plan for both the airport services and marketing agreements of 2003

Year	1.5.2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	30.4.2013
Annual number of departing passengers	28 811	43 216	43 216	43 216	43 216	43 216	43 216	43 216	43 216	43 216	14 405
EXPECTED REVENUES (in EUR)											
Net charge to be paid by Ryanair per departing passenger	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Total aviation revenues	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Non-aeronautical revenues per passenger	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Total non-aeronautical revenues	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Total annual revenues	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
EXPECTED CHARGES (in EUR)											
Monthly operational charges	12 138	12 381	12 628	12 881	13 139	13 401	13 669	13 943	14 222	14 506	14 796
Annual operational charges	97 104	148 569	151 541	154 571	157 663	160 816	164 032	167 313	170 659	174 072	59 185
Investment costs: Extension of the runway	408 491	279 391	0	0	0	0	0	0	0	0	0
Total annual charges	505 595	427 960	151 541	154 571	157 663	160 816	164 032	167 313	170 659	174 072	59 185
NET ANNUAL RESULT (in EUR)	– 302 213	– 120 415	158 525	158 065	157 596	165 761	169 595	169 098	168 590	168 073	55 848

Discount rate	4,8 %	NPV (in EUR)	637 143
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— Airport services and marketing agreements of 2003 + The marketing agreement of 28 August 2008

- (250) The Commission will examine by means of an *ex ante* analysis whether the marketing agreement concluded with AMS on 28 August 2008, together with the airport services agreement and the marketing agreement of 2003, incrementally contributes to the profitability of the airport. The Commission will thus establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH would have been able to expect from this new agreement with the information at its disposal in 2008. As the duration of the 2008 contract was two years, this analysis will be carried out in respect of two years ⁽¹²⁰⁾.
- (251) Incremental costs include:
- (a) costs for marketing services;
 - (b) operational incremental costs directly caused by the Ryanair agreements.
- (252) The costs for marketing services are, according to the 2003 marketing agreement, reflected in the net charge of [...] * to be paid by Ryanair per departing passenger ⁽¹²¹⁾. In addition, the second marketing agreement of 2008 introduced a fixed amount of EUR [...] * for 2008 and EUR [...] * for 2009 to be paid by the airport to AMS.
- (253) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 initially provided by Germany in its table from April 2003, which becomes EUR 13 401 in 2008 taking into account a 2 % annual inflation rate. This amount will be further updated each year according to inflation (2 % per year).
- (254) To assess incremental revenues, the Commission will take into account the following revenues:
- (a) Aeronautical revenues: revenues expected per departing passenger from Ryanair's activity should amount to [...] * for the period in question, according to the marketing agreement of 7 April 2003, representing the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations ⁽¹²²⁾.
 - (b) Non-aeronautical revenues: as explained in recital 246(b), in the absence of any relevant *ex ante* information, the Commission will exceptionally rely on *ex post* data, and the average of EUR 1,50-2,00 [...] * seems appropriate for 2009. This figure will be corrected on the basis of a 2 % inflation rate. These non-aeronautical revenues will apply to both departing and landing passengers.
- (255) The Commission will assume a number of passengers on the basis of the number Flugplatz Altenburg-Nobitz GmbH should have expected in 2008. The 2008 marketing services agreement mentions among its objects routes between AOC and London with a four-per-week winter service and a daily summer service, and a connection to Girona with a three-per-week summer-only service ⁽¹²³⁾. Considering an 80 % load factor on an aircraft with 189 seats ⁽¹²⁴⁾, the Commission calculates an expected annual number of 45 333 passengers for the flights to London and 13 797 passengers for the flights to Girona.
- (256) Germany did not provide any discount rate or weighted average capital cost for the airport. The Commission will thus consider a 5,59 % discount rate, based on its 2008 communication on reference rates ⁽¹²⁵⁾, which gives a base rate of 4,59 % for Germany for the period 1 July 2008 to 31 August 2008, to which 100 basis points have to be added.

⁽¹²⁰⁾ Another option would have been to conduct the analysis over the 28 August 2008-27 August 2010 time-frame, the actual duration of the contract: as all the assumptions remain equal, the Commission chooses to perform the analysis on two years without further specifications. This simplifies the analysis and provides the same result.

⁽¹²¹⁾ On the date of signature of the second marketing agreement (28 August 2008), the net charge per departing passenger to be paid by Ryanair to AOC was EUR [...] *, as the number of rotations was no more than four.

⁽¹²²⁾ In 2003, a single rotation between London Stansted and Altenburg was agreed.

⁽¹²³⁾ As indicated in footnote 48, the IATA summer season covers a seven-month period and the winter one five months.

⁽¹²⁴⁾ Flight capacity mentioned in the 2008 marketing agreement.

⁽¹²⁵⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6.) — Associated table on base rates for the 27 Member States (from 1.7.2008 to 30.6.2013).

- (257) Table 18 shows the resulting incremental business plan, including all the assumptions described. Such a plan should have been taken into consideration by Flugplatz Altenburg-Nobitz GmbH before signing its marketing agreement with AMS in 2008 in order to ascertain that this agreement incrementally contributed to the profitability of the airport. The net present value of the cash flows is positive. This proves that this second marketing agreement, combined with the airport services agreement and the marketing agreement of 2003, would have been profitable to the airport from an *ex ante* perspective.

Table 18

Ex ante business plan for the airport services and marketing agreements of 2003 + the marketing agreement of 28 August 2008

	Year 1	Year 2
Annual number of departing passengers	59 130	59 130
EXPECTED REVENUES (in EUR)		
Net charge to be paid by Ryanair per departing passenger	[...]*	[...]*
Total aviation revenues	[...]*	[...]*
Non-aeronautical revenues per passenger	[...]*	[...]*
Total non-aeronautical revenues	[...]*	[...]*
Total annual revenues	[...]*	[...]*
EXPECTED CHARGES (in EUR)		
Fixed marketing charges	[...]*	[...]*
Monthly operational charges	13 401	13 669
Annual operational charges	160 812	164 028
Total annual charges	[...]*	[...]*
NET ANNUAL RESULT (in EUR)	141 938	42 455
Discount rate	5,59 %	
Net Present Value (in EUR)	182 146	

— Airport services and marketing agreements of 2003 + the marketing agreement of 25 January 2010

- (258) The Commission will examine by means of an *ex ante* analysis whether the marketing agreement concluded with AMS on 25 January 2010, together with the airport services agreement and the marketing agreement of 2003, incrementally contributes to the profitability of the airport. The Commission will thus establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH could have expected from this new agreement with the information at its disposal in 2010.
- (259) The duration of the 2010 contract is over one year (it starts on 25 January 2010 and ends one year after the start of the first flight connection, supposed to start with the 2010 summer season). However, the services provided by Ryanair cover a period of seven months (IATA summer season). Therefore, the Commission will conduct its incremental analysis based on a seven-month period.
- (260) Incremental costs include:
- (a) costs for marketing services;
 - (b) incremental operational costs directly caused by the Ryanair agreements.
- (261) The costs for marketing services are reflected, in line with the 2003 marketing agreement, in the net charge of [...] * to be paid by Ryanair per departing passenger ⁽¹²⁶⁾. In addition, the third marketing agreement of 2010 introduced a fixed amount of EUR [...] * for 2010 to be paid by the airport to AMS.
- (262) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 initially provided by Germany in its table from April 2003, which becomes EUR 13 942 in 2010 taking into account a 2 % annual inflation rate.
- (263) To assess incremental revenues, the Commission will take into account the following revenues:
- (a) Aeronautical revenues: revenues expected from Ryanair's activity per departing passenger should amount to [...] * for the period in question, according to the marketing agreement of 7 April 2003, representing the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations ⁽¹²⁷⁾.
 - (b) Non-aeronautical revenues: as explained in recital 246(b), in the absence of any relevant *ex ante* information, the Commission will exceptionally base its analysis on the *ex post* data provided by Germany in Table 16. The Commission will assume that, in January 2010 when the third marketing agreement was signed, the airport, in determining likely non-aeronautical revenues, would have taken into account its actual revenues in the preceding years, which had significantly increased in comparison with 2006 and 2007. Consequently, it seems likely that in 2010 the airport would have based its forecasts in terms of non-aeronautical revenues on the two preceding years, which would give an average of EUR 1,80–2,30 [...] * per passenger for 2008 and 2009. These non-aeronautical revenues apply to both departing and landing passengers.
- (264) The Commission will assume a number of passengers on the basis of the number Flugplatz Altenburg-Nobitz GmbH should have expected from the signature of the 2010 marketing services agreement. The agreement mentions among its objects summer routes between AOC and London on a daily basis commencing in summer 2010, with Girona three times a week and Alicante twice a week. Considering an 80 % load factor for an aircraft with 189 seats ⁽¹²⁸⁾, the Commission calculates the number of passengers for this seven-month flight period as being 32 193 for flights to London, 13 797 for flights to Barcelona, and 9 198 for flights to Alicante.
- (265) Table 19 shows the resulting incremental business plan, including all the assumptions described, which should have been taken into consideration by Flugplatz Altenburg-Nobitz GmbH before signing its marketing agreement with AMS in 2010, to ascertain that this agreement incrementally contributed to the airport's profitability. The cash flow in the period is negative. This proves that this third marketing agreement, combined with the airport services agreement and the marketing agreement of 2003, was not profitable to the airport from an *ex ante* perspective.

⁽¹²⁶⁾ On the date of signature of the third marketing agreement (25 January 2010), the net charge per departing passenger to be paid by Ryanair to AOC was [...] *, as the number of rotations was not above four.

⁽¹²⁷⁾ In 2003, a single rotation between London Stansted and Altenburg was agreed.

⁽¹²⁸⁾ Flight capacity mentioned in the 2010 marketing agreement.

Table 19

Ex ante business plan for the airport services and marketing agreements of 2003 + the marketing agreement of 25 January 2010

	2010 summer season
Number of departing passengers	55 188
EXPECTED REVENUES (<i>in EUR</i>)	
Net charge to be paid by Ryanair per departing passenger	[...]*
Total aviation revenues	[...]*
Non-aeronautical revenues per passenger	[...]*
Total non-aeronautical revenues	[...]*
Total revenues	[...]*
EXPECTED CHARGES (<i>in EUR</i>)	
Fixed marketing charges	[...]*
Monthly operational charges	13 943
Total operational charges	97 601
Total charges	[...]*
NET RESULT (<i>in EUR</i>)	– 318 569

- (266) Consequently, in 2010 the airport paid Ryanair/AMS EUR [...] for seven months of flight services which provided it with [...] aeronautical revenues and EUR [...] non-aeronautical revenues. At this time and since 2003, the date on which it started to do business with Ryanair, the airport had never been profitable, even at an operational level without public contributions.

— Conclusion

- (267) In conclusion, the Commission considers on the one hand that the conditions offered to Ryanair/AMS under the combination of the airport services agreement concluded on 3 March 2003 and the marketing agreements concluded on 7 April 2003 and on 28 August 2008 between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS are market compliant. Therefore the Commission takes the view that Ryanair/AMS did not benefit from a selective economic advantage through this combination of agreements.

- (268) On the other hand, the Commission considers that the conditions offered to Ryanair/AMS under the combination of the airport services agreement concluded on 3 March 2003 and the marketing agreements concluded on 7 April 2003 and on 25 January 2010 between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS are not market-compliant. Therefore the Commission takes the view that Ryanair/AMS benefited from a selective economic advantage through this combination of agreements.

Selectivity

- (269) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the airport services and marketing agreements were concluded only with Ryanair and its wholly owned marketing services subsidiary AMS.
- (270) Although other airlines (Eurowings and Air Berlin) flew from Altenburg in the 2000-2002 period, they did not benefit from such marketing agreements. Germany argues that the conditions of Ryanair's service agreement were drafted according to the schedule of airport charges in force at the time and applicable to all potential airlines. However, the Commission is of the opinion that it is the combination of this specific services agreement with the subsequent marketing agreements which provided an advantage to Ryanair. Thus, all these agreements constitute selective measures within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

- (271) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, it is to be assumed that the latter have been affected by that aid ⁽¹²⁹⁾. In accordance with settled case-law ⁽¹³⁰⁾, for a measure to distort competition it is sufficient that the recipient of the aid is in competition with other undertakings in markets open to competition.
- (272) The service and marketing agreements in question contribute to significantly reducing the airport charges to be paid by Ryanair, which lowers the normal operating costs of an airline benefiting from such a reduction. Therefore, this airline is capable of strengthening its position in the market. Moreover, the air transport sector is characterised by intense competition between operators from different Member States, in particular since the entry into force of the third stage of liberalisation of air transport ('third package') on 1 January 1993 ⁽¹³¹⁾. It follows that the reduced charges affect trade between Member States and distort or threaten to distort competition in the air transport sector.
- (273) Therefore, the service and marketing agreements concluded with Ryanair distort or threaten to distort competition and affect trade between Member States.

Conclusion

- (274) The Commission concludes that the airport services agreement concluded on 3 March 2003, combined with the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS on 7 April 2003 and on 28 August 2008 — granted after the judgment in *Aéroports de Paris* — does not constitute State aid to Ryanair/AMS within the meaning of Article 107(1) TFEU.
- (275) The Commission concludes that the airport services agreement concluded on 3 March 2003, combined with the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS on 7 April 2003 and 25 January 2010 — granted after the judgment in *Aéroports de Paris* — constitutes State aid to Ryanair/AMS within the meaning of Article 107(1) TFEU.

8.2. COMPATIBILITY OF THE AID

8.2.1. Measure 1: Financing of airport infrastructure at AOC

- (276) The Commission has to assess whether the aid can be found compatible with the internal market. Article 107(3) TFEU provides for certain exemptions to the general rule set out in Article 107(1) TFEU that State aid is not

⁽¹²⁹⁾ Case 730/79 *Philip Morris* [1980] ECR I-2671, paragraph 11.

⁽¹³⁰⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, paragraph 46.

⁽¹³¹⁾ See Council Regulations (EEC) No 2407/92 (OJ L 240, 28.8.1992, p. 1), (EEC) No 2408/92 (OJ L 240, 28.8.1992, p. 8) and (EEC) No 2409/92 (OJ L 240, 28.8.1992, p. 15).

compatible with the internal market. The aid in question can only be assessed on the basis of Article 107(3)(c) TFEU, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.

- (277) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) TFEU. As provided for in recital 173 of the 2014 Aviation Guidelines, the Commission will apply the rules in force at the time when the aid was granted to unlawful investment aid to airports. Accordingly, it will not apply the principles set out in the 2014 guidelines in the case of unlawful investment aid to airports granted before 4 April 2014, the date of adoption of these guidelines.
- (278) The financing of AOC's infrastructure was granted between 2000 and 2011. Therefore, the principles set out in the 2005 Aviation Guidelines apply for the assessment of the compatibility of the infrastructure financing granted between 2005 and 2011. As regards infrastructure financing granted before 2005, no specific compatibility criteria were in force at the time to assess the compatibility of investment aid to airports. The Commission has therefore to assess these measures directly on the basis of Article 107(3)(c) TFEU, taking into account its decision-making practice in this matter. The Commission's practice regarding the assessment of the compatibility of aid granted to airport managers was consolidated in the 2005 Aviation Guidelines. Therefore the Commission will assess the compatibility of investment aid granted to Flugplatz Altenburg-Nobitz GmbH before 2005 on the basis of the criteria set out in the 2005 Aviation Guidelines.
- (279) The 2005 Aviation Guidelines provide a framework for assessing whether investment aid to airports may be declared compatible pursuant to Article 107(3)(c) TFEU. According to point 61 of the 2005 Aviation Guidelines the Commission has to examine whether:
- (a) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);
 - (b) the infrastructure is necessary and proportional to the objective which has been set;
 - (c) the medium-term prospects for use of the infrastructure are satisfactory, in particular as regards the use of existing infrastructure;
 - (d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
 - (e) the development of trade is not affected to an extent that is contrary to the EU interest.
- (280) In addition to the requirement to satisfy specific compatibility criteria specified in the 2005 Aviation Guidelines, State aid to airports, like all other State aid measures, should have an incentive effect. It should also be necessary and proportionate to the desired legitimate objective in order to be cleared as compatible aid ⁽¹³²⁾.

8.2.1.1. *The construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)*

- (281) According to Germany and to the articles of incorporation of the airport's operator, the objective of the latter is to improve the economic-related infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.
- (282) By financing the main infrastructure developments of the airport during the period in question, the *Land* of Thuringia aimed to improve the accessibility of the region and thus stimulate regional development and the creation of new jobs in a structurally weak region, as good passenger and freight transport connections are essential for the competitiveness of local business and industry.

⁽¹³²⁾ It is settled case-law that the Commission can declare an aid measure compatible only if it is necessary for achieving a legitimate objective (see, for example, Case 730/79 Philip Morris; Case C-390/06 Nuova Agricast; Case T-162/06 Kronoply).

- (283) Indeed, in 2007 Germany based its assessment regarding infrastructure financing on the Klophaus study, which stated in particular that the direct, indirect, induced and catalyst effects of AOC for the economy and attractiveness of the region, especially concerning jobs, are positive and significant. A growing number of passengers would let AOC become a regional airport offering the chance to the Altenburger Land of changing its international profile and therefore improving its economic and business structures. According to this study, AOC would have brought significant overall economic benefits of common interest for the whole region of central Germany.
- (284) In this respect, as indicated in Table 1, the number of passengers at the airport significantly increased until the years 2007-2010: the airport attracted a number of incoming passengers to the region, which is of a particular importance for the area's economy. In the beginning of 2000, and until circa 2007, traffic forecasts were positive and supported the need for further infrastructure developments. In addition, the airport itself played an important role as an employer and indirectly generated the creation of induced jobs in the region ⁽¹³³⁾.
- (285) The infrastructure investments in question did not constitute a duplication of existing infrastructure. The closest airport to AOC is Leipzig–Halle airport, located around 85 km and over one hour's travelling time from AOC. Furthermore, Leipzig–Halle airport is an international airport and serves both Leipzig (Saxony) and Halle (Saxony-Anhalt). AOC, as a regional airport, serves the southern part of the *Land* of Thuringia. From a business perspective, the airport is relevant for companies situated in the nearby industrial area.
- (286) The Commission can therefore conclude that the financing of airport infrastructure at AOC met a clearly defined objective of common interest.

8.2.1.2. *The infrastructure is necessary and proportionate to the objective which has been set*

- (287) According to the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH, the object of the company is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony. During the 2000-2011 period, the airport undertook the necessary infrastructure investments in order to meet the requirements associated with this target.
- (288) At the beginning of the period in question, investments were needed to adapt the overall infrastructure to airlines' needs in connection with the conversion of the former military airfield into a civil airport.
- (289) Then, as Germany states, the infrastructure investments at AOC were necessary to meet the security and safety requirements of the airport in view of the increasing number of passengers targeted through the Ryanair services agreement. Investments were needed in order to renovate and update the airport. Security and safety measures were undertaken throughout the period to adapt the airport to the anticipated increase in Ryanair passengers. All studies ⁽¹³⁴⁾ carried out in 2007 to assess the economic viability of the airport predicted increasing activity at AOC during the 2007-2015 period.
- (290) Reconstruction work on the terminal in 2009 was completed to comply with safety requirements and the separate handling of Schengen and non-Schengen passengers. According to Germany, alternatives to this reconstruction were considered, but, given the higher number of passengers and the high costs of these alternative options, the long-term solution of reconstructing the terminal was pursued.
- (291) Since the airport operator did not have sufficient funds and as Germany maintains that the main investments concerned public remit activities, public funding was needed.
- (292) The Commission therefore considers that the investments in the infrastructure were necessary to adapt to increasing passenger numbers as well as to meet the current requirements for modern airport infrastructure. The airport was only able to serve the connectivity and the development of the region with the infrastructure built.

⁽¹³³⁾ See recital 96.

⁽¹³⁴⁾ See footnote 34.

- (293) The necessity and proportionality of the investment aid to Flugplatz Altenburg-Nobitz GmbH therefore follows from the need to meet current requirements for modern airport infrastructure. The Commission therefore concludes that the infrastructure investments in question were necessary and proportionate to the objective which had been set.

8.2.1.3. *The medium-term prospects for the use of the infrastructure are satisfactory, in particular as regards the use of existing infrastructure*

- (294) The medium-term prospects for use of the existing infrastructure were satisfactory, at least until 2009. The board of directors of Flugplatz Altenburg-Nobitz GmbH had already envisaged an expected overall amount of approximately EUR 20 million in infrastructure investments over the whole 2000-2010 period. Annual numbers of passengers continued to grow until the peak years of 2008-2009.
- (295) Following a period of significant growth, air traffic in Germany and Europe was negatively affected by the economic and financial crisis in 2009, which resulted in a 4,6 % decrease in passenger air traffic in Germany in 2009, which was thus one of the worst years for air traffic. However, the general trend of growth in air transport was not stopped, only slowed down. Starting in June 2010 the monthly growth rates in passenger air traffic in Germany increased again and were 7 % higher than the monthly growth rates of the previous year. In line with forecasts, since 2009 Germany has enjoyed strong economic growth of around 3 % per annum. Growth in the air traffic market is normally higher than general economic growth ⁽¹³⁵⁾.
- (296) The three studies carried out in 2007 ⁽¹³⁶⁾ all predicted that the operator of the airport would improve its annual results and reach an almost balanced operating income by the year 2015, together with the strengthening of the nearby industrial area. This was confirmed by the draft business plan drawn up for the period 2007-2015. Germany based its reasoning on the profitability of low-cost-carrier traffic and on the possible scenario that AOC could reach 500 000 passengers by 2015.
- (297) Therefore, according to the information provided by Germany, the infrastructure in question would have met medium-term demand in terms of airlines and passengers and offered good prospects for use.

8.2.1.4. *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*

- (298) Germany confirms that, despite the fact that Ryanair was the only airline operating from AOC in the years 2003-2011, the infrastructure was potentially open to all potential users without any commercially unjustified discrimination.

8.2.1.5. *The development of trade is not affected to an extent contrary to the EU interest*

- (299) According to point 39 of the 2005 Aviation Guidelines, the category of the airport is an indication of the extent to which airports are competing with one another, and therefore also the extent to which public funding granted to an airport may distort competition. The 2005 Aviation Guidelines state that public funding to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest. This cannot be taken, however, as an implication or statement that distortions of competition and effects on trade are ruled out.
- (300) AOC always served fewer than 150 000 passengers per annum during the period in question, so it qualifies as a small regional airport (category D) according to the 2005 Aviation Guidelines.

⁽¹³⁵⁾ Updated position on the demand forecast for Kassel-Calden airport (*Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel-Calden*), Intraplan Consult GmbH, 12 March 2012, p. 8.

⁽¹³⁶⁾ See footnote 34.

- (301) AOC is a typical regionally oriented airport, which is reflected by the fact that a significant number of the passengers using it came from the *Land* of Thuringia. On the basis of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that the closest airport, Leipzig-Halle airport (85 km and around 1h 10min travelling time from AOC), lies at the outer limit of the same catchment area. Leipzig-Halle airport is an international airport and serves both Leipzig (Saxony) and Halle (Saxony-Anhalt). AOC, as a regional airport, serves the southern part of the *Land* of Thuringia.
- (302) Apart from their geographical distance from one another, both airports follow significantly different business models and target different types of passengers. Leipzig-Halle airport is a well-established airport and has a more sophisticated infrastructure providing greater comfort to passengers. It offers international as well as domestic flights, a number of holiday destinations and air freight transport. AOC has a rather low-comfort infrastructure and its business model was based on low-cost carriers.
- (303) On the basis of the above, the Commission can therefore conclude that the investment aid granted to Flugplatz Altenburg-Nobitz GmbH neither distorts competition nor affects trade to an extent contrary to the common interest.

8.2.1.6. *The aid has an incentive effect and is necessary and proportionate*

- (304) The infrastructure financing aid provided by Germany to Flugplatz Altenburg-Nobitz GmbH should have an incentive effect and should be necessary and proportionate in relation to the legitimate objective sought.
- (305) The Commission must establish whether the State aid granted to Flugplatz Altenburg-Nobitz GmbH changed the behaviour of the beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that: (i) it would not pursue without the aid; or (ii) it would pursue but in a limited or different manner. In addition, the aid is considered to be proportionate only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.
- (306) According to the information submitted by Germany, the investments in infrastructure necessary to reach the standard of an operational airport open to commercial flights could not have been realised without the aid. The airport was loss-making over most of the period in question. Germany has always considered that such a regional airport could not operate without public funding. In particular, without the aid, the airport would not have met the expected service levels for airlines and passengers, and the level of the economic activity of the airport would have been reduced.
- (307) Therefore, it can be concluded that the aid measure in question had an incentive effect, as it enabled the beneficiary to realise the necessary investments.
- (308) With regard to the assessment of the proportionality of the aid, it can be considered that the intensity of the aid for the project was limited to the investments required to convert the airport from an ex-military to a civil airport, open to all potential airlines. In addition, the investment-financing process at Flugplatz Altenburg-Nobitz GmbH was organised in such a way as to avoid any overcompensation: at the end of each year, a business plan was agreed for the year to come and was then reviewed during the course of the year to adapt it to business reality ⁽¹³⁷⁾. The airport had to reimburse public funders in the event of over-funding of a project. As the amount of aid was limited to the minimum necessary for the aided activity to take place, the investment aid in question can therefore be considered necessary and proportionate in relation to the legitimate objective.

8.2.1.7. *Conclusion*

- (309) In view of the above assessment, the Commission concludes that the investment aid granted to Flugplatz Altenburg-Nobitz GmbH is compatible with Article 107(3)(c) TFEU, as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines. Therefore, the measure is compatible with the internal market.

⁽¹³⁷⁾ Germany provided annual business plans (*Wirtschaftsplan*) for the period 2000-2005 with the corresponding amended business plans (*Nachtrag zum Wirtschaftsplan*).

8.2.2. Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in the years 2000-2011

- (310) In accordance with the 2014 Aviation Guidelines, the Commission considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of unlawful operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period ⁽¹³⁸⁾.
- (311) The 2014 Aviation Guidelines lay down conditions under which operating aid to airports may be declared compatible with the internal market within the meaning of Article 107(3)(c) TFEU ⁽¹³⁹⁾. According to point 137 of the 2014 Aviation Guidelines ⁽¹⁴⁰⁾, in order for operating aid granted before the publication of these guidelines to be considered compatible with the internal market, the following cumulative conditions must be met:
- (a) the measure must contribute to a well-defined objective of common interest;
 - (b) there must be a need for state intervention;
 - (c) the aid measure must be an appropriate policy instrument to address the objective of common interest;
 - (d) there must be an incentive effect;
 - (e) the aid must be limited to the minimum necessary; and
 - (f) undue negative effects on competition and trade between Member States must be avoided.

8.2.2.1. Contribution to a well-defined objective of common interest

- (312) According to Section 5.1.2(a) of the 2014 Aviation Guidelines, in order to give airports time to adjust to new market realities and to avoid any disruptions in air traffic and connectivity of the regions, operating aid to airports will be considered to contribute to the achievement of an objective of common interest, if it: (i) increases the mobility of European Union citizens and connectivity of regions by establishing access points for intra-European Union flights; or (ii) combats air traffic congestion at major European Union hub airports; or (iii) facilitates regional development.
- (313) According to the German authorities, the financing of operating losses of Flugplatz Altenburg-Nobitz GmbH was necessary to maintain continued operations at the airport, in order to meet the object of the company, as stated in its articles of incorporation, which is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.
- (314) Given that, in order to promote regional development in Central Germany, good points of access are required, there was a fundamental need to keep the airport functioning. The operation of the airport served regional development and job creation. Therefore, the operating aid granted was clearly aimed at facilitating regional development.

8.2.2.2. Need for state intervention

- (315) Under Section 5.1.2(b) of the 2014 Aviation Guidelines, in order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. In this respect, any State aid to an airport must be geared to a situation where aid can bring about a material improvement that the market itself cannot deliver.

⁽¹³⁸⁾ Point 172 of the 2014 Aviation Guidelines.

⁽¹³⁹⁾ Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), point 104.

⁽¹⁴⁰⁾ Communication from the Commission — Guidelines on State aid to airports and airlines, point 137.

- (316) Germany submits that state intervention was needed as the airport had difficulty ensuring the financing of its operations on its own. The financial reports of Flugplatz Altenburg-Nobitz GmbH often state that the financial situation of the airport was strictly linked to shareholders' and other public contributions. The existence of the company would even be jeopardised without public capital contributions ⁽¹⁴¹⁾.
- (317) The granting of operating aid provided the airport with the necessary resources to ensure its operations and adjust its business model to the requirements of low-cost carriers.
- (318) The Commission recognises that AOC is a small regional airport with fewer than 150 000 passengers per annum which, under normal market conditions, would not be able to fully cover its own operating costs. Therefore there was a need for state intervention.

8.2.2.3. Appropriateness of the aid measure

- (319) According to Section 5.1.2(c) of the 2014 Aviation Guidelines, any aid measure for an airport must be an appropriate policy instrument to address the objective of common interest. The Member State must, therefore, demonstrate that no other less distortive policy instruments or aid instruments could enable the same objective to be reached.
- (320) According to Germany, the aid measure in question is appropriate to address the intended objective of common interest that could not have been met through other less distortive policy instruments.
- (321) The aid amount was geared to covering the expected funding gap of operating costs calculated for the year to come.
- (322) In view of the above, the Commission considers that the measure in question was appropriate to achieve the desired objective of common interest.

8.2.2.4. Existence of incentive effect

- (323) According to Section 5.1.2(d) of the 2014 Aviation Guidelines, an incentive effect for operating aid exists if it is likely that, in the absence of operating aid, the airport's level of economic activity would be significantly reduced. This assessment needs to take into account the presence of investment aid and the level of traffic at the airport.
- (324) The financial reports of Flugplatz Altenburg-Nobitz GmbH underline that the existence of the company would be jeopardised without public capital contributions. Without operating aid to cover the airport operator's losses, the airport would eventually have become unviable due to the uncovered operating losses.
- (325) In view of the above, the Commission considers that the aid measure in question had an incentive effect.

8.2.2.5. Proportionality of the aid amount (aid limited to a minimum)

- (326) According to Section 5.1.2(e) of the 2014 Aviation Guidelines, in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.
- (327) In the present case, the public shareholders of the airport operator established the amount of operating aid on the basis of annual *ex ante* business plans and limited it to the funding needs of the airport.
- (328) Parameters of these business plans were updated during the financial year in question with the current results of the airport. For example, on 8 November 2002, the board of directors approved the business plan for 2003 on the basis of data available in September 2002. This business plan was then updated on 24 October 2003 by the board of directors, to whom an updated business plan with data available in October 2003 was presented ⁽¹⁴²⁾.

⁽¹⁴¹⁾ See recital 43.

⁽¹⁴²⁾ Germany provided the Commission with business plans (*Wirtschaftsplan*) for the years 2000-2005 and updated business plans (*Nachtrag zum Wirtschaftsplan*) for the years 2002-2005.

- (329) In view of the above, the Commission observes that the operating aid during this period allowed the airport operator to adjust its business model to its new operating requirements linked to the Ryanair services agreement, with a permanent control on the amount of financing necessary to cover the losses. The aid amount was thus limited to the expected operating losses.
- (330) In addition, Germany states that the conversion of the airport in various projects ⁽¹⁴³⁾ since 2010-2012 helped reduce the global funding gap of the airport and therefore shareholders' contributions. The operating aid was monitored over the whole period in question to adapt it to the real necessities of the airport.
- (331) Therefore, the Commission considers that the operating aid in the case in question was proportional and limited to the minimum necessary for the aided activity to take place.

8.2.2.6. *Avoidance of undue negative effects on competition and trade between Member States*

- (332) According to Section 5.1.2(f) of the 2014 Aviation Guidelines, when assessing the compatibility of operating aid, account will be taken of distortions of competition and the effects on trade. An indication of potential competition distortions or effects on trade may be the fact that the airport is located in the same catchment area as another airport with spare capacity.
- (333) In the present case, the Commission observes that the closest airport is Leipzig-Halle airport, which is located 85 km and 1h 10 min by car from AOC. As stated in recitals 300 and 301, the business model of Flugplatz Altenburg-Nobitz GmbH set out from the outset to position the airport as a regional airport aimed at developing the nearby industrial area. Even if the 2007 Klopheus prognosis had been realised, the airport would have reached 500 000 passengers by 2015, which would still not have placed it in a position to compete with an airport with over two million passengers like Leipzig-Halle airport.
- (334) In order to further limit the negative effects on competition and trade, Germany points out that AOC's infrastructure was open to all potential users and was not dedicated to one specific user.
- (335) In view of the above, the Commission considers that the undue negative effects on competition and trade between Member States are limited to the minimum.

8.2.2.7. *Conclusion*

- (336) In view of the above, the Commission concludes that the financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011 is compatible with the internal market on the basis of Article 107(3)(c) TFEU, and in the light of the compatibility conditions laid down in Section 5.1.2 of the 2014 Aviation Guidelines.

8.2.3. **Measure 3: Airport charges and payments to Ryanair under the combination of the 2003 airport services agreement, the 2003 marketing agreement and the 2010 marketing agreement**

- (337) Germany claims that the airport services contract and the marketing services agreements do not constitute State aid and therefore Germany does not provide any legal basis for potential compatibility with the internal market. Under these circumstances, it can be concluded that the aid is incompatible with the internal market given that the burden of proof of the compatibility of aid with the internal market, by way of derogation from Article 107(1) TFEU, is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied. Moreover, the Commission considers that the State aid in question cannot be considered compatible start-up aid under the relevant rules.

⁽¹⁴³⁾ See recital 34.

8.2.3.1. Applicable legal framework

(338) As regards start-up aid, the 2014 Aviation Guidelines state that

‘the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014.’⁽¹⁴⁴⁾

(339) The 2005 Aviation Guidelines, in turn, stipulate that

‘the Commission will assess the compatibility of ... start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty [now Article 108(3) of the TFEU], on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*.’

8.2.3.2. Compatibility assessment for the contract concluded on 25 January 2010, combined with the airport services contract concluded on 3 March 2003 and the marketing agreement concluded on 7 April 2003

(340) The contract with AMS was concluded in 2010, after the publication of the 2005 Aviation Guidelines. The aid in question was granted by the 2010 marketing agreement, the effects of which come on top of the two agreements concluded in 2003, which — considered in isolation — do not constitute State aid. Consequently, the compatibility of the aid must be examined under the 2005 Aviation Guidelines.

(341) Considering that the compatibility conditions for start-up aid enshrined in point 79 of the 2005 Aviation Guidelines are cumulative, it should be only necessary to demonstrate that one of those conditions is not met in order to establish that the aid to the airlines is not compatible. Nevertheless, the Commission will review several criteria set out in the 2005 Aviation Guidelines to assess the compatibility of the aid measure in question.

(342) Point 79(c) of the 2005 Aviation Guidelines specifies that, in order to be compatible, the aid should apply only to the opening of new routes or new schedules. The 2010 agreement covers the daily route to London, which had existed since 2003, and the route to Girona, which was opened in 2007. Only the route to Alicante was opened in 2010. Therefore this criterion is not met by the aid measure in question.

(343) Point 79(d) of the 2005 Aviation Guidelines requires the long-term viability and degressiveness of the measure in question: ‘the route receiving the aid must ultimately prove profitable, i.e. it must at least cover its costs, without public funding. For this reason start-up aid must be degressive and of limited duration’. There is no indication that the routes in question could become profitable for Ryanair without the public funding under the marketing agreements. This is confirmed by the fact that Ryanair gave up the routes when public funding ended.

(344) Point 79(e) of the 2005 Aviation Guidelines adds the criterion of the compensation for additional start-up costs: ‘the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running’. The aid does not appear to be related to specific start-up costs. Marketing payments to Ryanair continued throughout the entire period that the airport did business with the airline. Therefore this criterion is also not fulfilled.

(345) Finally, under point 79(f), the amount of aid in any one year may not exceed 50 % of eligible costs for that year. There is no evidence that actual spending on marketing would have amounted to twice the amount of the aid.

⁽¹⁴⁴⁾ 2014 Aviation Guidelines, recital 174.

8.2.3.3. Conclusion

- (346) In conclusion, the aid to Ryanair and AMS cannot be found to constitute compatible start-up aid, as the compatibility conditions are not met. The State aid granted to Ryanair and AMS under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010 therefore constitutes unlawful and incompatible State aid that has to be recovered.

9. CONCLUSION

9.1. MEASURE 1: FINANCING OF INFRASTRUCTURE INVESTMENTS IN THE YEARS 2000-2011

- (347) The Commission considers that the aid provided to Flugplatz Altenburg-Nobitz GmbH in the form of financing of infrastructure investments throughout the 2000-2011 period is compatible with the internal market.

9.2. MEASURE 2: FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN THE YEARS 2000-2011

- (348) The Commission considers that the aid provided to Flugplatz Altenburg-Nobitz in the form of financing of operating losses throughout the 2000-2011 period is compatible with the internal market.

9.3. MEASURE 3: RYANAIR SERVICES AND MARKETING AGREEMENTS

- (349) The Commission considers that the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 28 August 2008 does not constitute State aid to Ryanair/AMS.
- (350) The Commission finds that Germany, through the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, provided unlawful aid to Ryanair and its wholly owned subsidiary AMS, in breach of Article 108(3) TFEU.
- (351) By signing the agreement in 2010 with Ryanair and AMS, Flugplatz Altenburg-Nobitz GmbH could not, from an *ex ante* point of view, cover all the incremental costs linked to Ryanair's activities at the airport. An undue advantage was conferred on Ryanair/AMS in the form of an amount of aid which must be reimbursed to Germany.

Recovery of the aid provided to Ryanair/AMS

- (352) In accordance with the TFEU and the settled case-law of the Court of Justice, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽¹⁴⁵⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to restore the previously existing situation ⁽¹⁴⁶⁾. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽¹⁴⁷⁾.
- (353) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ⁽¹⁴⁸⁾ laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (354) Therefore, the State aid mentioned above must be reimbursed to Germany, in so far as it has been paid out.

⁽¹⁴⁵⁾ Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽¹⁴⁶⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽¹⁴⁷⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64-65.

⁽¹⁴⁸⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

- (355) Regarding the amounts to be recovered, the Commission will consider the *ex ante* business plan set out in Section 8.1.3, Table 19, with the following additional considerations:
- (a) The aid amount to be recovered should correspond to the negative incremental cash flow at the time when the decision was taken to sign the agreement. The negative cash flow corresponds to the amount of financing needed for the agreement to be market-compliant.
 - (b) The Commission considers that the time-frame to take into consideration for this business plan is the 2010 summer season. Indeed, the effective advantage conferred on the airline is limited to the effective duration of the agreement in question, as once this agreement was terminated Ryanair/AMS did not benefit from any more advantages from the airport.
- (356) Results showing the indicative amount to be recovered by Germany from Ryanair/AMS are indicated in Table 20.
- (357) To take into account the actual advantage conferred on the airline and its subsidiaries under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, the amounts indicated in Table 20 may still be adjusted in accordance with the supporting evidence provided by Germany. This adjustment is based on: (i) the difference between, on the one hand, actual payments as presented *ex post* that were made by the airline with regard to the airport charges, and on the other hand, the forecast cash flows (*ex ante*) on these items of income shown in Table 19; and (ii) the difference between, on the one hand, the actual marketing payments as presented *ex post* which were paid to the airline or its subsidiaries under the marketing agreement and, on the other hand, the marketing costs as specified *ex ante* corresponding to the amounts indicated in Table 19.
- (358) As explained at recital 212, the Commission considers that, for the purpose of the application of State aid rules, AMS and Ryanair are considered to be a single undertaking. Therefore, Ryanair and AMS are jointly and severally liable for the entire reimbursement of the aid received under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010.
- (359) In addition, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁴⁹⁾, Germany has to add to the aid amount recovery interest, calculated from the date on which the unlawful aid was available to the beneficiary up to the date of its recovery ⁽¹⁵⁰⁾. Since in the case in question the cash flows corresponding to the aid amounts are complex and were paid (at different dates) throughout the application of the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, the Commission deems it acceptable to assume for the calculation of the recovery interests that the time of payment of the aid is the end of the 2010 IATA summer season (i.e. 30 October 2010),

Table 20

Amount to be recovered for both the airport services and marketing agreements of 2003 and the 2010 marketing agreement

	2010 Summer season
Number of departing passengers	55 188
EXPECTED REVENUES (in EUR)	
Net charge to be paid by Ryanair per departing passenger	[...]*
Total aviation revenues	[...]*

⁽¹⁴⁹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁵⁰⁾ See Article 14(2) of Regulation (EC) No 659/1999.

	2010 Summer season
Non-aeronautical revenues per passenger	[...]*
Total non-aeronautical revenues	[...]*
Total revenues	[...]*
EXPECTED CHARGES (in EUR)	
Fixed marketing charges	[...]*
Monthly operational charges	13 943
Total operational charges	97 601
Total charges	[...]*
NET RESULT (in EUR)	
AMOUNT TO BE RECOVERED	– 318 569

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Flugplatz Altenburg-Nobitz GmbH between 2000 and 2011 by means of financing infrastructure investments in the years 2000-2011 is compatible with the internal market.
2. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Flugplatz Altenburg-Nobitz GmbH between 2000 and 2011 by means of financing operating losses in the years 2000-2011 is compatible with the internal market.
3. The airport services agreement concluded on 3 March 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, combined with the marketing services agreement concluded on 7 April 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing services agreement concluded on 28 August 2008 between Flugplatz Altenburg-Nobitz GmbH and AMS, does not constitute aid.
4. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Ryanair/AMS by means of the combination of the airport services agreement concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair on 3 March 2003, the marketing services agreement concluded on 7 April 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing services agreement concluded on 25 January 2010 between Flugplatz Altenburg-Nobitz GmbH and AMS is incompatible with the internal market.

Article 2

1. Germany shall recover the incompatible aid referred to in Article 1(4) from the beneficiaries.
2. Taking into account that Ryanair and AMS constitute a single economic unit for the purpose of the present Decision, they shall be jointly liable to repay the State aid received by either, by virtue of the combined application of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010.

3. The sums to be recovered shall include interest from the date on which they were available to the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
5. Germany shall cancel all outstanding payments of aid referred to in Article 1(4) with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(4) shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date on which it is notified.

Article 4

1. Within two months following notification of this Decision, Germany shall submit the following information:
 - (a) the total amount (principal and interest) of aid received by the beneficiaries;
 - (b) the total amount (principal and interest) to be recovered from the beneficiaries in accordance with Article 2;
 - (c) a detailed description of the measures already taken or planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already repaid by the beneficiaries.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION (EU) 2016/288**of 27 March 2015****on the aid scheme SA.34775 (13/C) (ex 12/NN) implemented by the United Kingdom —
Aggregates levy***(notified under document number C(2015) 2141)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By letter dated 20 December 2001 (registered on 28 December 2001), the United Kingdom authorities ('UK authorities') notified to the Commission an aid scheme with the title 'phased introduction of the aggregates levy in Northern Ireland'. In their notification, the UK authorities informed the Commission that they intended to introduce a levy on aggregates with effect from 1 April 2002. This levy was to be introduced by the Finance Act 2001, Part 2, Sections 16 to 49 and Schedules 4 to 10. The aid scheme itself (phased introduction of the aggregates levy in Northern Ireland) was described as consisting of the introduction of the levy in several stages in Northern Ireland so as to preserve the international competitiveness of companies in Northern Ireland that manufacture processed products such as concrete and asphalt from aggregates. This staged introduction of the levy for Northern Ireland was to be introduced by the Finance Act 2002.
- (2) In addition to the notification, the Commission received on 27 September 2001 a complaint from two companies engaged in the extraction and processing of aggregates and, on 15 April 2002, an additional complaint, submitted by the British Aggregates Association (the 'BAA'). The complainants considered that the Finance Act 2001 entailed State aid for the products and processes exempted from the aggregates levy (the 'AGL') and considered that the derogations relating to Northern Ireland were aid incompatible with the internal market.
- (3) After the submission of additional information on 21 February 2002, the Commission adopted, on 24 April 2002, a no objections decision with respect to the AGL ⁽²⁾. It considered that the different exemptions provided for in the Finance Act 2001 were justified by the logic of the tax and that the Finance Act 2001 did not entail any State aid. The Commission further considered that the staged introduction of the AGL in Northern Ireland constituted aid that was compatible with the internal market.
- (4) On 12 July 2002, the BAA brought an action for annulment of the Commission's decision of 24 April 2002, registered as Case T-210/02. On 13 September 2006, the General Court dismissed the action in its entirety. On 27 November 2006, the BAA appealed the judgment of the General Court. By judgment of 22 December 2008 in Case C-487/06 P, the Court of Justice set aside the appealed judgment and referred the case back to the General Court.

⁽¹⁾ OJ C 348, 28.11.2013, p. 162.

⁽²⁾ OJ C 133, 5.6.2002, p. 11.

- (5) On 7 March 2012, in its judgment in Case T-210/02 RENV, the General Court annulled the Commission decision mentioned in recital 3 above. The General Court found that the Commission failed to demonstrate that the tax differentiation associated with the exemption is justified on the basis of the normal taxation principle underpinning the AGL or on the basis of the environmental objective of the AGL. The General Court found in particular that the Commission had failed to take account of the normal taxation principle in determining the selective nature of any advantage generated by the AGL. In this connection, the General Court pointed to the inconsistencies in terminology used by the Commission in its decision, namely as regards the terms 'virgin', 'primary' and 'secondary' aggregates, which did not correspond to the terms used in the Finance Act 2001 as amended. Also, the Commission had failed to explain in its decision why certain exempt materials (used as aggregates, like clay aggregates) were not in the same legal and factual situation as taxed material.
- (6) Following the annulment of the Commission Decision of 24 April 2002, the Commission was required to reassess whether the exemptions, exclusions and tax reliefs provided for in the 2001 Finance Act, as amended by the Finance Act 2002 and Finance Act 2007, constituted State aid. The Commission registered the file under an NN reference, since the AGL has been in force since 1 April 2002. The issue of the compatibility of the staged introduction of the AGL in Northern Ireland has been examined in the context of another procedure (see SA.18859 (11/C) — United Kingdom — Relief from Aggregates levy in Northern Ireland).
- (7) In addition to the observations and submissions made during the proceedings before the Union Courts, the complainant submitted further comments and information to the Commission on 13 June 2012 and 26 October 2012. Those comments were transmitted to the United Kingdom on 15 May 2013. On 27 September 2012 and 27 May 2013, the UK authorities provided further information on the AGL.
- (8) By letter dated 31 July 2013, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the tax exemptions, tax exclusions and tax reliefs established in Sections 17(3)(e), 17(3)(f)(i) and (ii), Section 17(4)(a) (in so far as the exempted material consists wholly of coal, lignite, shale, slate that is used as aggregate or consists mainly of coal, lignite, shale and slate), Section 17(4)(c)(i) and (ii) (when it consists mainly of the spoil), 17(4)(f) (as far as clay is concerned), 18(2)(b) (in so far as it relates to an exempt process that provides for materials that are used as aggregates) and 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are used as aggregates) of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007. The Commission raised no objections to the tax exemptions, tax exclusions and tax reliefs established in Sections 17(2)(b), 17(2)(c), 17(2)(d), 17(3)(b), 17(3)(c), 17(3)(d) and 17(3)(da), 17(4)(d) and 17(4)(e), Section 17(4)(a) (in so far as the exempted material consists wholly of coal, lignite, shale, slate that is used for other purposes than as aggregate), Section 17(4)(c) (when it consists wholly of the spoil), Section 17(4)(f) (except for clay), Section 18(2)(a), Section 18(2)(b) (in so far as it relates to materials that are not used as aggregates), Section 18(2)(c), Section 30(1)(a), Section 30(1)(b) (in so far as it relates to exempt processes within the meaning of Section 18(2) (a) and (c)), Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b) that provides for materials that are not used as aggregates) and Section 30(1)(c) of the Finance Act 2001, as amended by the Finance Act 2002 and Finance Act 2007, on the ground that they do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.
- (9) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾ (the 'Opening Decision'). The Commission invited interested parties to submit their comments on the aid.
- (10) The Commission received extensive comments from 16 interested parties between 20 December 2013 and 17 January 2014, supplementary information from a British Aggregates Association member on 10 February 2014 and from the British Aggregates Association on 5 March 2014. They were forwarded on 27 May 2014 and 13 June 2014 to the United Kingdom, which was then given the opportunity to reply. The United Kingdom submitted its reply by letter dated 30 June 2014. In addition, it submitted observations on the Opening Decision on 1 October 2013, 31 October 2013 and 28 February 2014.

⁽³⁾ Idem 1.

- (11) The Commission requested further information from the United Kingdom on 14 July 2014, 1 September 2014, 8 September 2014, and 28 November 2014. The United Kingdom provided such information on 29 August 2014, 9 September 2014, 18 September 2014 and 8 and 9 December 2014.
- (12) Following a tripartite meeting on 15 July 2014, the Commission requested further information to be submitted jointly by the United Kingdom and the BAA on 18 July 2014. Such information was submitted to the Commission on 8 September 2014. The BAA submitted additional information in response to the questions of the Commission on 15 September 2014. The information submitted was subsequently forwarded to the United Kingdom authorities on 17 October 2014, who responded on 12 November 2014, 14 November 2014 and 17 November 2014.
- (13) The Commission requested further information from the BAA on 10 July 2014 and 16 October 2014. The BAA provided such information on 6 November 2014 and 21 November 2014. The information was forwarded to the United Kingdom authorities on 2 December 2014 who responded on 18 December 2014.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. NOTION OF AGGREGATES

- (14) Aggregates are used in the construction sector. They can generally ⁽⁴⁾ be described as corresponding to granular or particulate material which because of its physical and chemically inert properties is suitable for use on its own or with the addition of cement, lime or bituminous material in construction as concrete ⁽⁵⁾, roadstone, asphalt or drainage courses ⁽⁶⁾, or for use as construction fill ⁽⁷⁾. Aggregate may be natural, manufactured or recycled ⁽⁸⁾. The Opening Decision describes in detail the notion of aggregates and aggregates use in recitals 8 to 13.
- (15) The definition of aggregates is intrinsically linked to the possible uses of certain granular or particulate quarried materials in construction sector, as explained above in recital 14, as this is what primarily differentiates the notion of aggregates from the notion of minerals.
- (16) Natural aggregates are aggregates that occur naturally and that can be used without industrial processing. These are sand, gravel and crushed rock ⁽⁹⁾ and are extracted from quarries and gravel pits or from sea dredging.
- (17) Recycled aggregates derive from reprocessing materials previously used in construction, including construction and demolition residues ⁽¹⁰⁾.
- (18) Manufactured aggregates are generally lightweight and high density aggregates manufactured for specialist purposes. They are produced after application of an industrial process (usually a thermal process). Examples are: blast furnace slag aggregate, expanded clay aggregate, expanded perlite aggregate, expanded polystyrene bead aggregate ⁽¹¹⁾.

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

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

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

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

⁽⁸⁾ European Standard BSEN 12620:2002.

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

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

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

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

2.2. BACKGROUND TO THE AGL AND ITS OBJECTIVE

- (20) Aggregate is a constrained natural resource, in terms of the sites at which it can be acceptably extracted ⁽¹⁵⁾. The quarrying of aggregate takes up land in the medium to long-term and causes environmental damage and pollution.
- (21) Following a series of actions aimed at tackling the environmental concerns of the quarrying of aggregates that are described in recitals 15 to 18 of the Opening Decision, the AGL was introduced in April 2002 with the aim of encouraging the more efficient use of aggregates in the construction industry by:
- Internalising in the price of aggregates some of the environmental costs of the extraction of aggregates, such as noise, dust, visual intrusion and biodiversity loss. In that sense, the AGL should encourage efficient extraction of aggregates and encourage economy of use and less waste at the construction site.
 - Encouraging a shift in demand away from deliberately extracted aggregates towards alternatives like:
 - recycled aggregates,
 - wastes and by-products from other processes, including the extraction of other minerals (clay and coal extraction wastes, glass and tyre wastes) ⁽¹⁶⁾.
- (22) In this connection, the UK authorities had explained on the occasion of the Opening Decision that aggregates for construction uses are a relatively low value product, especially compared with the total costs of building projects for which aggregates are an input. Aggregates can be extracted from the ground relatively easily. Therefore without additional price signals, such as the one given by the AGL, there is no particular incentive to use aggregates efficiently.
- (23) Also, without additional price signals, recycling of aggregates would not be economically viable. The UK authorities considered that incentivising the use of recycled aggregates, while not without its own environmental costs such as use of energy and creation of noise, is an important aspect of reducing the environmental costs associated with the extraction of materials from the ground (such as long-term biodiversity impacts). Indeed, the use of recycled materials does not require the disturbance of new land or the sea-bed.
- (24) In addition to encouraging the use of recycled aggregates as an alternative to newly-quarried material, the AGL's structure also seeks to reduce the extraction of sand, gravel and rock specifically for use as aggregates, by incentivising the use of other materials that would otherwise be discarded. By-products, spoil and waste of other extraction processes or of industrial processes are usually considered to be of lower quality and specification than materials specifically extracted and exploited for use as aggregates. They may have slightly different uses and

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

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

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

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

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

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

- (25) Initial projections suggested that the AGL would reduce demand for virgin aggregates by an average of 20 Mt/annum.
- (26) The UK authorities had indicated that given the aim of inducing a more efficient extraction and a more efficient use of virgin aggregates, 'the levy falls on those who undertake quarrying for the purposes of commercially exploiting aggregate' ⁽¹⁷⁾. In this connection, the UK authorities had explained that while quarrying of high-specification materials to be used in the construction sector also produces materials of lesser quality and hence price, it is not in practice possible to relieve these materials in a similar manner as by-products of industrial processes or other extraction activities. First, the proportion of high quality and low quality aggregates will vary from quarry to quarry because of geological factors, but is not an immutable figure for any given quarry as more efficient practices can help reduce the proportion of low quality aggregates. In addition, the term low quality aggregate is, to some extent, a subjective term. What one quarry operator would consider as low quality could be part of another's primary product range. Exempting low quality aggregates could thus lead to unequal treatment of operators and lead to tax avoidance or evasion. Extensive public consultation with the industry on this issue around the time of the introduction of the AGL did not yield a workable definition of how to distinguish between high quality materials — which should be taxed — and lower quality by-products of the process of extracting high value aggregates. The UK authorities had further noted that taxing low quality aggregates also reflects the desire to address the environmental costs of aggregate extraction, regardless of whether the extracted product is ultimately deemed to be of high or low quality.
- (27) Finally, the UK authorities had noted that the AGL is not conceived as a general tax on mineral extraction, but as a tax on the extraction of rock, sand and gravel used as aggregates in the construction sector and subject to commercial exploitation in the United Kingdom. The UK authorities have explained that while the extraction of other materials may have similar environmental impact, not all have suitable options for lessening the intensity of extraction through the use of alternative materials such as recycled materials and spoil. In addition, aggregates' extraction was the largest mineral extraction activity in the United Kingdom (in 2002, it accounted for around 70 %, by tonnage, of all mineral extraction) and therefore constituted the main source of environmental damage arising from mineral extraction across the United Kingdom as a whole. The scope of the tax was defined in order to achieve the greatest environmental benefit in the form of a reduction in the extraction of aggregates and in terms of the preservation of strategic resources, while at the same time not imposing a dead-weight tax burden on materials for which an alternative does not exist.

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

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

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

- (29) Following the Opening Decision, the UK authorities amended the Finance Act 2001 by suspending the exemptions for the materials as regards to which the Commission had expressed doubts as of 1 April 2014.
- (30) The UK authorities explained that in preparing the necessary legislation for the suspension, they concluded on the basis of comments received from industry that determining whether certain materials had been 'extracted for use as aggregates' would be impractical. Accordingly, they devised a new criterion, 'for construction purposes' which is consistent with the definitions used by the existing legislation. In order, however, to achieve the same result as envisaged by the Opening Decision with the application of the latter criterion, the suspension legislation additionally provides that: (i) clay (including ball clay, china clay and fireclay) and shale used to make ceramic construction products; and (ii) gypsum used to make plaster and plasterboard; are to be considered exempt processes. This is due to the fact that they could be included in material extracted 'for construction purposes', but they do not represent uses as aggregates of the respective materials.

2.4. STRUCTURE OF THE AGL AND EVENTS TRIGGERING THE TAX

- (31) Section 16(1) of the Finance Act 2001 states that 'a levy, to be known as aggregates levy, shall be charged in accordance with this Part on aggregate subjected to commercial exploitation'. Section 16(2) reads 'The charge to the levy shall arise whenever a quantity of taxable aggregate is subjected on or after the commencement date, to commercial exploitation in the United Kingdom'.
- (32) According to Section 17(1) 'aggregate' 'means (subject to Section 18 below) any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it'.
- (33) Section 18(1) provides that: 'In this Part references to aggregate: (a) include references to the spoil, waste, off-cuts and other by-products resulting from the application of any exempt process to any aggregate; (b) but do not include references to anything else resulting from the application of any such process to any aggregate'.
- (34) According to Section 18(2) exempt processes are:
- '(a) the cutting of any rock to produce stone with one or more flat surfaces;
 - (b) any process by which a relevant substance is extracted or otherwise separated (whether as part of the process of winning it from any land or otherwise) from any aggregate;
 - (c) any process for the production of lime or cement from limestone or from limestone and anything else'.
- (35) Section 18(3) lists the relevant substances as being (a) anhydrite; (b) ball clay; (c) barytes; (e) china clay; (f) feldspar; (g) fireclay; (i) fluorspar; (j) fuller's earth; (k) gems and semi-precious stones; (l) gypsum; (m) any metal or the ore of any metal; (n) muscovite; (o) perlite; (p) potash; (q) pumice; (r) rock phosphates; (s) sodium chloride; (t) talc; (u) vermiculite. Subsections (3)(d) and (h) of Section 18 were omitted retroactively as of 1 April 2002 by changes introduced by the Finance Act 2002.
- (36) Section 16(2) of the Finance Act 2001 read in conjunction with Section 19(1) and Section 19(2) determines that the AGL is triggered by any of the following four types of commercial exploitation within the United Kingdom that would occur first:
- (a) it is removed from its originating site, or any site registered under the name of a person who is the operator of the originating site ⁽¹⁸⁾, or any other site to which the quantity of aggregate had been removed for the purpose of having an exempt process applied to it on that site but at which no such process has been applied to it.
 - (b) it becomes subject to an agreement to supply it to any person ⁽¹⁹⁾;

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

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

- (c) it is used for construction purposes ⁽²⁰⁾; or
 - (d) it is mixed, otherwise than in permitted circumstances ⁽²¹⁾, with any material or substance other than water.
- (37) For the purpose of the AGL, the Finance Act 2001 distinguishes essentially between three types of originating sites:
- (a) the port or other landing site at which aggregate won from the United Kingdom seabed is first landed (Section 20(1)(a));
 - (b) the site where an exempt process took place (Section 20(1)(b)). This relates to situations where an exempt process has been applied, the exempt substance has been extracted and some aggregate is left over and exploited. The site where the extraction of the exempt substance took place becomes the originating site of the aggregate;
 - (c) the site where the aggregate is obtained from the ground (Section 20(1)(d)).
- (38) As a result of the concept of commercial exploitation, the AGL applies to both aggregates extracted in the United Kingdom and imported aggregates. Imported aggregates will be subjected to the AGL not when they are landed in the United Kingdom ⁽²²⁾ but when they are the subject matter of an agreement (and the aggregate is already located in the United Kingdom) or are used for constructions purposes (in the UK) or are mixed (in the United Kingdom) with any material or substance other than water, unless in permitted circumstances ⁽²³⁾.
- (39) Section 19(3) of the Finance Act 2001 contains further details on the concept of commercial exploitation. It provides in letter (e) that there is no commercial exploitation taking place when — without its being subjected to any process involving its being mixed with any other substance or material (apart from water) — it again becomes part of the land at the site from which it was won ⁽²⁴⁾.
- (40) Sections 21 and 22 define who is the operator of a site and whether it is the operator of a site or some other person who is responsible for exploitation (and therefore liable to account for the AGL) in a given situation.

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

- (41) Section 17(2) of the Finance Act 2001 provides that an aggregate is not a taxable aggregate in four cases:
- (a) if it is expressly exempted;
 - (b) if it has previously been used for construction purposes (whether before or after the commencement date);
 - (c) if it is, or derives from, any aggregate that has already been subjected to the AGL;
 - (d) if it is aggregate that was removed from its originating site before the commencement date.
- (42) An aggregate is regarded as being used for construction purposes when it is used as a material or support in the construction or improvement of any structure (including roads, paths, the way on which any railway is or is to be laid, embankments, buildings and bridges) or when it is mixed with anything as part of the process of producing mortar, concrete, tarmacadam, coated road stone or any similar construction material ⁽²⁵⁾.

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

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

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

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

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

⁽²⁵⁾ See Notice AGL 1.

- (43) Section 17(3) specifies that the aggregate is exempt from the AGL if:
- ‘(b) it consists wholly of aggregate won by being removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out: (i) in connection with the modification or erection of the building; and (ii) exclusively for the purpose of laying foundations or of laying any pipe or cable;
 - (c) it consists wholly of aggregate won: (i) by being removed from the bed of any river, canal or watercourse (whether natural or artificial) or of any channel in or approach to any port or harbour (whether natural or artificial); and (ii) in the course of the carrying out of any dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach;
 - (d) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any highway or proposed highway and in the course of excavations carried out: (i) for the purpose of improving or maintaining the highway or of constructing the proposed highway; and (ii) not for the purpose of extracting that aggregate;
 - (da) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any railway, tramway or monorail or proposed railway, tramway or monorail and in the course of excavations carried out: (i) for the purpose of improving or maintaining the railway, tramway or monorail or of constructing the proposed railway, tramway or monorail; and (ii) not for the purpose of extracting that aggregate;
 - (e) it consists wholly of the spoil, waste or other by-products, not including the overburden, resulting from the extraction or other separation from any quantity of aggregate of any china clay or ball clay; or
 - (f) it consists wholly of the spoil from any process by which: (i) coal, lignite, slate or shale; or (ii) a substance listed in Section 18(3) below; has been separated from other rock after being extracted or won with that other rock.’
- (44) Subsection (3)(da) of Section 17 was inserted by Section 22(3) of the Finance Act 2007, applies from 1 August 2007.
- (45) In addition, subsection (4) of Section 17 exempts aggregates consisting wholly or mainly of any one or more of the following, or is part of anything so consisting, namely:
- ‘(a) coal, lignite, slate or shale;
 - (c) the spoil or waste from, or other by-products of: (i) any industrial combustion process; or (ii) the smelting or refining of metal;
 - (d) the drill-cuttings resulting from any operations carried out in accordance with a licence granted under the Petroleum Act 1998 or the Petroleum (Production) Act (Northern Ireland) 1964;
 - (e) anything resulting from works carried out in exercise of powers which are required to be exercised in accordance with, or are conferred by, provision made by or under the New Roads and Street Works Act 1991, the Roads (Northern Ireland) Order 1993 or the Street Works (Northern Ireland) Order 1995;
 - (f) clay, soil or vegetable or other organic matter.’
- (46) According to the Notice AGL 1, ‘wholly’ means that 100 % of the material in question is one of the exempt materials. ‘Mainly’ means that more than 50 % of the material is one of the exempt materials. Artificially mixing aggregate with a larger amount of exempt material will not produce an exempt mixture but will mean that the AGL is due on the aggregate at the time of mixing.

- (47) Section 30(1) of the Finance Act 2001 provides for regulations to be made establishing a person's right to a credit of tax if:
- (a) the aggregate that has been subject to the AGL is exported from the United Kingdom in the form of aggregate;
 - (b) an exempt process is applied to the aggregate that has been subject to the AGL;
 - (c) the aggregate that has been subject to the AGL is used in a prescribed industrial or agricultural process;
 - (d) the aggregate that has been subject to the AGL is disposed of in such manner not constituting its use for construction purposes as may be prescribed ⁽²⁶⁾; or
 - (e) the whole or any part of a debt due to a person responsible for subjecting the aggregate to commercial exploitation is written off in his accounts as a bad debt.
- (48) Section 30(1)(b) of the Finance Act 2001 provides for tax relief in case an exempt process within the meaning of Section 18(2)(a), (b) and (c) of the Financial Act 2001 has been applied to the material when the material has already been subject to the AGL. It thus mirrors the exemptions provided for in Section 18(2).
- (49) The industrial and agricultural processes that can benefit from tax relief under Section 30(1)(c) are listed in the Schedule 'Industrial and Agricultural Processes' to Regulation 13 of the Aggregates Levy (General) Regulations 2002. Notice AGL 2 ⁽²⁷⁾ describes in more detail the type of processes that are concerned. They are the following:

Industrial processes

- Code 001: Iron, steel and non-ferrous metal manufacture and smelting processing including foundry processes, investment casting, sinter plants and wire drawing
- Code 002: Alloying
- Code 003: Emission abatement for air, land and water
- Code 004: Drinking water, air and oil filtration and purification
- Code 005: Sewage treatment
- Code 006: Production of energy
- Code 007: Ceramic processes
- Code 008: Refractory processes
- Code 009: Manufacture of glass and glass products
- Code 010: Manufacture of fibre glass
- Code 011: Man-made fibres
- Code 012: Production and processing of food and drink
- Code 013: Manufacture of plastics, rubber and PVC

⁽²⁶⁾ The Aggregates Levy (General) Regulations 2002 (SI 2002/761) prescribe in which cases the disposal of aggregates may lead to a tax relief. According to Regulation 13a a person is entitled to a tax credit in respect of any AGL accounted for where the taxable aggregate in question is disposed of (by dumping or otherwise) in any of the following ways:

- '(i) it is returned without further processing to its originating site or any site which is not its originating site but is registered under the same name;
- (ii) it is disposed of to landfill;
- (iii) it is gravel or sand and is used for beach restoration purposes at a site which is not its originating site.'

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

- Code 014: Chemical manufacturing for example soda ash, sea water magnesia, alumina, silica
- Code 015: Manufacture of precipitated calcium carbonate
- Code 016: Manufacture of pharmaceuticals, bleaches, toiletries and detergents
- Code 017: Aerating processes
- Code 018: Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media
- Code 019: Manufacture of pigments, varnishes and inks
- Code 020: Production of growing media and line markings for sports pitches and other leisure facilities
- Code 021: Incineration
- Code 022: Manufacture of desiccant
- Code 023: Manufacture of carpet backing, underlay and foam
- Code 024: Resin processes
- Code 025: Manufacture of lubricant additives
- Code 026: Leather tanning
- Code 027: Paper manufacture
- Code 028: Production of art materials
- Code 029: Production of play sand, e.g. for children's sandpits
- Code 030: Clay pigeon manufacture
- Code 031: Abrasive processes: specialist sandblasting, iron free grinding (pebble mills) and sandpaper manufacture
- Code 032: Use as propping agent in oil exploration (or production), for example, fracture sands and drilling fluids
- Code 033: Flue gas desulphurisation and flue gas scrubbing
- Code 034: Manufacture of mine suppressant
- Code 035: Manufacture of fire extinguishers
- Code 036: Manufacture of materials used for fireproofing
- Code 037: Acid neutralisation
- Code 038: Manufacture of friction materials, for example automotive parts

Agricultural processes

- Code 039: Manufacture of additives to soil
- Code 040: Manufacture of animal feeds
- Code 041: Production of animal bedding material
- Code 042: Production of fertiliser
- Code 043: Manufacture of pesticides and herbicides

- Code 044: Production of growing media, including compost, for agricultural and horticultural use only
- Code 045: Soil treatment, including mineral enrichment and reduction of acidity.

2.6. RATE

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

2.7. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

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

3. COMMENTS FROM INTERESTED PARTIES

- (52) As mentioned in recital 10 above, the Commission received extensive comments from interested parties following the publication of the Opening Decision.
- (53) The comments from interested parties concerned: (i) the Opening Decision itself; (ii) the logic of the AGL; (iii) the exemptions which had previously been found not to constitute State aid already in the Opening Decision; and (iv) the exemptions under investigation.
- (54) For ease of reference, this section will outline the comments received in relation to the Opening Decision. The remaining categories of comments received are presented in the relevant sections of this decision.

3.1. COMMENTS REGARDING THE CONTENT OF THE OPENING DECISION

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

- (55) Mr Bird has provided the Commission with his contribution to the UK authorities' public consultation on the approach to suspending the exemptions from the AGL in respect of which the Commission expressed doubts in the Opening Decision.
- (56) Mr Bird further claims there are a number of inaccuracies in the Opening Decision, such as:
- (i) various quarrying sites have been identified showing that there is no risk the United Kingdom will run out of aggregates;

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

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

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

- (ii) slag aggregate, crushed slate aggregate and the silica sand from china clay production have always been a major source of aggregate;
 - (iii) exempted aggregates and recycled aggregates could not replace quality aggregates required in construction, which are extracted together with lesser quality aggregates (1 tonne good quality with 1 tonne of lower quality aggregates). New waste heaps have been created due to this material;
 - (iv) a series of abuses of the AGL are taking place;
 - (v) quarries have opened simply to produce aggregates that are exempt ⁽³¹⁾. Mr Bird claims there are slate quarries that produce simply slate rock and not any roofing slate. Mr Bird provides as example the names of two quarries;
 - (vi) shale aggregates quarries are producing and selling untaxed aggregates. One million tonnes of shale were used for constructing a road near Edinburgh;
 - (vii) the Opening Decision allegedly fails to recognise what aggregate is: smaller sizes of rocks, crushed or uncrushed, including natural sand and gravel. Armour rock for sea defences, stone for river protection, walling stone, fireplace stone, ditching stone, cobbles for roads and hearting stone for marine breakwaters are all taxed as aggregates if they are not geologically slate or shale;
 - (viii) the AGL is nonsensical, as sorted walling stone that is not cut is taxed;
 - (ix) only slate from north Wales may be used as roofing slate. Slate from other slate areas in the United Kingdom is not used as roofing slate, but as walling stone or paving stone. Sandstone, walling and paving stone is taxed. Shale is not used for roofing. Slate and shale quarries have been opened because the materials are exempt from the levy ⁽³²⁾;
 - (x) allegedly, the AGL has in fact had a negative environmental impact as recycled aggregate operations are environmentally damaging also due to the additional transportation distances of exempted materials;
 - (xi) silica sand from china clay workings has always been a source of aggregate. There is little sand in Cornwall, thus the sand from china clay quarries does not reduce extraction of natural sand. It is actually an important source of sand in the area. This sand distorts the market for crushed rock fines which are a by-product of local hard rock aggregate quarries whose prime objective is to produce aggregate chippings for concrete, asphalt and construction work;
 - (xii) china clay by-products are exempted while limestone by-products are taxed even when the limestone is used for agriculture or for industrial processing. They produce 20 % waste by-products;
 - (xiii) allegedly, a number of old worked-out china clay quarries have been reopened solely for the exploitation of the exempted aggregates as the kaolin had been worked out. On the other hand, someone wanting to exploit an old granite tip would have to pay the tax;
 - (xiv) the by-products of the refining and smelting of metal are indeed not the same as natural aggregates, but they were never waste and have a very good market. Mr Bird claims the AGL should apply to by-products that are not waste;
 - (xv) Mr Bird considers that it is impossible to replace quality aggregates with aggregates from most slate, shale or china clay operations.
- (57) Mr Bird supplemented this information with a submission on 10 February 2014 regarding the uses of slag aggregate, a by-product of the steel manufacturing industry. The submission aims at showing that slag is not a waste, but a first class aggregate that can be used as an alternative to cement.

⁽³¹⁾ Mr Bird did not provide any example or evidence in this regard.

⁽³²⁾ See footnote 31.

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

- (58) The BAA considers that the concept of aggregate should not be used to determine whether or not the AGL results in State aid as there is no clear definition of aggregate which corresponds to the scope of the tax. The Commission defines aggregates in the Opening Decision as 'rock, gravel and sand extracted for the purpose of providing bulk in construction'. However, allegedly, the AGL taxes many materials that are used for different purposes than 'providing bulk in construction', such as uncut building stone used to construct walls, armour rock, rail track ballast, high polished stone value (PSV) stone for skid-resistant asphalt, etc. The BAA mentions that the British competition authorities have assessed the aggregates market on a number of occasions and generally concluded that specialist materials such as rail track ballast and high PSV stone are in different markets from each other and from 'construction aggregate' because they are used for different applications and there is neither demand-side substitution nor supply-side substitution ⁽³³⁾.
- (59) The BAA maintains that three of the exemptions on which the Commission concluded positively in the Opening Decision are selective, i.e. the exemption for recycled building waste, aggregate excavated in the course of construction of roads, railways, buildings, etc., and industrial waste/by-product. The BAA claims that from the perspective of the 'shift in demand' objective these three categories of exempted materials are in the same position as the waste/by-product of, inter alia, china clay, slate and coal as regards which the Commission expressed doubts in the Opening Decision.

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

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

4. COMMENTS FROM THE UNITED KINGDOM

- (61) The UK authorities provided extensive comments to the doubts raised in the Opening Decision and additional information as well as compatibility grounds for the exemptions under investigation.
- (62) No comments were received from the UK authorities regarding the content of the Opening Decision itself. For ease of reference, the comments and information received are presented in the relevant sections of this decision.

5. ASSESSMENT OF THE MEASURE

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

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

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

- (64) The BAA, as mentioned above in recital 59, maintains that the exemptions for recycled building waste, aggregate excavated in the course of construction of roads, railways, buildings etc., and industrial waste/by-product are not within the logic of the AGL from the perspective of the 'shift in demand' objective.
- (65) The Commission concluded in the Opening Decision that recycled aggregates and freshly extracted aggregates are not in a comparable situation in the light of the objective of the AGL and the distinction made between recycled and freshly extracted aggregates results from the nature and logic of the AGL. It is clear that using recycled aggregate, even though the recycling process is less environmentally friendly than the excavation of fresh aggregate process, prevents the excavation of the same quantity of fresh aggregate. Moreover, incentivising the use of materials that are the unavoidable result of certain activities that would take place in any event clearly helps to reduce build-up of waste and prevents the excavation of the same quantity of fresh aggregate.
- (66) Therefore, these three exemptions contribute to achieving a greater environmental benefit by preventing additional quarrying.
- (67) Several interested parties mentioned in this regard that there have been cases of additional excavation solely with the purpose of obtaining aggregates for sale. However, these are cases of clear abuses that should be reported and dealt with under the national law of the United Kingdom and do not constitute a matter for State aid law.
- (68) The reasons underlying the doubts expressed by the Commission in the Opening Decision as regards the waste/by-product of, *inter alia*, china clay, slate and coal do not affect the assessment of the three exemptions mentioned above, primarily the doubts raised by the Commission do not preclude the final results of the formal investigation procedure and the materials subject to the exemptions are different and result in different circumstances.
- (69) Mr Bird points to the use as aggregates of a series of materials exempted from the AGL which proves that the exemptions from the AGL help to achieve its environmental purpose as they successfully replace freshly quarried aggregates.
- (70) The data provided by the UK authorities, as we will show below in recital 143 shows that the number of quarries producing exempt materials has not increased following the introduction of the AGL, but has, in fact, decreased.
- (71) One of the quarries that Mr Bird has listed as allegedly producing only slate rock and not roofing slate is in fact, according to its own website, producing roofing slate. As regards the other quarry, the UK authorities have committed to investigate what material it actually produces and will commence enforcement under the national legislation depending on the results of the investigation.
- (72) Both the UK authorities and the BAA maintained that they have no information that former worked-out china clay quarries had been recently reopened. The UK authorities are not aware of any permission granted in this respect and the two china clay and ball clay producers are not aware of such openings.

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

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

- (74) According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also state measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect ⁽³⁴⁾.
- (75) As regards the criterion of the selectivity of the advantage, it is necessary to consider whether, under a particular statutory scheme or specific tax system, a state measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU in comparison with other undertakings in a comparable legal and factual situation in the light of the objective pursued by the scheme or tax system concerned ⁽³⁵⁾.
- (76) However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the tax system of which it is part does not satisfy that condition of selectivity ⁽³⁶⁾. A Member State can thus show that a measure results directly from the basic or guiding principles of its tax system.
- (77) For the purpose of assessing the selective nature of the advantage conferred by the measure in question, it is important to determine what constitutes the reference framework, since the existence of an advantage may be established only when compared with this reference framework ⁽³⁷⁾.
- (78) In summary, selectivity can be assessed following a three-step approach:
- (i) determination of the reference system (or normal taxation system) where the normal taxation principle of the AGL and the (environmental) objective are identified;
 - (ii) the establishment whether the tax differentiation constitutes a derogation from the normal taxation regime inasmuch as it differentiates between economic operators who are in a comparable legal and factual situation; and
 - (iii) in case of comparability of legal and factual situation the tax differentiation does not constitute a derogation if it can be justified by the objective of the tax system. In absence of such justification the measure is to be considered de facto selective. When justifying the tax differentiation only the intrinsic mechanisms of the tax system necessary for the achievement of the objective pursued can be invoked. Objectives unrelated to the tax system cannot be considered in this regard.
- (79) As the General Court has confirmed ⁽³⁸⁾, the reference framework on the basis of which normal taxation and the existence of any selective advantages are to be determined consists of the AGL itself since it established a specific tax system applicable to the aggregates sector in the United Kingdom. It is thus by reference to the normal taxation and objective of the AGL that it is necessary to examine whether tax differentiations are justified.
- (80) The Commission has examined the Finance Act 2001 as amended retroactively by the Finance Act 2002. As the AGL is an on-going scheme, the Commission has also examined the exemption laid down in Section 17(3) (da), which was introduced by the Finance Act 2007.

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

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

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

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

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

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

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

- (82) The AGL was introduced on 1 April 2002. What constitutes commercial exploitation is defined in Section 19. Four types of commercial exploitation are envisaged: (a) the removal of aggregate from its originating site; (b) the conclusion of an agreement to supply; (c) the use for construction purposes; or (d) the mixing with any material or substance other than water.
- (83) As to the concept of aggregates, the UK authorities have confirmed on many occasions that the AGL is not conceived as a levy on all extracted minerals or even on all rock, gravel or sand, but only on rock, gravel and sand extracted for the purpose of providing bulk in construction.
- (84) This is further confirmed by the preparatory works of the AGL ⁽³⁹⁾. Those works confirm that from the outset, the AGL was intended to be a tax on aggregates and not on any particular extracted mineral. This has also been recognised by the General Court ⁽⁴⁰⁾.
- (85) As indicated in recital 14 above, aggregates can generally be described as corresponding to granular or particulate materials which because of their physical and chemically inert properties are suitable for use on their own or with the addition of cement, lime or bituminous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill. Natural aggregates are sand, rock and gravel. However, materials that are used as aggregates can also serve other purposes. In other terms, for the purposes of the AGL whether a material has to be considered as an aggregate or not will depend on its use rather than its geological composition.
- (86) In the course of drafting the AGL legislation, the UK authorities realised that a use-based definition of the scope of the tax would prove problematic, as the intended use for the product could change after the tax point had passed ⁽⁴¹⁾. In order to solve that difficulty, the UK authorities opted for another technique. Instead of using a precise definition of the term 'aggregate' or general taxation criteria, the Finance Act 2001 starts by subjecting sand, gravel or rock to the tax but then narrows down the application and scope of the tax through exclusions, exemptions and tax reliefs of rock, sand or gravel that have been used for certain purposes or have been subjected to certain processes.
- (87) The objective assigned to the AGL is to ensure that the environmental impact of aggregates extraction (in particular damage to biodiversity and to visual amenity) is more fully reflected in prices so as to induce a more efficient extraction and use of aggregates. It also aims at encouraging a shift in demand away from freshly extracted aggregates towards alternative aggregates such as recycled aggregates and aggregates which are the by-products of or waste from certain extraction or industrial processes. The shift in demand on its turn will reduce the need for freshly extracted aggregates and will thus limit the damage to the environment associated with the extraction activity.
- (88) The Commission considered in the Opening Decision that it was necessary to determine the objective assigned to the tax system of the AGL without referring to the terminology of virgin or primary aggregates, but by reference to its content. The terminology is described in detail in recitals 64 and 65 of the Opening Decision.
- (89) Irrespective of the terminology used, the UK authorities oppose aggregates that were (freshly) extracted for their use as aggregates to various materials that were either not freshly extracted as aggregates or that were inevitably obtained as a result of other activities that were not aimed at the extraction of aggregates, but which nonetheless could serve as alternatives to freshly and specifically extracted aggregates.
- (90) Taking into account the explanations provided by the UK authorities the Commission concluded in the Opening Decision that the normal taxation principle of the AGL is the taxation of rock, gravel and sand (freshly) extracted for being used as aggregates and subjected to commercial exploitation within the United Kingdom on or after 1 April 2002.

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

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

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

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

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

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

- (93) The BAA reiterated its statements from previous submissions that the AGL is inherently illogical. The BAA claims that there is no clear definition for aggregates that can explain the scope of the AGL. The BAA maintains that, the AGL taxes many materials that are outside the scope of the definition laid down in the Opening Decision i.e. materials that are used for different purposes than 'providing bulk in construction' or use in concrete, roadstone, asphalt, drainage courses or as construction fill. They claim that, armour rock for sea defences, which is taxed, is not used to add bulk in construction and is much larger and heavier than aggregates that are used for concrete or the other uses listed. In addition, uncut building stone is taxed by the AGL while it is used to construct walls of buildings and traditional hedges (i.e. walls separating fields) rather than any of the uses listed. The BAA argues that it cannot be claimed that these materials are 'aggregate' and that roofing slate, cut building stone or clay for the manufacturing of bricks is not 'aggregate'. All the materials are rock extracted from the ground, but used for different purposes and are not interchangeable. Furthermore, there would be, supposedly, no environmental basis to label some of these materials as 'aggregate' and others not.
- (94) The BAA claims that the fact that the exemptions are based on the geology of the material is problematic as the geological terms of clay, shale and slate cover a very wide geological range of rocks that are extracted from quarries that could not produce roofing slate tiles or ceramic products. This material however still qualifies as exempt clay, shale and slate from a geological perspective. The BAA provides some statements from Dr Rachel Hardie, a specialist geologist, as regards the poor choice of geological terms for differentiating rocks. Moreover, the exemptions for material mainly consisting of certain geological groups add even more difficulties. The BAA has provided in this respect a report prepared in 2003 by the British Geological Society for the United Kingdom tax authorities to assist tax officers with the application of the exemptions for slate, shale and clay in a geologically correct manner (the 'Report'). The Report seeks to define shale, slate and clay, in terms of their characteristics and geological origin so as to assist the United Kingdom tax authorities. However it also mentions that 'the original choice of these terms for the purpose of the Act is believed to have been based on their use as economic mineral commodities rather than geological entities'. It also provides that '[c]lay, shale, mudstone and slate occur extensively in the United Kingdom', with shale often being 'interbedded with sandstones'.
- (95) The BAA claims that the UK authorities have treated shale and mudstone as synonyms and that consequently the entire family of rocks has been treated as exempt. Furthermore, the BAA argues that the definitions for the three materials determined by the report are very restrictive and that other materials could still have been categorised as shale, slate or clay. For example slate rock with the required 'slaty cleavage' to produce roofing tiles is relatively rare and rocks exhibiting a weak slaty cleavage that would be unsuitable for cleaving may be much more extensive, but still be classified as slate. The BAA further argues, partially quoting from the report, that slate is also extracted for decorative architectural uses, i.e. dimension stone, wall cladding, paving, sills, fireplaces, table-tops and ornaments for home and garden, for which a slaty cleavage would be less important than cutting and polishing. The BAA presents the example of a slate quarry that produces slate that is different from roofing slate and in regard to which it is, allegedly, unclear whether the material should be classified as slate at all.
- (96) The BAA argues that, in their experience, an expert geologist's opinion is commonly sought to ascertain which rock is present at a quarry for the purposes of the AGL and whether an exemption is available for its extraction.

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

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

- (98) The BAA argues that when the UK authorities suspended the exemptions from the AGL regarding which the Commission raised doubts in the Opening Decision, those authorities have, in fact, introduced two new exemptions, i.e. for clay and shale used in ceramic construction products and gypsum used in plaster and plasterboard. They consider that these materials cannot be considered to be in a different situation from materials taxed under the AGL in light of its environmental logic. The BAA maintains that, these materials are in the same situation as rock, sand and gravel as they have been extracted for construction purposes. They claim that these additional exemptions constitute State aid that could not be found by the Commission to be compatible aid as the relevant conditions are not met.
- (99) The BAA maintains that the extraction of clay and shale used for the production of ceramic construction products could be reduced by using concrete construction products that can be produced with quarry waste/by-product (which is often taxed).
- (100) The BAA claims that it does not matter that clay undergoes a chemical change when used in the manufacture of bricks and other ceramic products used in construction as this is irrelevant from an environmental perspective.

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

- (101) Cloburn Quarry maintains that it extracts granite and greywacke. The latter is used for polished stone value anti-skid aggregates with a PSV in excess of 70. As there is no exemption for by-products for such material, large stockpiles of greywacke dust are accumulating and will become a major problem in time.
- (102) Cloburn Quarry maintains that, sales volumes of the quarry have recently decreased from 1,3 million tonnes in 2007/2008 to 0,5 million tonnes. This is allegedly due, less to the recession and more to the exempt sales from competing quarries.
- (103) According to Cloburn Quarry, the AGL diminishes the chances of the quarry competing with imported aggregates, as their by-products are sold without tax somewhere else, and, externally, with quarries that do not have to pay a similar levy.
- (104) Cloburn Quarry maintains that the AGL has led to a depressed market, i.e. low price for aggregates, and exempted quarries can transport their materials farther.
- (105) According to Cloburn Quarry, in 2013, 50 000 tonnes of aggregates sales were lost due to the exempted quarries. There is a particular problem with shale deposits that are being used on large construction sites, especially along the Glasgow-Edinburgh corridor. Around 1 million tonnes of shale was used for roads construction. This has affected competition as other quarries could not sell their low-value by-products. Moreover, the quarry's bright red aggregates compete with the plum red decorative slate which is exempted.
- (106) The quarry submits that it has faced competition and lost tenders for projects to quarries it suspects of benefiting from an exemption from the AGL. According to the quarry, one of the contracts was lost to a quarry which received planning consent to work an exempt shale deposit for aggregates' extraction. According to the quarry, at least 800 000 tonnes of shale were available that could have been forward-sold to the main contractor.
- (107) The quarry also submitted a series of general comments regarding the lack of environmental scope of the AGL.

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

- (108) Blinkbonny Quarry reports that it has been facing competition from another quarry that, possibly, sells exempt material included in ready mix concrete and would therefore be able to offer lower prices. It considers that, had it not been for the exemption, the competing quarry would not have opened and would not have been able to compete on the market. The Quarry alleges that the exemption enables their competitor to transport its material for longer distances which creates environmental damage.
- (109) Blinkbonny Quarry further provided a series of comments in response to the Opening Decision. It claims that the measure favours those with exemptions by allowing them to sell products onto an open market without the same costs as those who do not benefit from this advantage.
- (110) Blinkbonny Quarry considers that the AGL has failed in its environmental objective as it has resulted in the creation of a cheaper material which is transported further and which encourages the quarrying of exempt aggregate for the sake of producing cheaper materials which are not by-products or waste. Moreover, the Quarry claims that exempt shale and slate are being sold as aggregates for construction purposes and, due to the exemption, more shale and slate are being extracted for use as aggregates.

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

- (111) Kinegar Quarries claims that all quarries produce lower grade aggregates. In its view, it makes no difference whether the product is slate that is exported all over the world or the everyday aggregates used within 15 miles of the quarry. Kinegar Quarries maintains that as aggregates are secondary products they can be used in a variety of ways and have always been cheap. Kinegar Quarries further considers that the cost of aggregates is low because they are a by-product of a higher grade product, and in order to maintain a balance of stock, will be priced according to supply and demand. Nevertheless, it maintains that aggregates always brought in some revenue until the AGL was introduced. Thereafter, secondary aggregates were required to compete with aggregates benefiting from the exemption and in certain circumstances they could not. However, production of secondary aggregates has not diminished as there is demand for the higher quality product. They just cannot be sold to the same extent. This, allegedly, leads to increased stockpiles of secondary aggregates. Moreover, Kinegar Quarries claims that there are no environmental benefits due to the additional transportation of aggregates.
- (112) Kinegar Quarries claim that the United Kingdom Government had sought to ensure that non-aggregate producers can sell their by-products as levy exempt aggregates minimising their stocks of by-products. They consider that this goal has been achieved by the exemptions granted to non-aggregate producers (and a growing number of aggregate producers) for products which should in fact be called aggregates, because they are sold for the same purpose as material from an aggregate producer. However, the stockpiles of by-products have moved from non-aggregate producers to aggregate producers who pay levy.
- (113) Kinegar Quarries mention that following the introduction of the AGL their sales of secondary aggregates dropped from over 50 000 tonnes in 2007 to 9 000 tonnes in 2013 and this could not be attributed entirely to economic recession. It maintains that it is no longer able to compete with exempted aggregates as its quotations are GBP 1,5-GBP 2,0 higher than those of its competitors.

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

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

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

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

- (116) The Mineral Products Association submits that the ability of some operators to extract exempt materials such as shale and slate for the purpose of supplying aggregates markets is contrary to the original principles of the design of the AGL. The Association considers that extracted materials which are used for aggregates purposes should be subject to the AGL and that the exemptions should be limited to non-aggregate uses of the materials.
- (117) The Association submits that materials which arise as a result of individual combustion processes or smelting and refining of metal are genuine by-products of these processes and should be exempted as they meet the underlying objective of the AGL to encourage the use of recycled material and resource efficiency. By comparison, exemptions for shale, slate and other extracted materials lead to local market distortions as they lead to the substitution of taxed materials by untaxed materials.

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

- (118) The BAA claims that the environmental objective of the AGL is to shift demand in favour of waste/by-product material as opposed to the implementation of the 'polluter pays principle', as the Commissions allegedly states in the Opening Decision. This suggested primary objective, of polluter pays principle, if in fact applicable, would entail a selective approach to materials (to the 'aggregates sector' but not to other mineral-extraction activity), which inevitably results in State aid. Rather, the environmental objective of the AGL is intended to promote the use of aggregates which are by-products of waste from certain processes or of recycled aggregates, thereby reducing the use of quarried aggregates (shift in demand logic).
- (119) The BAA submits that the effect of a would be 'shift in demand' logic of the tax would mean, in practice, that the AGL would be limited to rock, sand or gravel used to add bulk to construction and, that in view of this objective, only by-products or waste that could replace extracted minerals should benefit from the exemption. However, BAA points out that this limitation is not the guiding principle of AGL taxation which allows for materials that cannot be replaced to be taxed.
- (120) The BAA considers that even if the exemptions under investigation were removed, the scope of AGL would be not consistent with its environmental logic, i.e. the 'shift in demand' logic. According to BAA, the removal of exemptions for by-product/waste materials would make the AGL less aligned with its environmental objective. By contrast, they claim that the removal of exemptions for material extracted for 'use as aggregate', such as slate and shale, would be in line with the environmental objective of the AGL.
- (121) The BAA considers that the fact that the scope of the AGL does not correspond to the environmental objective of 'shift in demand' is supported by the fact that the by-product/waste of lime or cut building stone and materials such as rail track ballast and high PSV stone, for which there is no substitute, are taxed.
- (122) The BAA considers that the scope of the AGL is too far removed from its environmental logic. This would be due to the fact that some of the material that is not-taxed could be replaced with by-product or waste. They provide as example clay used for bricks and ball clay used for tiles.

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

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

- (124) The BAA claims that there is evidence that the availability of exemptions for the by-product/waste of china clay quarries has encouraged the extraction of more material than required, purely to benefit from the exemptions for the alleged by-products i.e. high quality granite ⁽⁴²⁾. The BAA further maintains that there is also evidence that some china clay quarry operators concentrate their efforts on the extraction of these alleged by-products rather than the original china clay material ⁽⁴³⁾. The BAA refers to an e-mail from a quarry operator to the BAA ⁽⁴⁴⁾ alleging that since the introduction of the AGL they have experienced severe difficulty competing with aggregates from china clay quarries as they the aggregate they produce are cheaper and have taken over the market. As per the e-mail, the aggregates sold by china clay quarries are high grade stone and not a secondary product or a by-product. The production of the respective quarry operator has halved and they have not achieved a profit in over nine years. Their waste materials cannot be sold.
- (125) The BAA maintains that the way the AGL is applied in the context of lime extraction is problematic. The extraction of lime itself is not taxed, but its waste or by-products are taxed. Moreover, the AGL applies to fines, by-product or waste of certain quarries, which can be used in the manufacturing of concrete building blocks that could be used to replace bricks manufacture with untaxed clay.

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

- (126) QPANI maintains that it represents approximately 95 % of companies involved in the supply of quarry products to the construction industry in Northern Ireland. QPANI considers that the AGL had a flawed design from the beginning as materials should have been taxed based on their use, rather than on their geology.
- (127) QPANI believes that there should not be an aggregates levy exemption for shale and slate if used for aggregates purposes. Slate and shale are used as aggregates in the United Kingdom construction markets and can have significant local market impact where they are supplied into aggregates markets. This is particularly true in Northern Ireland. While the supply of slate and shale for aggregates purposes can be materials which are, in effect, the by-products of extraction for non-aggregates purposes (e.g. the extraction of slate for the production of roofing slate), these materials are also extracted primarily for supply into aggregates markets.
- (128) QPANI also questions the exemption for materials which consist 'mainly' of coal, lignite, slate or shale. According to QPANI it would be more simple and consistent if a simple distinction were made between materials used for aggregates purposes, on the one hand, and those used for non-aggregates purposes, on the other. Materials used for aggregates purposes should be subject to the AGL and materials used for non-aggregates purposes should not be subject to it.
- (129) QPANI maintains that the AGL has led to environmental damage due to the possibility to transport farther exempt materials.
- (130) QPANI submits that in Northern Ireland there have been hundreds of thousands of tonnes of shale imported from Donegal, in Ireland. Shale from Ireland is sold in construction markets across the whole of Northern Ireland. Construction projects along the border with the Ireland have used exempt aggregates from Ireland classified as shale.
- (131) QPANI further makes reference to stone that is described as shale and, thus, unduly benefits from the exemption.

(k) Comments from the UK authorities

- (132) The UK authorities maintain their position that the exemptions and reliefs under investigation do not give rise to State aid. In particular, they submit that the distinctions made by the levy are justified by the nature or general scheme of the tax system and therefore do not satisfy the condition of selectivity.
- (133) The UK authorities acknowledge the description of aggregates as included in recital 8 of the Opening Decision. Furthermore, they agree with the logic of the AGL as described in recital 67 of the Opening Decision.

⁽⁴²⁾ No such evidence has been submitted to the Commission.

⁽⁴³⁾ See footnote 42.

⁽⁴⁴⁾ A copy of the e-mail has been submitted to the Commission.

- (134) The UK authorities mention that the General Court observed in paragraph 55 of its judgment of 7 March 2012: 'the normal taxation principle underlying the aggregates levy is based solely on the notion of the commercial exploitation in the United Kingdom of a material that is taxable as an "aggregate"'. The UK authorities maintain that since the AGL is not intended to tax rock, sand, or gravel exploited for use in industrial or agricultural processes, any levy paid on materials used for such non-aggregate purposes is recoverable as a tax credit. Following the same logic, rock, sand or gravel which is extracted, but not commercially exploited (as defined in the legislation) falls outside the scope of the levy.
- (135) The United Kingdom, quoting the General Court's judgment, explained that the AGL's objective: '... essentially entails the promotion in the construction industry of the use of aggregates which are the by-products of or waste from certain processes (also known as "secondary" aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as "primary" aggregates), which are non-renewable natural resources, and thereby limiting the damage to the environment associated with that process of extraction ("the aim of shifting demand" or "the environmental objective of the AGL").'
- (136) The UK authorities maintain that the logic of the tax was set out clearly from the beginning in the Regulatory Impact Assessment: 'The main objective of the Government's chosen option would be to reduce the environmental costs of quarrying that are imposed on individuals and firms in society more generally, and to encourage recycling.'
- (137) The UK authorities claim that the AGL seeks to achieve its environmental objective in two distinct, but interconnected ways. First, the imposition of the levy helps to internalise some of the damage caused by the extraction and transportation of aggregate. The levy thus leads to a decrease in demand for freshly extracted aggregate as costs increase. Secondly, exemptions and reliefs are granted for waste and recycled materials in order to encourage a shift in demand from freshly extracted aggregate to such materials, while not discouraging the production of non-aggregate material. For the achievement of the environmental objective of the AGL, it was designed to ensure that there are economically attractive alternatives to freshly extracted, taxable aggregate.
- (138) The UK authorities maintain that, through its exemptions, the AGL aims to encourage the use of recycled or by-product material (which arises during a process not intended to produce aggregate), so as to reduce the demand for virgin aggregate and thereby reduce the environmental damage associated with aggregates quarrying. The derogations from the scope of the tax may fall into two categories: recycled aggregate and unavoidable waste by-products. The latter can be defined as material which is commercially exploited in the United Kingdom and used as construction aggregate, but which arises as an unavoidable consequence of a process which is not carried out deliberately to produce aggregate. At their turn such products fall into two categories: (a) those materials which arise unavoidably from the extraction of a non-aggregate mineral; or (b) those which arise unavoidably from a digging or dredging process not intended to extract any material for commercial exploitation.
- (139) The UK authorities maintain that those materials which are extracted for commercial exploitation as aggregate, or which arise as by-products from a process which is intended to produce aggregate for commercial exploitation, are in a different factual situation to the exempted materials.
- (140) The UK authorities maintain that, in accordance with the derogations described above, the exemptions from the levy distinguish between waste materials that arise as the by-product of the extraction of a non-aggregate mineral, which are exempt, and waste materials that are the by-product of the extraction of aggregate (such as waste from limestone), which remain subject to the tax. The distinction, in their view, stems from the objective of discouraging the extraction of limestone for aggregate whilst not discouraging the production of non-aggregate material. The AGL discourages the extraction of aggregate from natural rock while encouraging the use of alternative supplies of aggregate.
- (141) The UK authorities submit that the exemptions from the tax are crucial for achieving the environmental purpose of the AGL as they reduce the damage created by fresh quarrying. They maintain it is the price difference between exempt and taxed materials which shifts demand from fresh quarrying. The exemptions are consistent with the environmental objective of the AGL in so far as the use of exempt materials ultimately reduces demand for the extraction of fresh aggregate and the environmental harm associated with it.

- (142) The UK authorities maintain that there are many examples of exempted materials replacing premium quality aggregates. For example, the construction of the 2012 Olympic Park required over a million tonnes of aggregate fill materials. By-products of china clay production from Cornwall were used alongside recycled aggregates in place of premium aggregates such as freshly quarried limestone or granite. Slate waste from a [...] (*) slate quarry was used as pipe bedding in the [...]. This crushed slate was used in place of other crushed rock aggregate. Slate by-product from the same quarry was also used in construction at [...] in place of premium quality aggregate.
- (143) The UK authorities show that the number of exempt quarries has not increased after the introduction of the AGL as shown in the table below which contains the number of active quarries at a certain point in time:

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

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

- (144) In 2009, crushed rock accounted for 59,4 % of primary aggregate sales in the United Kingdom. The remainder of such sales concerned sand and gravel. Limestone was by far the most important source of crushed rock aggregate, accounting for 66 % of the total, followed by igneous rock such as granite (24 %) and sandstone (9 %). Limestone, igneous rock and sandstone all have other uses, e.g. as building stones, or in the case of limestone, as industrial lime.
- (145) In 2012, 1 tonne of limestone aggregate would sell for GBP 7,16 to GBP 11,70 per tonne. 1 tonne of granite would sell for GBP 6,12 to GBP 12,82 per tonne. 1 tonne of slate aggregate would sell for between GBP 2 and GBP 8 per tonne.

(*) Business secret

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

5.5. ASSESSMENT OF COMMENTS RECEIVED

- (147) The Commission already concluded in the Opening Decision that the normal taxation principle of the AGL can be summarised as being the taxation of rock, gravel and sand freshly/deliberately extracted for being used as aggregates and subjected to commercial exploitation within the United Kingdom on or after 1 April 2002.
- (148) In addition to the comments made by the UK authorities above as regards the tax principle underpinning the AGL, the Commission makes the following observations.
- (149) Several third parties commented that the AGL does not treat materials in a consistent manner because by-products from other exempted materials (rock used to produce stone with one or more flat surfaces (hereafter referred to as 'cut stone'), lime), high PSV rock, armour rock for sea defences, walling rock and by-products/waste from extraction of primary high quality aggregates are not exempted. They would allegedly be in the same legal and factual situation as currently exempted by-products of non-aggregate materials or as materials having specialised uses that are not taxed.
- (150) The Commission itself raised the question in the Opening Decision as to why it is considered justified to grant exemptions for by-products of ball clay, china clay, coal, lignite, shale and slate but not for by-products of lime for agricultural use and cut stone.

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

- (151) Following receipt of extensive information from third parties and from the UK authorities, the Commission notes that waste or by-products from the extraction of cut stone and lime consists of the same type of rock as the cut-stone and lime: (i) waste from the extraction of limestone used for producing lime is likely to consist also of limestone, and (ii) waste arising from the extraction of rock to produce cut stone is likely to consist largely of the chippings of the same type of rock which is being cut.
- (152) The exemptions from the AGL distinguish between waste materials that arise as the by-product of the material extracted not for aggregate use (such as waste from china and ball clay, coal, lignite and slate extraction), which are exempt, and waste materials that are the by-product of the deliberate extraction of material for an aggregate use (such as waste from limestone), which remain subject to the tax.
- (153) This tax distinction stems from the objective of discouraging the fresh extraction of limestone, granite, sandstone, etc., for aggregate use while not affecting the production of non-aggregate material.
- (154) As described by the UK authorities, limestone, sandstone and granite are the most common materials extracted for aggregates use. An AGL exemption of by-products of cut stone or of limestone used to produce lime would in fact at least maintain the level if not encourage the fresh extraction of these materials.
- (155) Moreover, there is no additional (processing) costs for obtaining cut stone and lime from the main extracted materials. This is unlike, for example, ball clay and china clay extraction where the separation of these materials from the waste is very costly.
- (156) The UK authorities explained that both the stone to be cut and the limestone used for obtaining lime are deliberately extracted for use as aggregates. Also, their by-products and waste may be sold on their own even without the main material as they make good quality material for aggregates use. As proof of this, the UK authorities submitted pricing information showing that, indeed, the prices of the lime and cut-stone are in the majority of cases not much higher than the prices of their respective by-products. The cost of limestone for lime is around GBP 12,50 to GBP 19,50 per tonne, whereas the price of its by-product is GBP 7,16 to GBP 11,70 per

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

- (157) Moreover, there is no objective way to distinguish between limestone as a by-product of agricultural lime production and limestone quarried specifically for use as aggregate. The same is applicable to granite and sandstone and to by-products of cut stone. Thus these freshly extracted materials and their by-products are interchangeable and thus the quarry operator can decide depending on the demand to sell both for the same 'aggregates use'.
- (158) On the basis of the considerations set out in recitals 151 to 157 above, the Commission notes that the by-products of the extraction of lime and cut stone are not in a different factual and legal situations as the freshly extracted products. In addition, any possible exemption for the spoil arising from extraction of limestone/rock used for cut stone or for other purposes than aggregates would only serve to encourage increased extraction of fresh rock and limestone, and would not contribute to the shift of demand.

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

- (159) Materials used for high PSV rock, armour rock, walling stone and primary high quality aggregates represent indeed either specialised uses of the respective materials, or uses where they cannot be replaced by recycled aggregates or by waste from materials that are not subject to the tax.
- (160) However all the materials used for high PSV rock, armour rock, walling stone and primary high quality aggregates and their by-products are of the same rock. For example armour rock is produced from the same rock as the smaller aggregates chippings that result as by-products.
- (161) These rocks are in general suitable for aggregates use and the quarry operators have a choice as to how to sell or exploit the given rock in accordance with demand.
- (162) For the reasons explained in recitals 151 to 157 above as regards by-products of cut stone and of lime, the Commission cannot exclude that an exemption for high PSV rock, armour rock for sea defences, walling rock, primary high quality aggregates and their by-products/waste, would encourage the extraction of these materials for aggregates purposes.
- (163) As regards the fact that several interested parties questioned the logic of the AGL in view of the fact that high PSV and armour rock are taxed whereas clay for flood defences or materials for other specialist uses are not taxed, the UK authorities jointly with the BAA submitted information that PSV (is a measure of the resistance of an aggregate to polishing; aggregates with a high PSV are used in a bituminous mixture laid on the surface of roads to give a high level of skid resistance. Aggregates with the highest PSV are used in locations such as bends and braking zones, and are specified for their PSV and aggregate abrasion value (AAV). These are properties that are inherent in the rock deposits and enhanced by the manufacturing process. The materials are still aggregate and this use is classified as an aggregate use for the purpose of the AGL.
- (164) Armour rock is used to protect the United Kingdom shorelines from erosion. The requirements of the specification depend of the specific severity of the marine environments. Qualities that are specified include density and aggregate abrasion value. It is classified as an aggregate use for the purpose of the AGL as it is used for strength and bulk.
- (165) Moreover, whether a material used for a certain purpose is interchangeable or not does not affect the logic of the AGL and the exemptions granted for other materials. Indeed, the Commission notes that there the AGL applies to a variety of different uses that are not interchangeable. However, as long as such materials can and are widely used as aggregates and their use as aggregates makes economic sense, an exemption for such materials even for certain uses would undermine the objective of the AGL.

- (166) Numerous interested parties point to the fact that exempted aggregates replace secondary aggregate products and not the higher grade products. The Commission notes, firstly, that this consideration does not cast any doubt over the fact that the AGL is achieving its environmental scope as the exempted materials which are unavoidable by-products of material extracted for a non-aggregate use are replacing freshly extracted aggregates. It does not matter if they replace higher grade or lower grade aggregates as long as fresh extraction is diminished. Moreover, the Commission notes that on occasion exempted materials could even replace higher grade aggregates as described by the UK authorities in recital 142.
- (167) The Commission acknowledges the problems with implementing the AGL and its exemptions based on the geology of the materials. However, the Commission also notes that it would have been more difficult to base the exemptions on the uses of the materials as this might lead to difficulties in enforcement and leave more room for abuse. Moreover, it appears that the UK authorities have obtained the Report as support for the implementation of the AGL and follow the definitions and tests for the material provided therein. The BAA themselves acknowledged that the UK authorities use an expert geologist to determine the materials produced by quarries.
- (168) As regards the exclusion of clay and shale used for ceramic products from the suspension of the AGL, the Commission notes that this is an exempt industrial process which has already been considered in the Opening Decision and found not to constitute State aid.
- (169) As regards the content of the *Cornish Building Stone and Slate Guide 2007*, submitted by the BAA, the Commission notes that it cannot be relied upon as an accurate source of information for a comprehensive overview of all products of a quarry. It is a guide made for promotional purposes where quarries advertise their products addressed to the construction industry. The Commission, thus, considers that the quarries appearing in the *Cornish Building Stone and Slate Guide 2007* would have presented products in line with their marketing strategy towards the construction industry. The UK authorities mentioned that they allow quarries to advertise their products as they wish regardless of the geological composition of the respective materials and do not consider such promotional descriptions as relevant for the qualification of materials for the purposes of the AGL.
- (170) It follows that the taxation of high PSV rock, armour rock for sea defences, walling rock, primary high quality aggregates and their by-products/waste falls within the normal taxation principle of AGL and is justified by the objective pursued.

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

- (171) The Commission considers that the comments received by all interested parties do not provide reasons to depart from its findings in the Opening Decision as regards normal taxation principle under the AGL and the objective of the AGL.
- (172) The normal taxation principle of the AGL is that rock, gravel and sand defined as aggregates pursuant to Section 17(1) are to be taxed when they are subjected to commercial exploitation as defined in Section 19 within the United Kingdom on or after 1 April 2002 ⁽⁴⁵⁾.
- (173) In accordance with the description that had been provided by the UK authorities prior to the Opening Decision and as confirmed by the preparatory works of the AGL ⁽⁴⁶⁾, the Commission found in the Opening Decision ⁽⁴⁷⁾ that aggregates can generally be described as corresponding to granular or particulate materials which because of their physical and chemically inert properties are suitable for use on their own or with the addition of cement, lime or bituminous material in construction as concrete, roadstone, asphalt or drainage courses, or for use as construction fill ('aggregates use').

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

⁽⁴⁶⁾ See footnote 39.

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

- (174) All interested parties and the UK authorities acknowledged the term of 'aggregates use' in their submissions and presented their comments accordingly. The BAA has actually submitted comments aiming to show that the AGL lacks logic as certain materials that do not fulfil this definition are taxed. The Commission has addressed in detail these comments above in recitals 151-158 and 159-165.
- (175) Thus, in other words, the normal taxation principle of AGL is the taxation of rock, gravel or sand when extracted for 'aggregates use'/extracted for commercial exploitation as aggregate as described above.
- (176) The above description is also consistent with the objective of the AGL which is to make the extraction of aggregates more efficient by internalising the environmental costs of that activity. As also confirmed by the General Court ⁽⁴⁸⁾, the objective of the AGL is to promote in the construction industry the use of aggregates which are the by-products of or waste from certain processes (also known as 'secondary' aggregates), or of recycled aggregates, thereby reducing the use of quarried aggregates (also known as 'primary' aggregates), which are non-renewables natural resources, and thereby limiting the damage to the environment associated with that process of extraction (the aim of 'shifting demand').

5.6. TAX DIFFERENTIATIONS

- (177) The Finance Act 2001 initially establishes a broad basis for the imposition of the AGL. The scope of this imposition is then narrowed down through exclusions and exemptions. In addition, the Finance Act 2001 also provides for a certain number of tax reliefs. The Commission will examine again whether the exclusions, exemptions and tax reliefs as regards to which it raised doubts in the Opening Decision are in line with the normal taxation principles in the light of the objective of the AGL.
- (178) For the purpose of assessing the tax differentiations under the AGL, the reference framework/normal taxation principle used by the Commission is the imposition of the AGL on materials that are commercially exploited in the United Kingdom as aggregates ⁽⁴⁹⁾. As described above in recital 173, the 'use as aggregates' is intrinsically linked to the commercial exploitation of rock, gravel and sand for construction purposes, that is their use as material or support in the construction or improvement of any structure (including roads and paths, the way on which any railway track is or is to be laid and embankments) or mixing them as part of the process of producing mortar, concrete, tarmacadam, coasted roadstone or any similar construction material ⁽⁵⁰⁾.
- (179) In addition, the notion of aggregates use, as defined above, is used by the Finance Act 2001 in Section 30(1)(d) of the Finance Act 2001 which provide a right for a person to ask for a tax credit if 'the aggregate that has been subject to the AGL is disposed of in such manner not constituting its use for construction purposes as may be prescribed'.
- (180) If an exempted material is extracted for aggregates use or is subjected to the commercial exploitation for construction purposes as described above it should fall within normal taxation under the AGL as it is in a comparable factual and legal situation as the taxed materials and its exemption could be justified only in light of the inherent objective pursued by the AGL.
- (181) As regards the exemptions under investigation concerning by-products, waste, or spoil of other materials or processes, the Commission will maintain the assessment criteria used in the Opening Decision. The Commission will take into account in its assessment whether the respective waste, spoil or by-product unavoidably results from an activity that is unrelated to deliberate extraction of materials for aggregates use, i.e. either from the extraction of a material that is not deliberately extracted for aggregates use or from a process that is not related to the extraction of aggregates. The extraction of the main material not for aggregates use provides an indication as to whether the exemption of respective waste, spoil or by-product can contribute to the objective underlying the AGL.
- (182) For by-products, waste or spoils resulting from the extraction of material for aggregates use, the Commission will assess whether their exemption may lead to a decrease of the fresh extraction of materials for aggregates use and thus contribute to the objective of AGL.

⁽⁴⁸⁾ See T-210/02 RENV — *British Aggregates v Commission*, ECLI:EU:T:2012:110, Paragraph 64.

⁽⁴⁹⁾ See T-210/02 RENV — *British Aggregates v Commission*, ECLI:EU:T:2012:110, Paragraph 55.

⁽⁵⁰⁾ See Section 48 (2) of the Finance Act 2001.

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

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

- (184) In the context of their submissions prior to the Opening Decision, the UK authorities had indicated that neither of the substances exempted under Section 18 ⁽⁵³⁾ are quarried or mined for use as aggregates.
- (185) As long as those minerals are not used to provide bulk in the construction sector, the Commission considered that the exclusion of those minerals from the scope of the AGL was in line with its normal taxation principles ⁽⁵⁴⁾.
- (186) The Commission concluded in recital 74 of the Opening Decision that in so far as the minerals concerned are not used as aggregates, their exemption/exclusion from the AGL does not lead to a selective advantage within the meaning of Article 107(1) TFEU.
- (187) However, it found that some of those minerals are sometimes also extracted to serve as aggregates. For instance, vermiculite and perlite serve to produce lightweight manufactured aggregates ⁽⁵⁵⁾. The exclusion of these minerals, in so far as they are extracted to produce lightweight aggregates and are used as such, was considered not to be in line with the normal taxation principles of the AGL. It was therefore not clear to the Commission why the extraction of those minerals would not be in a comparable situation as the extraction of other taxed aggregates.
- (188) As the Commission was lacking relevant information necessary for its assessment, it expressed doubts as to whether a general exemption of those materials, which does not seem to take into account their use as aggregates, is in line with the normal taxation principles underpinning the AGL.
- (189) The UK authorities provided a list of uses of each of the materials listed in Section 18(3) of the Finance Act 2001 mentioning whether they are or could be used as aggregates. In accordance with such list the only materials that are susceptible for use as aggregate of the materials listed in Section 18(3) of the Finance Act 2001 are perlite, pumice and vermiculite.
- (190) As the rest of the materials listed in Section 18(3) of the Finance Act 2001 are not used as aggregates or are not susceptible for use as aggregates they are not in the same legal and factual situation as taxable aggregates.
- (191) According to the UK authorities, perlite may be found in Northern Ireland, but extraction ceased before the aggregates levy was introduced. There continue to be imports into the United Kingdom of this material, which is useful for its insulating properties and its light weight after processing.

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

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

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

⁽⁵⁴⁾ Recital 73 of the Opening Decision.

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

- (192) The UK authorities maintain that perlite may be used in the production of lightweight construction materials (plasters, mortars, insulation, ceiling tiles) and as a soil conditioner. It expands greatly when heated and is not, therefore, a natural aggregate. Perlite can be used as a lightweight aggregate, e.g. in concrete or Portland cement. However, before it can be used as such, it must be subjected to a physical transformation that goes beyond simple crushing and screening. Its particular properties would also preclude its substitution by recycled material or by-product from non-aggregate production.
- (193) According to the UK authorities, pumice is not known to occur naturally in the United Kingdom, but is imported. Its cellular nature gives it a low density that enables it to float on water. It can be used as an abrasive and in the production of lightweight construction materials. It is much lighter than taxable aggregate material.
- (194) The UK authorities maintain that there is some evidence that pumice is used in the United Kingdom as a lightweight aggregate in construction, lightweight concrete, precast concrete and concrete block manufacture. Its use in these circumstances results from its particularly low density. As with perlite and vermiculite, its particular properties and uses would preclude substitution by other recycled material or by-product from non-aggregate production.
- (195) The Commission has considered whether pumice should be compared to high PSV rock or armour rock, which are also specialised products that cannot be substituted with exempt material. However, pumice appears different from high PSV rock and armour rock as, when it is used as aggregate, it can only be used in this specialised scope, as lightweight aggregate. On the other hand, the materials used to produce high SPV stone and armour rock can and are widely used as aggregates when they are not used in these particular specialised circumstances.
- (196) Vermiculite is, according to the UK authorities, a form of mica that, like perlite, has the unusual property that it expands greatly when heated. It is not known to occur in the United Kingdom, although there are imports.
- (197) The UK authorities maintain that like perlite, vermiculite may be used for insulation, as a lightweight aggregate for plaster and concrete, and as a soil conditioner. However, before it can be used as such it must be subjected to a physical transformation that goes beyond simple crushing and screening. Its particular properties would also preclude its substitution by recycled material or by-product from non-aggregate production.
- (198) According to the UK authorities, imported quantities of such products are as follows, with data for perlite and vermiculite recorded together in import statistics since 2010:

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

- (199) The UK authorities claim that imported pumice costs on average GBP 408/tonne in 2012, and vermiculite and perlite cost on average GBP 128/tonne. These high prices reflect the specialist applications of these minerals, and indicate that they would not be used as a substitute for aggregate extracted in the United Kingdom.
- (200) The UK authorities maintain that perlite, pumice and vermiculite are not exploited commercially as aggregate in the United Kingdom and are not in the same legal and factual situation as taxable aggregate, in the light of the environmental objective pursued by the AGL.

- (201) The Commission considers that since perlite and vermiculite undergo a physical transformation that goes beyond simple crushing and screening for them to be used as aggregates, they are not comparable to taxable materials which are not subject to such transformations.
- (202) The natural properties of perlite, pumice and vermiculite differentiate them from the rest of the aggregates. Moreover, all three materials are not natural aggregates, but serve as specialised lightweight aggregates that can neither be replaced, nor replace other materials. Their price reflects their specialist use as well as the fact that they could not possibly substitute aggregates extracted in the United Kingdom.
- (203) In addition, none of these materials is currently extracted in the United Kingdom as extraction of perlite ceased before the introduction of the AGL.
- (204) The Commission has not received any comments from interested parties as regards to these materials.
- (205) The Commission concludes that perlite, pumice and vermiculite are not in the same legal and factual situation as taxable aggregate in light of the objective of the AGL.
- (206) The Commission thus finds that the exclusion of and tax relief for certain minerals as provided by Section 18(2)(b) and Section 30(1)(b) of the Finance Act 2001 does not entail a selective advantage to these materials.

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

- (207) The Commission noted that all those materials qualify as rock and thus are aggregates within the meaning of Section 17(1) of the Act 2001.
- (208) As far as slate and shale are concerned, they are often cut with one or more flat surfaces. In such case, they would also benefit from a relief from the AGL by virtue of Section 18(2)(a) (exempt process of cutting stone). The tax credit for materials to which an exempt process applied is in line with the normal taxation principles underpinning the AGL.
- (209) In the context of their submissions prior to the Opening Decision, the UK authorities had explained, that coal, lignite, slate or shale are not primarily quarried for use as aggregates. Slate is traditionally extracted for use as a specialist building material (e.g. as roofing or flooring). In some regions its use is encouraged for heritage reasons. Shale is a fissile mineral with a high clay content. As natural clay deposits become depleted, shale is increasingly used in the manufacture of bricks and tiles. It can also be an ingredient in the production of cement. Coal is a sedimentary rock composed primarily of carbon. Lignite has a much lower carbon content than coal and a very high moisture content. Both are used as energy products.
- (210) The Commission concluded that excluding those materials when they are used for other purposes than as aggregates was in line with the normal taxation principle underpinning the AGL.
- (211) The Commission noted ⁽⁵⁶⁾ that, according to evidence produced by the BAA and attached to its Reply submitted to the General Court in Case T-210/02, slate and shale are used as aggregates ⁽⁵⁷⁾. The same did not apply for coal and lignite.

⁽⁵⁶⁾ Recital 83 of the Opening Decision.

⁽⁵⁷⁾ Extracts (dated 30 October 2002) from the website of Alfred McAlpine

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

- (212) The Commission concluded in recital 84 of the Opening Decision that a general exemption of shale and slate, even when they are used as aggregates or bulk for construction purposes, did not appear to be in line with the normal taxation principles underpinning the AGL and did not seem to result from the nature and logic of the AGL.
- (213) The Commission also considered in recital 85 of the Opening Decision that the argument that shale and slate would not in most instances be used as aggregates did not justify their general exemption from AGL. It is precisely because it was difficult to determine in advance to what use the materials would serve that the United Kingdom chose to grant a tax credit in case some of the materials subject to tax would be used for industrial and agricultural purposes. The Commission considered that, rather than granting an outright exemption, it would have been more appropriate to extend tax relief also to shale and slate.
- (214) The Commission also expressed doubts as regards the justification for extending the exemption to material that is mainly (i.e. in excess of 50 %) made of coal, lignite, shale or slate.
- (215) The Commission concluded that a general exemption of those materials, in particular slate and shale, even when they are used as aggregates, i.e. bulk for construction purposes, would not be in line with the normal taxation principles underpinning the AGL.
- (216) Following the publication of the Opening Decision the Commission received numerous submissions from interested parties in this regard.

5.6.2.1. *Slate*

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

- (217) The BAA is in agreement with the UK authorities as regards the uses of slate by-products as aggregate, including that it is an alternative to freshly extracted aggregate in the manufacture of concrete and medium-strength engineering applications.
- (218) The BAA claims that slate, shale (and clay) have always (and, therefore, even before the introduction of the AGL) been used 'as aggregate' when suitable for the specific purpose and the material was available at the right price. For example, some 230 000 tonnes of slate aggregate was used to construct the A55 Bangor bypass road in 1980/1981 and 1990/1991.
- (219) The BAA, referring to a statement of specialist geologist Dr Rachel Hardie, maintains that there are quarries of mixed geology where deposits of rock qualifying as clay or slate are interbedded with other rock. According to that statement, there are quarries in Scotland and in other parts of the United Kingdom where the bulk of the aggregates produced is subject to the AGL, but where rock strata contain a proportion of exempt rock types. The products of these quarries have included stockpiles of, wholly or mainly, exempt rock types such as shale or slate ⁽⁵⁸⁾.
- (220) The BAA maintains that there are a number of slate quarries where the material does not have enough slaty cleavage for construction tiles, but where the material still qualifies as slate. The BAA has provided a list of seven slate quarries extracted from the British Geological Survey (BGS) *Directory of Mines and Quarries 2010* that are mentioned as extracting stone for aggregates use only, such as construction aggregate, hedging stone, uncut building stone and quarries which produce only a small amount of cut building stone. The BAA claims that these quarries are not different than granite or sandstone quarries which also produce building stone. The products of both types of quarries are of the same nature; however the slate quarries are exempt while the others are not.
- (221) As regards the nature of quarries exploiting taxed rock, such as granite, the BAA maintains that rock quarries sell varying amounts of uncut block stone. They claim that, if the quarry has a stone which is naturally 'blocky' and easy to trim, such a quarry will likely sell a quantity of this product, subject to local market demands (e.g. residential, garden centres) and the colour of the block stone extracted.

⁽⁵⁸⁾ No examples of quarries were provided.

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

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

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

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

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

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

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

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

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

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

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

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

- (230) According to their submission, the type of aggregates for which the Lantoom Quarry would have to pay the levy in case the exemption is found to be incompatible State aid is currently priced at approximately GBP 2 per tonne (the ex-works price varies between GBP 1,5 and GBP 3). This means that the levy would double the price.
- (231) The Quarry submits that the AGL exemption has been helpful in stimulating the market for aggregates made of the exempted materials. They claim that, waste can make up to 75 % of the mineral extracted. The slate aggregates by-products of the quarry are sold only with a 30-mile radius of the quarry.
- (232) According to the Lantoom Quarry, slate is not a very good material for aggregate use as it is softer and cannot be used to make concrete or bitmac.

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

- (233) The main business of BSL is the manufacture of dimensional slate products such as roofing, cladding, flooring, paving and architectural products.
- (234) BSL considers that the exemptions for slate do not constitute State aid because they are justified by and are entirely consistent with the nature and logic of the environmental objectives of the AGL. Slate is not traditionally extracted for use as aggregate; rather, it is extracted for use as a building material in roofing, cladding, flooring, paving and is often used for heritage reasons in the conservation of historic buildings in the United Kingdom.
- (235) BSL claims that spoil of slate is in a different factual situation compared with freshly extracted aggregates quarried specifically for their use as aggregates because aggregates resulting from the extraction of slate are a necessary and inevitable by-product of the processes by which dimensional slate products are produced.
- (236) BSL considers that the exemptions act as an incentive for slate quarries to recycle waste material as aggregates. If slate quarries ceased re-cycling waste as aggregates, more waste and spoil from slate extraction would be discarded into landfill or tipped as spoil.
- (237) According to BSL, the process of slate extraction is extremely costly given the physical depths which must be quarried, the adverse geological formations which are sometimes encountered and the engineering and geotechnical aspects of quarry design needed to ensure face stability in order to maintain a safe working environment. Slate is removed from the quarry in slabs ranging in size from approximately 1 metre × 0,5 metres to 3,5 metres × 1,5 metres with typical weights in the range of 500 kg to 12 tonnes per piece. The processing that takes place will depend on the nature of the product that is being made: roofing tiles, cladding, flooring or architectural products. Processing will typically involve initial cutting followed by splitting, application of a finish, further cutting or shaping. Around 50 % of BSL's sales of architectural slate products are exported from the United Kingdom.
- (238) BSL shows that at each stage of the process, waste and scrap slate is an unavoidable by-product. BSL estimates that only around 4 % of extracted material is processed into finished dimensional products (which are typically used for roofing, paving or flooring tiles) which means that 96 % is waste. The re-cycling of waste and scrap slate into aggregates reduces the amount of waste material that BSL would have to send to landfill or to tip at the quarry. Re-cycling of part of the waste and scrap slate helps to off-set some of the costs of slate extraction, but such sales are no more than ancillary to the main activity of slate extraction for the production and sale of dimensional stone slate products.
- (239) According to BSL, a slate quarry has no incentive to quarry just for aggregates as the cost of extraction is far greater and far more challenging (in an engineering sense) than at a typical aggregates quarry (which is a surface quarry) and it would not make sense commercially to quarry if the only material extracted was to be used as an aggregate.
- (240) As per their submission, BSL obtained planning consent on the basis that it extracts stone as a source of local 'vernacular' building materials. An application to extract aggregate alone from its quarries would be very unlikely to be approved given their location within or close to the Lake District National Park.

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

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

- (243) The comments of Eunomia have been sent on behalf of a consortium of United Kingdom secondary aggregates producers (slate, colliery spoil and incinerator bottom ash).
- (244) The generation of material suitable only for use as aggregate is an unavoidable part of the process of extracting slate intended for roofing or other high value processes. The price obtained when used as aggregate is much lower and would not, by itself, be sufficient incentive to undertake extraction. Welsh Slate indicates that roofing slate sells at an average of GBP [...]/tonne, with an upper value of GBP [...] per tonne. By contrast, secondary aggregates sell for between GBP [...] per tonne and GBP [...] per tonne. Accordingly, the exemption has not led to any increase in the amount of primary extraction being undertaken, nor is extraction being encouraged by the existence of the exemption.
- (245) The existence of waste slate tips created before the introduction of the AGL, would preclude the need for any additional slate quarrying for aggregate.
- (246) Eunomia considers that if the exemption for slate were cancelled, the AGL would [...] the post-extraction production costs of slate aggregates which amount to [...] GBP to [...] GBP.

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

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

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

- (248) According to Torrington Stone, one of its quarries, having as primary product taxed gritstone, offers natural stone products such as walling stone, hedging stone, gambion stone. This taxed gritstone competes directly with slate quarries which offer exactly the same products. The walling stone is hand-picked and is uncut at the quarry, hence cannot benefit from an exemption from the AGL. The stone is cut on site by the stonemason, but the AGL would have already been paid.
- (249) Torrington Stone maintain that, on the other hand, slate is naturally irregular in shape and has to be cut (sawn) to make good if only for bed width.

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

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

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

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

(l) *Comments from the UK authorities*

- (252) The UK authorities pointed to the fact that the General Court held in its judgment of 7 March 2012 in T-210/02 RENV that materials such as clay, slate, and shale satisfy, in principle, the normal taxation principle of the levy in that they constitute 'aggregates' within the meaning of the Finance Act 2001 (Section 71) and 'in so far as they are used and exploited commercially as such', are in a situation comparable to other taxed alternative aggregates (Section 72). According to the UK authorities, the General Court made it clear that the 'potential' inclusion of those materials within the scope of the levy 'depends only on their actual and established exploitation as aggregates'.
- (253) The UK authorities maintain that there is no clear evidence, including the submissions of the BAA during the court proceedings, which shows that slate, shale, coal or lignite are being deliberately extracted for use as aggregate in the United Kingdom.
- (254) As regards slate, the UK authorities submit that slate is a rock that can be split into thin sheets. It is used mainly for roofing, but also for decorative cladding and as monumental stone. It is produced in North Wales, the Lake District, Devon and Cornwall.
- (255) According to the UK authorities, slate is exempt from AGL because high quality slate is quarried for use as roofing and flooring and for its decorative properties rather than for use as aggregate. These can include roofing slate, furnishings, architectural products (window sills and copings, kitchen and bathroom worktops, counters, fire surrounds, hearths, cladding, house signs, memorials and floor tiles) and ornaments (hereinafter referred to also collectively as 'specialised architectural products'). However, the slate chippings and trimmings that result from the extraction and shaping of high quality slate can be substituted for freshly extracted aggregates. The exemptions therefore also encourage the use of waste slate chippings, and any other associated by-product, providing a net environmental gain by reducing the environmental harms which would have resulted from additional aggregate quarrying.
- (256) According to the UK authorities, the quarries offering slate aggregates, slate chippings, for sale for use as aggregate emphasize in their advertising their high quality slate products, such as roofing slate, worktops, hearths, flooring and memorial plaques, which are plainly the focus of the extraction activities ⁽⁵⁹⁾.
- (257) The UK authorities claim that slate is not well suited for aggregate use because it tends to form flat 'slabby' and uneven shapes rather than the cuboid shapes which are preferred in most aggregate applications. High quality slate is not used as aggregate because its physical and/or chemical properties make it unsuitable and it is sold for higher value purposes.
- (258) The UK authorities estimated that each tonne of slate quarried produces 95 % waste chippings and about 5 % of slate suitable for high quality uses such as roofing tiles or cladding ⁽⁶⁰⁾. Much of the rock in which high quality slate occurs possesses less perfect cleavage, making it unsuitable for cleaving into thin slates. The production of identical cut and cleaved slates from the higher quality material also generates large amounts of trimmings. As a result, large tips of slate waste made up of slate chippings are historically associated with sites where slate working has occurred. The UK authorities provide information from studies in this regard. They point to the fact that, the production of slate waste still exceeds the market for the mineral as aggregate and slate waste heaps are still formed. The production of slate has decreased since 2000 as roofing slate production has declined. Since the suspension of the AGL in April 2014, slate producers observed a decrease in demand for slate waste and more material was added to waste heaps.

⁽⁵⁹⁾ See, for example, <http://www.honister.com/>; <http://www.callywithquarry.co.uk/quarry>

⁽⁶⁰⁾ 'Survey of Arisings and Use of Secondary Materials as Aggregates in England and Wales in 2001' Symonds Group, November 2002

- (259) According to the UK authorities, slate by-product can be used as a low-grade aggregate for engineering fill and as decorative aggregates, and with careful selection and crushing can comply with the base requirements for road construction ⁽⁶¹⁾. Although slate waste is not as strong as other aggregates it has been found to perform adequately in this basic role and is therefore suitable as an alternative to freshly extracted aggregate in the manufacture of concrete and medium-strength engineering applications. Some slate waste is also crushed into powder and granules for industrial use in the manufacture of roofing felt and bituminous paints. Through the exemption for slate, the levy encourages the use of these waste slate chippings, thereby reducing the damage to natural habitats and the visual damage caused by the spoil heaps. This would encourage projects such as the A55 Bangor bypass which the BAA cited.
- (260) According to the UK authorities, since the suspension of certain levy exemptions in April 2014, [...] have been forced to sell their waste slate at a loss of 3 % showing that without the exemption there would not be a market for slate waste.
- (261) The UK authorities claim that, although only 5 % of the material extracted from slate quarrying is high-quality material, the relative value of suitably sized sheets of slate to be sold as roofing or floor tiles, or for cladding and other decorative purposes, justifies its extraction. High quality slate is sold for between GBP 727 and GBP 1 076 per tonne. The UK authorities have provided price of products from one slate producer which are as follows (GBP/tonne):

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

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

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

- (262) According to the UK authorities the cost of producing slate by-products amounts to GBP 5,7 to GBP 6,5 per tonne ⁽⁶²⁾. However the selling prices have varied over the years from up to GBP 7,36 per tonne to, the lowest price of GBP 4,10 per tonne. Another slate producer sold slate construction aggregates in a range of GBP 4,40 to GBP 6,42. The high value of good quality slate makes it the focus of activity at those sites where slate deposits exist. It would be economically irrational for any operator to quarry slate with the intention of selling it to be used as aggregate, rather than as a means to extract high quality slate.
- (263) The UK authorities provided data extracted from the financial information of slate producers showing that the revenue from architectural products makes them the companies' primary product. The ratio of roofing slate to aggregate in terms of revenue varied over the years between 2,54 to 3,52.
- (264) As regards the slate pricing information submitted by the BAA where pricing data for imports were used, the UK authorities show that UK architectural slate products and imported architectural slate products are different and compete on different markets than the imported products. Therefore, import pricing data would not be accurate for a price comparison.

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

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

- (265) The UK authorities claim that decorative slate is produced as a by-product of quarrying high quality slate. It sells for around GBP 15 per tonne. Whilst higher than the sale price for construction fill, as shown above, it is still far lower than the price for roofing slate (in excess of GBP 200 per tonne). The price of decorative slate is comparable to that for other decorative aggregates available through retailers in the United Kingdom. The environmental logic of the exemption for slate still holds as the decorative slate is an unavoidable by-product of high quality slate production, whereas the decorative market is a premium market for those producing limestone or granite.
- (266) The UK authorities maintain that it is consistent with the environmental objective of the AGL that slate and slate by-products are exempt from the levy in order to encourage the use of that alternative waste by-product as a substitute for freshly extracted aggregates.
- (267) The UK authorities claim that, in the same manner as shale, it appears that, slate can be found in association with a variety of other rock types. They are frequently found interbedded with sandstone and/or limestone. The term 'mainly' is intended to allow for compounds which mostly, but not entirely, comprise the exempt material as this is how they naturally occur. When compounds consist mainly of shale or slate, their physical properties make them less suitable for use as aggregate than if they were mostly formed of materials more likely to be used as aggregate.
- (268) The United Kingdom estimated that around 6,33 million tonnes of slate waste chippings were produced annually and that historic, usable stockpiles amounted to around 277 million tonnes. Of this, only 0,66 million tonnes were sold for use as aggregate before the introduction of the AGL. ⁽⁶³⁾ The remainder was either used as back-fill or left to form waste heaps.
- (269) The UK authorities submit that the existence of the exemption for slate by-products does not encourage further slate extraction as slate quarry operators already struggle to find a market for the exempt waste product which arises from their existing quarrying activity. They claim that, the overall number of slate quarries/workings has remained largely unchanged since the introduction of the aggregates levy, standing at 50 in 2000 and 49 in 2010.
- (270) The United Kingdom considers that waste slate chippings are correctly treated as the unavoidable by-product of an extraction process which is not carried out to produce aggregate, but which is carried out to obtain high quality slate for use as roofing tiles, cladding and other valuable products.
- (271) The UK authorities claim that by-products from cut slate production are unable to be distinguished from slate deliberately produced as aggregate.
- (272) The UK authorities contest allegations advanced by the BAA during the Court proceedings in T-210/02 RENV and in its submissions to the Commission according to which there would be slate quarries exploiting slate solely for aggregates purposes. Having investigated all the quarry names provided by the BAA throughout the procedures, the UK authorities maintained this conclusion. Furthermore, the UK authorities have expressed doubts concerning the evidence provided, as some quarries are mentioned both as producing roofing slate and as exploiting slate primarily for aggregates purposes.
- (273) As regards the BGS, the UK authorities claim that the data relies on self-description of materials produced by quarries and their end uses. They note that that quarries may describe a material in a different way than it would be categorised for the purposes of the AGL, and the materials produced by a quarry may change over time. The data is, therefore, the most accurate list of quarries in the United Kingdom and end uses of materials in existence, but it is not possible to say that it contains a completely accurate list of quarries in the United Kingdom and the definite uses of the materials extracted. The UK authorities maintain that the data is also out of date and that they are aware that some listed quarries have ceased to be active. The UK authorities also claim that the list contains companies that may have a valid quarrying planning permission, but that in fact do not and have never acted as quarries.

⁽⁶³⁾ See footnote 60.

- (274) The UK authorities showed that out of the total list of quarries put forward by the BAA as producing slate, shale and clay solely for aggregates use, eight quarries have been found to either never having exploited aggregates, performing other activities not subject to the AGL or as inactive since before the introduction of the AGL. Some of these quarries have been used as landfill sites.
- (275) Moreover, the UK authorities show that they have used the definitions provided by the Report that was drafted in 2003 specifically for assisting the tax authorities in enforcing the AGL. The objective criterion that is used by the UK authorities to distinguish between closely related rock types requires material categorised as slate to 'split only with a chisel into sharp flakes and tiles'. Where material does not have this slaty cleavage, it is not treated as slate for the purposes of the AGL, i.e. it is not exempted. Material such as that to which BAA refers would be categorised as mudstone and subject to the levy.
- (276) The UK authorities took note of the submissions from various interested parties as regard to the possible misrepresentation as slate of the products of one particular quarry. The UK authorities maintain that if the material meets the criterion they use for determining the existence of slate, splitting with a chisel, then the material has been correctly labelled as slate for the purposes of the AGL. However, the UK authorities note that products usually obtained from slate that splits with a chisel appear as imported on the quarry's website. The geology of the material at this site has not yet been verified by the United Kingdom revenue authorities ('Her Majesty's Revenue and Customs' or 'HMRC').
- (277) Given that HMRC's enforcement regime applies a risk-based approach and acts on information that a quarry may not be complying correctly with the tax regime, the UK authorities committed to investigate this and any other cases where research undertaken as a result of obtaining evidence for the Commission causes concerns about mis-classification of materials. HMRC undertook to request or take geological samples from these sites. If the material proves not to be slate, the levy will be charged on the material extracted and a penalty may be charged as well for mis-description of material.
- (278) The UK authorities further show that in marketing rock for sale purposes, quarries may choose to use a description which does not match the objective test used by HMRC for the purposes of the levy.
- (279) The UK authorities have reviewed confidential tax records and public information relating to each of the quarries which the BAA claimed were producing slate solely for aggregates purposes or which had allegedly mislabelled their products as slate so as to benefit from the exemptions. The results of the review were presented to the Commission and showed that there may be certain enforcement issues as regards one quarry. The UK authorities undertook to investigate what materials they actually produce and whether it has been labelled correctly as slate. However, as regards the rest of the quarries that were found to be or that have been active, no indication was found that they would be deliberately extracting slate for aggregates use.
- (280) Mention should be made that in its review of the information presented by the UK authorities, the Commission took into consideration the fact that slate specialist architectural products are cut to dimension. Therefore, the Commission considered that slate quarries where cut stone appears as the main product produce specialised architectural products (and thus not aggregates), primarily because slate aggregates are a result of crushing.
- (281) The UK authorities have provided statistics in support of their view that slate has not been displacing sales of secondary aggregates and that while demand for high quality crushed rock and high quality sand and gravel have both decreased over the period that the aggregates levy has been in place, sales of slate, clay and shale for construction have not risen by the same order of magnitude. Apparently, the proportion of the sales of the former is in line with the decrease in demand. The UK authorities conclude that slate, clay and shale have not substituted on a large scale high quality crushed rock, sand or gravel.

5.6.2.2. *Shale*

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

- (282) The BAA claims that shale can be used as aggregates, i.e. low-grade aggregates purposes, as also shown by the Report ⁽⁶⁴⁾. Shale, clay and mudstones may occur as overburden to crushed rock deposits and they can be sold as low-grade fill.
- (283) According to the BAA, shale and clay can be used for specific aggregates uses for which other rocks are not or less available, such as lining and capping of landfill sites and lining of ponds and canals. They claim that, these represent uses of clay and shale as aggregates in the same way as the use of materials for drainage and sea defences represents an aggregates use. The BAA argues that while shale is extracted as a by-product of clay and coal, there are also very large areas in the United Kingdom where harder, more mature shale, is interbedded with sandstone.
- (284) The BAA claims that, the harder variety of shale, similar to hard rock, has always been used as aggregate even before the introduction of the AGL. The BAA provided the example of a shale quarry that has been in operation since 1981 that produces building and walling stone, rockery and crazy paving stone together with some fill material.
- (285) The BAA submitted a list of 20 clay and shale quarries extracted from the BGS *Directory of Mines and Quarries 2010* that allegedly exploit material only for purposes of aggregate.
- (286) They claim that some quarries classified as 'sandstone' quarries in the BGS *Directory of Mines and Quarries* actually benefit from an exemption from the AGL on the basis that they are in fact shale quarries forming part of the Caithness Shale Beds in Scotland.
- (287) The BAA maintains that there are many quarries of mixed geology including shale that benefit from the exemption for the material which consists mainly of shale, as shale occurs extensively within the United Kingdom and is often interbedded with other rock. The BAA provides the example of a purely aggregate quarry that benefits from the exemption in this manner.
- (288) The BAA claims that the UK authorities hold information as regards the names of quarries which were exempt from the AGL on the basis that they were wholly or mainly slate or shale. However such information could not be provided to the BAA for confidentiality reasons.

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

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

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

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

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

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

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

- (293) The comments received from Eunomia were sent on behalf of a consortium of United Kingdom secondary aggregates producers (slate, colliery spoil and incinerator bottom ash).
- (294) According to Eunomia, colliery spoil (typically composed of shale) is available for re-use from either operational deep mines or closed/moth-balled deep mines. Colliery spoil is derived from the extraction of coal using deep mining methods. The qualitative properties of colliery spoil vary greatly between different mines and at different extraction phases, relating to the geology of the strata at the time of mining. Due to the inconsistent properties of colliery spoil, the material is very low grade and has very little reuse value.
- (295) Eunomia maintains that the colliery spoil does not typically command a positive price. However, having an outlet enables the respective mine to operate, through preserving spoil tip void landholdings. Eunomia claims that without the opportunity of supplying colliery spoil at no cost or at a competitive price, reflecting its inferior quality, there are no other financially viable options available to move colliery shale to facilitate built development. Eunomia maintains that for colliery spoil, the post-extraction production cost, assuming delivery within 5 km of the source site typically GBP [...] per tonne for operational deep mines, and GBP [...] per tonne for closed/mothballed deep mines. Therefore, imposition of the AGL at GBP 2 per tonne would [...] costs. It would then be cheaper for the colliery shale to be sent for disposal in the tip.

(e) Comments from the UK authorities

- (296) The UK authorities maintain that the logic for exempting shale is that the vast majority of shale is not used as aggregate. Indeed, most shale is generally unsuitable for use as aggregate. The high-quality use of shale is for brick-making which is ceramic process and, thus, exempt from the AGL. Any by-products from shale extracted for use in brick-making would therefore be a by-product of a material extracted for non-aggregate use.
- (297) The UK authorities claim that shale is part of the same family of rocks as clay. Clays range from soft and plastic to hard mudstones. Their physical and chemical properties and mineralogical composition determine their most appropriate use. Depending on the degree of fissility ⁽⁶⁵⁾ it can be difficult to distinguish between shale and clay, at one end of the spectrum, and between shale and slate, at the other.
- (298) The UK authorities maintain that shale is closely associated with clay extraction and also arises in coal mining. Like clay, shale can be used in the manufacture of facing, paving and engineering bricks (90 % of demand for brick clay is for use in the manufacture of facing bricks for the domestic housing market), tiles for roofing and cladding, and vitrified pipes for drainage and sewerage. Large tonnages are used in the manufacture of cement. Other uses include lining and capping landfill sites, lining ponds and canals, as landscaping material, in the manufacture of lightweight aggregate for block making and for general construction fill.
- (299) The UK authorities maintain that shale can be used as low quality aggregate, most commonly to fill space and provide bulk underneath the surface of roads. Some shale is also suitable for the manufacture of lightweight aggregate, but only after it has undergone a manufacturing process which involves subjecting the materials to high temperatures. In some circumstances, geological conditions (pressure and heat) have resulted in the formation of harder shales which when crushed form more blocky granules which can be suitable for some low-grade aggregate applications such as construction fill.

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

- (300) According to the UK authorities, as shale and clay are geologically similar, they are grouped together in United Kingdom national statistics. In 2000, of 10 838 000 tonnes of clay and shale sold in the United Kingdom, 7 880 000 tonnes were used for bricks, pipes and tiles, with 2 958 000 tonnes of clay and shale sold for other uses. In 2012, of 5 497 000 tonnes of clay and shale sold in Great Britain, 3 569 000 tonnes were used for bricks, pipes and tiles. The UK authorities contend that since the extraction of clay and shale halved between 2000 and 2012 and that the sales of clay and shale for other purposes than for bricks, pipes and tiles were 35 % lower in 2012 than in 2002, it is unlikely that the introduction of the levy increased the extraction of shale specifically for use as aggregate.
- (301) The UK authorities maintain that waste shale which arises during coal extraction is an unintended and undesirable by-product. It is generally only suitable as a basic fill in road construction or for flood embankments and is sold for a negligible price as a result. The waste-product is generally tipped in consolidated waste piles or used as additional fill material if there is an adjacent surface mine. While the coal itself sells for approximately GBP 50 per tonne, the shale is usually sold for a very low price, on average no more than GBP 1 to 2 per tonne, if demand arises close to the extraction site. The production costs are estimated to amount to between GBP 0,50 and GBP 2 per tonne. On occasion, the shale will even be given away for free so long as the purchasers transport it away themselves.
- (302) The same is true of other colliery spoil, which is generally only used as a low-grade aggregate where demand arises close to its extraction site.
- (303) The UK authorities maintain that, some of the shale by-product of other extraction activities is sold as aggregate but it is generally only economical to put shale to use as aggregate where demand arises close to its extraction site, because of the costs of transport. They claim that, since such shale has not been extracted for the purposes of commercially exploiting it as aggregate, and reduces demand for freshly extracted aggregate, its exemption would be in line with the environmental objective and the nature and logic of the AGL.
- (304) The UK authorities maintain that clay and shale are treated as one category by the BGS and by the United Kingdom Minerals Yearbook, the United Kingdom's annual collection of data. Their average selling price, according to the Office for National Statistics, ranges between GBP 2,52 and GBP 2,88 per tonne. In 2012 the prices ranged between GBP 3,34 to 4,44 per tonne.
- (305) The UK authorities provided information as regards a quarry that produces gritstone used in the production of asphalts for road surfacing. It also produces and sells shale which is interbedded within the layers of gritstone. The quarry estimated that the production cost for its shale products to be GBP 6,31 per tonne.
- (306) As regards shale used for ceramic processes the UK authorities provided information supplied by the British Ceramic Confederation ('BCC'), the trade association for the UK ceramic manufacturing industry. They note that there is considerable variability in the production costs for shale, depending on a number of factors. They estimate a general range of GBP [...] per tonne for the cost of extraction.
- (307) The BCC estimate that the sale price of shale for use as aggregates would be GBP [...] to GBP [...] per tonne. They observe that shale may be sold at a loss to expose good quality brick-making materials from beneath the shale deposit in question.
- (308) The BCC further note that most brick production occurs at sites associated with quarries, hence the material is not priced. However, they estimate a cost — if sold to a third party — of GBP [...] to GBP [...] per tonne, plus delivery costs. They observe that the sale price of shale would be lower than for high quality clays.
- (309) As regards the exemption for materials consisting mainly of coal, lignite, slate and shale, the UK authorities show that as naturally occurring minerals do not have 100 % purity the exemption is necessary.
- (310) The UK authorities consider that shale is not being quarried exclusively for use as aggregate and had investigated the initial claims made by the BAA in this regard with the occasion of the proceedings in front of Union courts. The UK authorities maintain that they found that shale continues to be produced as a by-product of other extraction activities, in particular clay, coal and limestone. The UK authorities contend that none of the documents put forward by the BAA before the Union courts or the Commission, prior to the adoption of the Opening Decision, showed that there would be quarries exploiting shale and clay primarily for use as aggregate.

- (311) The UK authorities were asked by the Commission to provide information as regards the products of four quarries mentioned in an interested party submission as being exempt quarries that won contracts solely because of such exemption and that provide the same type of products as their taxed quarry could have. One of the quarries is mentioned to have received permission to exploit shale. The UK authorities found that all four quarries had been registered for the payment of the AGL and have been doing so since its introduction in 2002. The quarries appear to sell ⁽⁶⁶⁾ quarried stone, sand, gravel, aggregate including recycled products and concrete products, hard stone aggregate, aggregates and filler, building products, decorative aggregates and sandstone flags, and, respectively, sand, gravel and other aggregates. No indication was found that any of the quarries benefited from an exemption for shale.
- (312) The UK authorities have also considered eight quarries mentioned in the BGS database as quarries deliberately extracting shale for aggregates use. They claim that at least some of these quarries extract other products in addition to shale. They thus, were apparently, unable to conclusively identify any shale quarries extracting shale solely for aggregates use.
- (313) The UK authorities explain that shale should also benefit from an exemption when it is a by-product of taxed aggregates. For example shale can be extracted as an unavoidable by-product of quarrying limestone or gritstone. The UK authorities claim that shale is a lower value material than limestone, and is unsuitable for a broad range of aggregate purposes. The UK authorities claim that shale produced as a by-product in this way was exempted in line with the environmental objective of the tax to enable quarries producing it as a by-product to sell it as a substitute for other freshly quarried aggregate for the limited range of applications for which it is suitable. If the material had originally been taxed in line with the limestone, quarries would have been unable to sell the waste shale.
- (314) According to the UK authorities, given that shale is generally only suitable for limited and specific aggregates applications, and that it is generally only economic to use shale as aggregate where demand arises close to the extraction site, it is very unlikely that there would be sufficient demand for shale near any one quarry primarily extracting other aggregates (e.g. gritstone) to incentivise extraction of additional taxed aggregate in order to access the un-taxed shale by-product. The UK authorities claim that they are not aware of any such instance where this has occurred or where it would be likely to occur in the future.
- (315) In response to an interested party submission to the Commission alleging that the primary material of Vyse quarry (belonging to Torrington Stone) in North Devon is mudstone and shale used as aggregate, with a secondary material of dirty sandstone, the UK authorities question whether shale is the primary material of this quarry as their website details their high quality sandstone products, and notes that 'universally acknowledged for its outstanding durability and quality, Braunton Aggregates supply a variety of sandstone from feature stone, hedging stone, garden chippings, rockery stones to screen fills and bulk aggregates'. In the 2010 Directory of Mines and Quarries produced by the British Geological Survey, Beam Quarry is listed as producing 'Sandstone, Carboniferous, Bude Formation'. They do not accept that the Vyse quarry is therefore evidence of shale being deliberately extracted for aggregates purposes.
- (316) According to the UK authorities, with regard to shale, the HMRC uses the criterion — as described in the Report — setting out that this material must 'split easily (with pen knife) into mm-thick flakes'. Material which breaks into small centimetre-sized blocks (and is therefore more suitable for aggregate applications) is classified as mudstone and is subject to the tax. The BAA claims in their submission that a number of quarries are solely extracting material classified as shale for the purposes of the tax and selling this material for aggregate. The UK authorities show that if there were to be any substantive evidence that there was such mis-description of rock as shale for the purpose of exemption from the AGL, HMRC would investigate this as potential tax fraud.

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

- (317) According to the UK authorities, all tax activity carried out by HMRC is risk-based. This means that not all businesses registered with HMRC are checked unless there is reason to query the returns that they make to HMRC. The UK authorities are aware of the risk of quarries benefiting from exemptions from the AGL by mis-describing the materials that they produce. HMRC carry out checks to ensure that the AGL is being applied accurately, and investigate where there is evidence of mis-description of materials.
- (318) The UK authorities have reviewed confidential tax records and public information in regard to the quarries the BAA mentioned that were producing clay and shale solely for aggregates purposes or have mislabelled their products as shale so that they benefit from the exemptions. The results of the review as regards each quarry have been presented to the Commission. The review showed that there may be certain enforcement issues as regards one quarry and the UK authorities undertook to investigate. As regards, the majority of the quarries that were found to be or have been active, no indication was found that they would be exploiting shale or clay solely for aggregates use. However, the information provided to the Commission show that at least four or five ⁽⁶⁷⁾ quarries are benefiting from the exemption although their main product is cut stone and shale is extracted in addition to it.

5.6.2.3. *Coal*

(a) Comments from the UK authorities

- (319) According to the UK authorities, coal is a combustible, sedimentary rock. British-produced coal has a high sulphur content and is used almost exclusively in coal-fired electricity generating stations fitted for flue gas desulphurisation, although there is also some domestic consumption. All coking coal (which is used in blast furnaces making steel) is currently imported. Coal is not suitable for use as aggregate.
- (320) According to the UK authorities, where coal is extracted by surface mining, the overburden ⁽⁶⁸⁾ and the strata from between the coal seams are lifted separately from the coal seams and the fireclays which lie immediately below some of the seams. Fireclay, which is a by-product of coal extraction, is extracted separately and sold at about 10 % of the price of coal, primarily as a colorant in the brick-making process. In all cases, the overburden, inter-seam dirt and any residue left after mineral processing (for example, to remove high ash content or other impurities) is replaced in the void after mining.
- (321) The UK authorities claim that all underground mines process their coal in a density separation plant. The waste from the process is generally tipped and consolidated. Historic waste tips have generally been landscaped and covered with vegetation to reduce their visual impact. If there is adjacent surface mining of coal and/or other minerals the waste is sometimes used as an additional fill material for the restoration of those voids.
- (322) According to the UK authorities, some spoil or waste from the production of coal can be used as low-grade aggregate, for example for bulk engineering fill or for flood embankments. The waste is fine grained and does not have the engineering capability to support, for example, a building development.
- (323) The UK authorities maintain that there is no evidence that any quarry in the UK would be extracting coal solely for obtaining aggregate. They claim that, the AGL is designed to ensure that material consisting wholly of the spoil resulting from the mining of coal is not taxed. Clean seams of aggregate which are extracted when digging down to the coal are subject to the AGL.

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

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

5.6.2.4. **Lignite**

(a) *Comments from the UK authorities*

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

5.6.2.5. **Assessment by the Commission**

5.6.2.5.1. **Slate**

- (325) Although slate is an aggregate within the meaning of Section 17(1) of the Act 2001 it follows from the UK authorities and the interested party submissions that slate is extracted for obtaining architectural and dimensional products that sell for much higher prices than what is sold for aggregates use. It would not make economic sense to exploit the quarries solely to extract slate for aggregate use which due to their properties are, in most cases, not suitable for high end aggregates uses, but are used as low-grade aggregate. Moreover, extraction methods are far more expensive than standard aggregate extraction methods — it would be economically illogical to deliberately produce aggregate in such an expensive way. For example the cost of production of slate aggregates amounts to GBP 5,7 to GBP 6,5 per tonne, while the sell with up to GBP 6,42 per tonne.
- (326) The material used for high quality slate purposes has a cut face due to the way in which it is extracted; heavy slate slabs are cut across the grain into set sizes using a saw, and then also usually have at least one face which is cleaved along a natural plane within the rock by riving (splitting with a mallet and chisel). In such case, the slate would undergo an exempt process in accordance with Section 18(2)(a) of the Finance Act 2001 and benefit from tax credit pursuant to Section 30.
- (327) The BAA and several interested parties claimed that table tops, walling stone and hedging stone are aggregates uses and that the quarries producing such products as primary products should be taxed. The main argument for this is that the products structure of the respective quarries is not different from that of rock quarries (such as granite or sandstone) that would also produce walling stone with priority and afterwards the secondary low-grade aggregates.
- (328) Unlike other aggregates such as limestone, slate appears to require deep quarrying, making its extraction expensive compared to the costs of an usual quarry. The UK authorities and interested parties have shown that there is an important difference between normal aggregates quarries (such as granite, sandstone and limestone) and slate quarries and that their different tax treatment is fully justified.
- (329) The BAA and several interested parties claim that there would be slate quarries that do not produce specialised architectural products, but exploit slate deliberately for aggregates use. Moreover, there would be quarries that claim they should be exempted because they produce slate, but, in fact the material they produce does not have the appropriate slaty cleavage or has been mislabelled.
- (330) In this regard the Commission notes, firstly, that according to the UK authorities there is no indication that any quarries would be deliberately extracting slate for aggregates uses. Indeed, in lack of clear evidence to the contrary, the UK authorities could not have been expected to prove a negative fact, i.e. that there are no quarries deliberately extracting slate for aggregates purposes. When provided with examples of quarries that allegedly exploited slate deliberately for aggregates use, the Commission has requested that the UK authorities provide information in respect of such quarries. The information shows that none of these quarries exploit slate deliberately and primarily for aggregates purposes. The information solely shed doubts as regards the qualification as slate of the products of one particular quarry which the UK authorities committed to investigate. A misrepresentation of the materials would constitute an abuse of the AGL and not a State aid issue.

- (331) Secondly, as described above in recital 169 the Commission considers that advertisements in which quarries describe their products for the purposes of attracting clients are not entirely relevant for the assessment of the use of the materials for the purposes of the AGL. The UK authorities themselves do not take such descriptions into consideration for tax enforcement purposes.
- (332) The criterion used by the UK authorities to check whether the material extracted by a particular quarry is slate is, in accordance with the Report ⁽⁶⁹⁾, whether it 'splits only with a chisel into sharp flakes and tiles'. Therefore, if there would be quarries claiming they produce slate and thus benefiting from the exemption, which in fact produce material that does not have sufficient slaty cleavage as the BAA claims, these quarries would have abusively not declared themselves for the payment of the AGL. This would represent an enforcement issue and would be investigated as fraud by the HMRC. The UK authorities committed to investigate the quarry mentioned above and any other cases where research undertaken as a result of obtaining evidence for the Commission causes concerns about mis-classification of materials. If the material proves not to be slate, the levy as well as a penalty will be charged.
- (333) In accordance with the findings of the General Court ⁽⁷⁰⁾ the inclusion of certain materials in the scope of the levy under the normal taxation rule applicable depends 'only on their actual and established exploitation as aggregates'. For freshly extracted slate, this can be interpreted so that, if there is no evidence of quarries deliberately extracting slate for aggregate use, slate is not comparable with the taxable materials and, thus, the exemption related to slate falls within the general principles of the AGL.
- (334) It has been demonstrated to the Commission that slate is not deliberately extracted for aggregates purposes, but quarried for obtaining dimensional and decorative products.
- (335) The Commission therefore concludes that freshly extracted slate is in a different factual and legal situation than the taxed materials and thus does not fall within the normal taxation principle of the AGL.
- (336) While it follows from the submissions that only a small part (around 5 %) of the material extracted from slate quarrying is high-quality slate which in suitably sized sheets can be sold as dimensional, architectural products and thus not for aggregates use, the remaining part of the quarry extraction is slate as by-product or waste which then can be used as aggregate (the exemption of spoil of slate extraction is assessed below in Section 5.6.4).
- (337) However given that the extraction of the slate by-product is unavoidable phenomenon when quarrying the high quality slate for decorative and dimension material used in the construction and it cannot occur when quarrying other materials its exemption contributes to the objective of the AGL. It can, indeed, help to shift the demand from freshly extracted materials for aggregates use towards slate as by-product. Moreover, there is no risk that this exemption could encourage the fresh extraction of the slate given the high costs of the extraction of slate which can be covered only when slate for decorative and dimension is obtained. This has been confirmed also by the decreasing number of active slate quarries since the introduction of AGL (from 43 to 32) as informed by the UK authorities ⁽⁷¹⁾.
- (338) The Commission notes that there might be naturally occurring slate that does not have a purity of 100 % purity, but that still meets the requirement to split only with a chisel into sharp flakes and tiles. In such cases, the UK authorities considered that the exemption should cover also material consisting mainly of slate.
- (339) The Commission therefore considers that since no evidence was provided that such material mainly consisting of slate was deliberately extracted for the use as aggregates the same reasoning that applies to material wholly consisting of slate, should apply also to material consisting mainly of slate which covers the situation described in recital 338.
- (340) Thus the exemption under Section 17(4)(a) of the Finance Act 2001 granted for material wholly or mainly of, or being part of anything consisting of slate does not derogate from the normal taxation of the AGL.

⁽⁶⁹⁾ See footnote 64.

⁽⁷⁰⁾ Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 72

⁽⁷¹⁾ See table in recital 143.

5.6.2.5.2. Shale

- (341) As shale is a rock and, thus, an aggregate within the meaning of Section 17(1) of the Finance Act 2001, its exemption from the AGL does not constitute a derogation from the normal taxation principle under the AGL, if shale is not deliberately extracted for aggregates use. In case of such extraction its exemption could only be justified if it contributes to the environmental objective of the AGL, i.e. to achieve a shift in demand.
- (342) Interested party submissions and the UK authorities pointed to a series of uses of shale as aggregate, mainly as low-grade aggregate to fill and provide bulk underneath the surface of roads or as embankment fill.
- (343) Moreover, the Commission notes that shale is often interbedded with sandstone or with other taxed materials. In such cases, it can be considered that the shale is deliberately extracted together with such materials for commercial exploitation as aggregate.
- (344) The UK authorities themselves have claimed that those materials which are extracted for use as aggregate, or which arise as by-products from a process which is intended to produce aggregate for commercial exploitation, are in a different factual situation to the exempted materials. Thus, the shale that is deliberately extracted for commercial exploitation as aggregate is also in a different factual situation to the exempted materials in the same way as all other freshly quarried taxed materials. Therefore, there would be no justification for a material to benefit from an exemption from the AGL when it is deliberately extracted for use as aggregate.
- (345) The UK authorities showed that the vast majority of shale is not used as aggregate as most shale is generally unsuitable for use as aggregate. The high-quality use of shale is for brick-making which is a ceramic process.
- (346) On the basis of information received from interested parties the Commission notes that freshly extracted shale can be used as aggregate, albeit not in widespread situations and, unlike the extraction of slate, there are no high-end specialised products being produced out of shale that would entail an exemption. In addition, shale itself is a material that can have very different characteristics from one exploitation point to another.
- (347) The Commission takes note of the submission of the UK authorities, detailed in recital 297 that shale is in the same family of rocks as clay, however harder shale can be considered in the same family as slate.
- (348) Moreover, in contrast to clay, some shale can be and is used for providing bulk in construction and it does not require physical transformations in this regard (recital 299).
- (349) Firstly, interested party comments received by the Commission show that shale can and is deliberately extracted for commercial exploitation as aggregate. Shale achieves a price ranging between GBP [...] and GBP 4,44 (see recitals 292, 304 and 307). Out of this price in some cases GBP 3 is only the price of the transportation of shale. The Commission notes however that it has not received pricing information for shale extracted as a main product of a quarry, but solely for shale extracted as a by-product of another material.
- (350) Concerning the fresh quarrying of shale, the Commission has received evidence as regards at least four or five ⁽⁷²⁾ quarries supporting that they are primarily extracting shale for aggregates use. As described in recital 318, in response to the list of quarries that appeared in the BGS *Directory of Mines and Quarries 2010* to be primarily extracting shale for commercial exploitation of shale aggregates submitted by the BAA, the Commission asked the UK authorities to provide information regarding these quarries from confidential tax records. This revealed that four or five ⁽⁷²⁾ quarries were registered as benefiting from the exemption from shale while producing cut stone and shale for aggregates use. The UK authorities explained that as the quarries produce cut stone, the shale should be viewed as by-products of cut stone and hence duly benefit from the exemption. However, this explanation cannot be accepted by the Commission. As described in recitals 151 to 158, by-products of cut stone are not exempted from taxation under the AGL. Moreover, all aggregates quarries would produce some cut

⁽⁷²⁾ See footnote 67.

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

- (351) The Commission notes the existence of a contradiction arising from a submission it has received. The comment received from Torrington Stone refers to their extraction and sale of shale aggregates obtained as a primary product from one of their quarries (Vyse). However, the UK authorities claim the quarry does not produce shale at all on the basis of how the quarries products are presented on its website. Nevertheless, the Commission notes that shale is mentioned on the website of Vyse Quarry, not in the description of their products, but in the technical specifications of the different products they extract ⁽⁷³⁾.
- (352) Moreover, since this is a submission from the quarry itself, the Commission has to take it into account. It may be the case that the material they produce has been wrongly labelled as shale, but the quarry itself claims it has benefited from the exemption for shale. Moreover, the UK authorities have stated on different occasions that they disregard, for the purposes of the AGL, the manner in which a quarry presents its products to the public. No mention was made of any geological test having been conducted at the quarry.
- (353) On the basis of the information and evidence available the Commission considers that the freshly quarried shale is in a factual and legal situation comparable to that of others taxed materials.
- (354) The UK authorities have not established that the exemption of freshly quarried shale for aggregates can be justified by the 'shift of demand' objective of the AGL. Indeed such exemption allows at least maintaining the fresh extraction of the shale for aggregates use and thus presents a derogation from the normal taxation principle of the AGL which is contrary to the objective of the AGL.
- (355) The exemption for spoil from shale extraction is assessed below in Section 5.6.4.
- (356) The Commission notes, however, that shale which occurs as a by-product of coal extraction benefits, in addition to the exemption under Section 17(4)(a), also from the exemption under Section of the 17(3)(f) of the Finance Act 2001. As will be established below in recital 367 of this Decision, coal is not and cannot be used as aggregate.
- (357) Shale that is an unavoidable by-product of coal extraction is suitable for aggregates use and thus it falls under the scope of normal taxation under the AGL. However its exemption can be justified by the 'shift of demand' objective of the AGL. In addition, due to its value, it is highly unlikely that the exempted shale as by-product could provoke an increase in fresh coal extraction, as it would not make economic sense.
- (358) Moreover, since shale is, like clay, mostly used in pipes, tiles and brick-making, which are ceramic products, it benefits from the tax credit granted for ceramic processes under Section 30(1)(c) of the Finance Act 2001. As this is not an aggregates use and as materials used for ceramic processes undergo extensive physical transformations, i.e. fusing to form a hard, durable and weather-resistant product, shale used for ceramic processes would duly benefit from the relief from the AGL. The Commission has already found in the Opening Decision the relief for industrial and agricultural processes (Section 30(1)(c)) to be in line with the normal taxation principles underpinning the AGL (recital 137).
- (359) The Commission notes that the BAA and other interested parties commented that materials used for bricks should not benefit from an exemption. The UK authorities showed, however, that bricks and other ceramics processes are not aggregate uses. Bricks undergo an extensive manufacturing process. They are formed by heating shale or clay to a high temperature (more than 1 000 °C) in a kiln, changing the structure of the shale or clay to make a solid, durable brick. Other ceramic products are fired in a similar way in a kiln, but made into different shaped products, e.g. pipes or tiles.
- (360) Bricks are not made to be used as bulk fill in a manner analogous to crushed rock. They are made to be stacked, in an orderly way, to form walls.

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

- (361) On the basis of the above, the Commission concludes that the use of shale in ceramic processes may benefit from a relief from the AGL as this does not represent an aggregate use of shale.
- (362) In addition, shale can be used in place of clay, slag or other materials as a source of aluminosilicate in the manufacture of cement. It is mixed with limestone, a process which is exempted from the AGL. The use of limestone, or limestone and other materials in cement, is exempted from the levy in accordance with Section 18(2)(c) of the Finance Act 2001 as in this use, the chemical properties of the material are important (with limestone providing calcium silicate, and clay or shale providing aluminosilicate). Therefore, shale used for the manufacture of cement together with limestone would duly benefit from an exemption under this section of the Finance Act 2001. The Commission has already found in the Opening Decision that the exemption for this process is in line with the normal taxation principles of the AGL (recital 90).
- (363) Shale producers would have to show what uses the material wholly or mainly consisting of shale they produced had in order to claim an exemption from the AGL.
- (364) For example, shale also occurs as an unavoidable by-product of clay extraction. Where this is the case and the shale is not already benefiting from another exemption or relief, it could be assessed whether the respective shale could not qualify for an exemption under the AGL as it has not been deliberately extracted for aggregates use. The exemption would be in line with the principles of the AGL as this regards shale that is obtained as an unavoidable by-product of a material that is neither an aggregate, nor used as aggregate and that could be used to replace freshly extracted aggregates.
- (365) With regard to shale occurring as by-product of fresh quarrying of other taxed materials, such as gritstone or limestone, the Commission notes that the exemption does differentiate the shale compared to other taxed materials. However, it has to be considered whether such tax differentiation can be justified by the objective of AGL. Even if the exemption could lead to an increase in the deployment of shale as by-product for aggregates use at the expense of other not exempted by-products, the Commission has not received any evidence from the UK authorities or from interested parties showing that this exemption contributes to the achievement of the AGL objective which aims at reducing the fresh quarrying of material for aggregates purposes.
- (366) The Commission therefore considers that material wholly or mainly consisting of shale that is deliberately extracted for aggregates use, including here shale occurring as by-product of fresh quarrying of other taxed materials, is in the same factual and legal situation as other aggregates that are taxed in light of the normal taxation principle of the AGL and of its environmental objective. Hence, the exemption is de facto selective.

5.6.2.5.3. Coal

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

5.6.2.5.4. Lignite

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

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

- (369) In their submissions to the Commission prior to the Opening Decision, the UK authorities had explained that china clay (also known as 'kaolin') ⁽⁷⁴⁾ and ball clay ⁽⁷⁵⁾ are valuable minerals. They are normally not quarried in order to serve as aggregates. Spoil consisting of waste rock and sand is an inevitable by-product of this extraction. China clay waste can be used in the construction of embankments and as general fill, in the production of bitumen bound materials for highway construction, and may be substituted for other fine aggregate in the manufacture of concrete. Ball clay waste can also be sold as aggregate into the construction market.
- (370) The UK authorities had highlighted that since the spoil resulting from ball clay and china clay extraction is available as soon as ball clay and china clay has been extracted and given that this spoil can provide an alternative to various sand, gravel and rock specifically extracted for use as aggregate, the exemption helps reduce the extraction of sand, gravel and rock that were specifically extracted for their use as aggregate and, on balance, the exemption helps reduce the environmental impact of aggregates extraction. The UK authorities had provided information regarding the waste resulting from china clay and ball clay extraction and the waste heaps created.
- (371) The Commission questioned in recital 106 of the Opening Decision whether such material would not be in a comparable situation to non-exempted aggregates, but observed that there may be a difference between the exempted material and non-exempted material in that the exempted materials constitute the spoil of china clay and ball clay extraction. It is an inevitable by-product of this extraction, which will occur not necessarily for the sake of aggregate extraction but in general for china clay and ball clay extraction. Indeed, both china clay and ball clay have specific properties that cannot always be replicated.
- (372) The Commission questioned in recital 107 of the Opening Decision whether this difference was sufficient to demonstrate that the tax exemption is justified by the nature and logic of the AGL and mentioned it required more information.
- (373) Following the publication of the Opening Decision the Commission received numerous submissions from interested parties in this regard.

5.6.3.1. *Comments received by the Commission*

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

- (374) According to its submission, Sibelco is a company involved in the extraction, processing and sales of china clay (kaolin) and ball clay. The majority, 80 % to 90 %, of ball clay and china clay production is exported. Sibelco submits that the primary purpose for the exploitation of its quarries is the extraction of ball clay and china clay. Other materials necessarily extracted can be regarded as secondary materials that may or may not be suitable for aggregate end use depending upon its constituents and possible processing.
- (375) Sibelco maintains that china clay and ball clay as well as the products derived from them cannot be used as aggregates. They are specialist industrial minerals with only non-aggregate applications and end uses. China clay and ball clay are distinguished by their unique physical and chemical characteristics and rarity and are, thus, highly valuable.
- (376) According to Sibelco, the spoil from these mineral extraction activities does not constitute material that is specifically extracted in order for it to be used as aggregate. The spoil is extracted as a necessary consequence of obtaining china clay and ball clay. The by-products are entirely different from the ball clay and china clay minerals and their uses are not the same or in any way interchangeable. Moreover, Sibelco maintains that,

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

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

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

- (377) Sibelco submits that given the location and distribution of china clay and ball clay sites, the specific geological conditions and the significant capital investment required to set up quarrying operations in these areas, without the china clay and ball clay extraction, no extraction activity of spoil would take place in any of these locations.
- (378) According to Sibelco, all sales of aggregate derived from by-products of china clay and ball clay extraction result in a direct reduction in the volume of this material being placed in heaps and mounds at the extraction site.
- (379) In accordance with the information provided by Sibelco, in china clay deposits, the clay mineral (kaolin) is formed by the decomposition and partial decomposition of feldspar minerals in granite. This process is known as kaolinisation and while the proportion and characteristics of the kaolin varies within the deposits, the overall yield of kaolin to the whole rock mass is typically around 10 %. While some element of selective extraction is possible, for the most part the whole rock mass (interburden) must be extracted before the kaolin can be separated. The process of separating out the kaolin by water separation, gravity methods and several stages of screening and sizing results in by-product material constituting weathered and un-weathered granite, stent (rock), quartz and mica. This by-product material is not, in its extracted form, suitable for aggregate use. Processing is required to make some part of it suitable for aggregate end uses.
- (380) According to Sibelco, in ball clay deposits, the clay is essentially also a kaolin mineral but deposited by sedimentary geological processes producing an often distinct layering of strata. The layering interposes ball clays, lignitic ball clays and sand seams. These interburden seams must be extracted to reveal successive ball clay seams. The ball clay seams and indeed the interburden seams must be carefully selected to ensure no contamination of the ball clay with other material and no unplanned cross mixing of different quality ball clay seams. The interburden typically represents more than 50 % of the whole extracted volume. Following extraction of the ball clay seams, these are mixed in precise blends depending on the specific end use.
- (381) According to Sibelco, the main difference between china clay and ball clay quarries and aggregates quarries is that in aggregate quarries the waste or by-products are essentially the same material. In ball clay and china clay quarries the by-products arising are distinctly different material than the clays which are being sought as the primary mineral.
- (382) According to Sibelco, the current exemption for aggregate material sold from appropriate processing of material derived as an inevitable by-product of china clay and ball clay extraction will not result in an increase in china clay and ball clay extraction activities. China clay and ball clay demand and sales drive the quarry development. Even though some by-products of both china clay and ball clay extraction are subsequently processed and made suitable for aggregate end uses, the majority of the resulting by-products are still placed in heaps and mounds. This is because there is no further demand for the aggregates (notwithstanding the current exemption from the levy), but extraction in the quarries must continue to produce the market demand volume of china clay and ball clay. Currently there is around five times more spoil, waste and by-products handled in Sibelco's china clay and ball quarries than aggregate sales. This demonstrates that even the current levy exemption cannot further incentivise the extraction of material for aggregate use. In addition, it appears that sales of clays and sales of aggregates have a completely different pattern. In aggregates production a supply contract regards one specific project and lasts a relatively short period of time. However, the ball and china clay industry has to supply ceramic manufacturers with a consistent blend of material for a period of many years.
- (383) In addition to its submission, Sibelco has also provided the Commission with an overview of the geology, extraction and processing of ball clay and china clay.

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

- (384) IML has china clay and ball clay operations covering over 5 000 hectares of land in Cornwall, Devon and Dorset in the south-west of England.
- (385) IML claims that the United Kingdom is a leading world producer and exporter of high-quality ball clay with more than 80 % of production exported. Ball clay is mainly used as a raw material in the manufacture of ceramics (particularly, sanitaryware, wall and floor tiles, and tableware). Other uses include in enamels and glazes, building bricks, refractory applications and as fillers and sealants. The material characteristics of ball clay render it unsuitable for use as aggregate. Aggregates generally need to be hard, granular materials. In contrast, ball clay is soft and fine-grained. The relative value of ball clay would also preclude its use as aggregate. It is a relatively rare and important material, with an ex-works value of up to GBP [...] per tonne, depending on its quality and the level of demand in the marketplace.
- (386) According to IML, the United Kingdom is one of the largest producers and exporters of china clay in the world with over 90 % of production exported.
- (387) IML claims that china clay is valued for its whiteness, fine particle size and flat particle shape, soft non-abrasive texture and chemical inertness. Its main uses are in the manufacture of paper as a filler and coating pigment, sanitaryware and tableware. More specialist applications include as a filler in paint, adhesives, plastics, rubber and sealants; and in the manufacture of glass fibre and pharmaceuticals.
- (388) According to IML, the material characteristics of china clay render it unsuitable for use as aggregate. The relative value of china clay would also preclude its use as aggregate. China clay is a very rare product, both nationally and internationally. Given its rarity and importance due to the demand for its use in a number of industries, it commands a relatively high price. A lower quality product in a basic application will sell for around GBP [...] ex-works whereas a highly refined specialist product for use in a technical application will command more than GBP [...] per tonne.
- (389) According to IML, they receive a modest royalty averaging at approximately GBP [...] per tonne for the material sold as secondary aggregates. According to IML, the extraction of ball clay and china clay would take place irrespective of any other factor, and the generation of waste product is inevitable. Its use as aggregate is far more beneficial for the environment than primary aggregate quarrying. Without a stable market for the waste more material will have to be surface tipped.
- (390) According to IML, of the 8,47 million tonnes that are mined in total, approximately 6,5 million fall into the category of potential aggregates feed material. Breccia, crushed stone, gravel, interburden, rock and stent can be processed to form crushed aggregates of one type or another ranging from single size chipping to sub-base/fill material. The crushing process will also yield gravel and sand products. In addition, sand is generated during the bucket wheel separation process of china clay. Not all of the 6,5 million tonnes of feed can be processed into marketable secondary aggregates, and waste volume varies depending on the nature of the china clay area being worked. An existing processor of china clay waste calculates that a yield of 65 % is typical meaning of the 6,5 million tonnes of annual run of mine aggregate feed, over 4 million tonnes of saleable product can be made.
- (391) According to IML, on average 'dry-screened' concrete sand sells for GBP [...] ex-works and a crushed product (aggregates) for GBP [...] ex-works. The sales are not made by the IML itself, but by a processor of china clay waste.
- (392) IML claims that there is no way the AGL exemption could lead to more extraction of ball/china clay for the purposes of deriving more levy-exempt material. IML already tips more waste than it supplies for aggregates processing proving that the level of extraction depends entirely on the market demand for the primary mineral; china/ball clay.
- (393) IML claims that, the extraction process already produces more waste than is currently sold and it would be illogical to mine more china/ball clay to derive the secondary aggregate by-product.

- (394) According to IML, for the production of tradable aggregates additional processing is required. They claim that, a dry screening plant for sand production costs in the region of GBP 0,75 million, a crushing plant costs in the region of GBP 2 million and a washing plant for processing mortar sand would cost up to GBP 1,5 million. Using the average selling prices of sand at GBP [...] per tonne and crushed aggregates at GBP [...] per tonne, production costs would typically make up 35 % for sand and 50 % for crushed aggregates.
- (395) According to IML, without the china clay content having been removed first, it would not be cost effective to quarry the sites for their aggregates potential. The potential aggregate materials are only available to the market because of the extraction of china and ball clay, as without this, the quarries would not be economically viable. Given the very high cost of extracting the minerals, and the relatively low quality of the by-product derived from that process when compared with primary aggregates, the sites would not generate any aggregates at all were it not for their mineral content.
- (396) According to IML, the exemptions from the AGL distinguish between waste materials that arise as the by-product of the extraction of a non-aggregates mineral (such as waste from china/ball clay extraction) which are exempt, and waste materials that are the by-product of extraction of aggregates (such as waste from limestone), which remain subject to the AGL.
- (397) IML claims that by-products from limestone and cut stone quarries are deliberately extracted for and used as aggregates, whereas by-products from china or ball clay extraction are unavoidable consequences of the extraction of those minerals.
- (398) IML has also provided the Commission with a case study published in 'Construction News' concerning the use of recycled and secondary aggregates from the extraction of china clay in concrete in a major London site.

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

- (399) According to the Kaolin and Ball Clay Association, as part of the exploitation of china and ball clay quarries other materials which are unavoidably extracted can be considered as 'secondary' materials, which may or may not be suitable for use as aggregates. The current AGL exemptions for these secondary materials were introduced in order to incentivise their use and to reduce the quantity of such materials being surface-tipped. The Kaolin and Ball Clay Association claims that china clay and ball clay cannot be used as an aggregate, and they are never extracted for such use.
- (400) According to the Kaolin and Ball Clay Association, without the extraction of china and ball clay, the aggregate materials derived from them would never be available to the market. Quite simply the cost of separating the china clay and ball clay from the aggregates, and the value of the aggregates themselves, would make this totally unviable. Selling prices of china clay and ball clay are substantially higher than the aggregates, which is why it is cost effective to mine them in their own right.
- (401) The Kaolin and Ball Clay Association maintains that further evidence of this is in the fact that currently, even with the aggregates levy exemption, only approximately one third of the material that could be processed into aggregates is processed.
- (402) According to the Kaolin and Ball Clay Association, it is certain that sales of by-product material will fall if the levy is imposed on these currently exempt minerals, in fact there is already evidence of this happening for projects starting in April 2014.

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

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

- (404) The BCC maintains that ball clay has a selling price at least 5 to 6 times higher and china clay at least 10 to 12 times higher than the by-product which can potentially be sold as secondary aggregate. Economics and site constraints would not result in a situation where more china clay and ball clay was extracted than could be sold in order to derive additional by-product material for aggregate production. Even with the exemption the majority (five times more) of china clay and ball clay by-products are still not being sold, but are placed in heaps on site.
- (405) According to the BCC, exempt and non-exempt quarries are significantly different. Non-exempt aggregates quarries mainly extract the same material as their primary products and waste or by-products. However, in china clay and ball clay quarries the waste is different from the main materials. The latter are feldspar minerals while the former are mostly silica-based sands.
- (406) The BCC maintains that the sales of the by-product material from china clay and ball clay quarries will fall if the levy is imposed on them. To meet demand additional virgin aggregates will have to be extracted.

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

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

(f) *Comments from the UK authorities*

- (408) The UK authorities maintain that not only do the material characteristics of china clay and ball clay preclude their use as aggregates, the relative value of ball clay and china clay would also preclude such use. The UK authorities claim that, in fact, there is no actual and established exploitation of ball clay and china clay as aggregates. Accordingly, the Commission's summary of the difference between the position of the spoil, waste or by-product of the extraction of these materials is entirely correct. The exemption of the inevitable by-products of materials which cannot and are not used as aggregate is entirely consistent with the environmental objective of the AGL.
- (409) The UK authorities provided a detailed description of ball clay and china clay and explained why they are not and cannot be used as aggregate. Moreover, both materials attract a high price. According to the UK authorities, ball clay is a relatively rare material, with a value of up to GBP 100 per tonne, depending on the particular grade of ball clay required and the level of demand in the marketplace. China clay is a very rare material, which commands a very high price on the market of between GBP 70 and GBP 400 per tonne. According to the UK authorities, the cost of producing of china clay and ball clay are also very high by comparison with the costs of production of other types of aggregates. The UK authorities provided information collected from companies active in the field. One company provided the average figure of GBP [...] per tonne of china clay, with a range of GBP [...] to GBP [...] for different china clay products. Another company mentioned GBP [...] per tonne. For a tonne of ball clay the average production cost is of GBP [...] in Dorset and GBP [...] in Devon. Another company mentioned GBP [...] per tonne.
- (410) According to the UK authorities, there are two companies currently supplying ball clay and china clay in the United Kingdom. The UK authorities provide the example of one supply contract for china clay and ball clay by-products where the price in 2012 was of GBP [...] per tonne. In the case of another contract the price was of GBP [...] per tonne of china clay waste sold. Ball clay waste had a price of GBP [...]. Neither of these two companies sells the spoil or inevitable by-products generated by their activities directly to the construction end-users of such aggregates. Instead, both companies have entered into agreements with third parties (that specialise in the sale of aggregates) under which they agree to provide up to a certain amount of aggregate for a fixed price, irrespective of the amount which is actually supplied. Accordingly, as the price is not determined directly for each tonne of aggregate they produce, the ball clay and china clay quarries have no incentive to increase the amount of spoil which they remove beyond the level which has been agreed. The third parties then sell the aggregate on to end users. According to the UK authorities, owing to the economic downturn not even the entire amount of aggregates can be sold.

- (411) The UK authorities claim that, the production of china clay cannot be separated from the production china clay waste. The nature of the wet extraction process is such that the pumps necessarily separate the desired kaolin material and waste products. Traditionally, the first stage in the extraction or quarrying of china clay was to remove the overburden and expose the rock bearing clays. The second stage of the process was that the quarry operator would subject the exposed clay or pit face to jets of water at high pressure. According to the UK authorities, this would remove the china clay, together with other products it was mixed with (sand and mica).
- (412) According to the UK authorities, the overburden resulting from the extraction is subject to the AGL. The rest of the material which is unavoidable in the china clay extraction process is covered by the exemption.
- (413) The UK authorities claim that ball clay is extracted entirely by open pit methods. Open pit extraction involves using hydraulic excavators and dump trucks to selectively dig, load and deliver individual production clays to storage and blending facilities. The overall clay to waste ratio for the industry is about 1 to 1,5.
- (414) According to the UK authorities, where an operator would be unable to obtain the high value china clay or ball clay product, there would be no incentive to extract the by-products by themselves, in particular due to their low economic value. The presence of kaolinite or any other type of clay in a rock reduces the material's strength and therefore has a negative effect on its possible performance as aggregate. Even if the operator did not want to obtain the high value material, it would still incur the high costs of removing and disposing of the fine material i.e. the kaolinite, other clay and mica. Accordingly, it would be illogical to remove high value products and dispose of them in order to obtain the low-value by-products which can be used as aggregates. According to the UK authorities, even with the exemption from the levy it would, allegedly, not be economically rational for extraction activities to be undertaken at the sites in order to obtain exempt spoil unless the higher value china clay and ball clay was also being extracted.
- (415) According to the UK authorities, the inevitable by-products generated by the extraction of ball clay and china clay are suitable for some aggregate uses.
- (416) The UK authorities commented on the distinction between the extraction of limestone for lime production and cut stone and the inevitable by-products generated by the extraction of ball clay and china clay. They contend that cut stone and limestone are extracted for use as aggregate, as well as for those non-aggregate purposes. Cut stone is produced from sandstone or granite — both of which are extracted for use as aggregate. The spoil, waste or by-products derived from the production of cut stone and limestone can also be used as aggregate.
- (417) According to the UK authorities, the fact that both limestone and its by-products can be used as aggregate is in part explained by their material characteristics. Waste arising from the extraction of limestone, which is used in the production of lime, is likely to consist not of a different waste material, but rather, additional limestone. The UK authorities claim that, in a small number of instances, the limestone 'waste' which arises from the quarrying of limestone for lime production may be chemically unsuitable for lime production. However, in the majority of instances, it would be perfectly suitable for either use as aggregate or the production of lime. The end-use of limestone will be determined more by local demand than chemical composition.
- (418) Moreover, according to the UK authorities, waste arising from the extraction of rock to produce cut stone is likely to consist largely of the chippings of the same rock which is being extracted. Unlike ball clay and china clay, there are no additional costs in relation to the separation of the higher and lower quality grades of the same material.
- (419) The UK authorities maintain, quoting the BGS, that both the freshly extracted material and their by-products are deliberately extracted for, and used as, aggregate ⁽⁷⁶⁾. The quarrying of limestone and rock for cut stone generates high quality aggregates which would be extracted for sale on their own, even if there was no local demand for limestone or cut stone. The cost of limestone for lime is around GBP 12,50 to GBP 19,50 per tonne, whereas the price of its by-product is GBP 7,16 to GBP 11,70 per tonne. The price per tonne of sandstone and quartzite used for producing cut stone is around GBP 45,76 to GBP 82,42, whereas the cost of its by-product aggregate is around GBP 6,58 to GBP 10,04.
- (420) According to the UK authorities, a granite quarry would produce varying proportions of cut stone for flooring, office buildings, domestic kitchens etc. and aggregate. Igneous rock (including granite), which is also used to produce cut stone, costs around GBP 5,51 to GBP 12,91 per tonne, whereas its aggregate by-product sells for around GBP 6,12 to GBP 12,82 per tonne.

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

- (421) According to the UK authorities, the proximity in price of limestone/cut stone and its spoil (which in any event is the same substance) means that there are incentives to extract both, depending upon local demand. The UK authorities contend that the difference between the unavoidable by-products of china clay and ball clay and the by-products of limestone and cut stone is justifiable and any other tax treatment would lead to uncontrollable abuses and could not be enforced.
- (422) The UK authorities further show that it is entirely consistent with the objective of the levy to encourage the use of the inevitable by-products of the extraction of china clay and ball clay, as they can be used as aggregate. As both limestone/cut stone and the by-products generated from their production can be used as aggregate, and are extracted for that purpose, the exemption of the spoil arising from extraction of limestone/rock used for cut stone would only serve to encourage increased extraction of fresh aggregate, and would not shift demand from freshly extracted aggregates to recycled aggregates and waste by-products.
- (423) The UK authorities allege that limestone is a high quality aggregate, for which there is also market demand. There is a market in limestone quarried solely for aggregate (88 quarries in the UK, as shown in the joint submission of the BAA with the UK authorities), and as such there is an environmental rationale to substitute this material for by-products of other quarrying. There is allegedly no objective way to distinguish between limestone produced as a by-product of agricultural lime production and limestone quarried specifically for use as aggregate.
- (424) One interested party mentioned that there are china clay and ball clay pits that have been reopened due to the introduction of the levy solely for extracting exempt aggregates. The UK authorities obtained confirmation from the two national producers of ball clay and china clay that this is not the case and maintained that they are not aware of any authorisations having been granted for such reopening purposes.
- (425) As regards the comment from an interested party that silica sand that is a by-product of china clay extraction has always been used as a source of aggregate in Cornwall and the exemption does not reduce the extraction of freshly quarried sand, the UK authorities verified and provided partial sand sales for Devon and Cornwall and showed that they could not attribute any of the production to by-products of china clay extraction.

5.6.3.2. Assessment by the Commission

- (426) The submissions from ball clay and china clay producers, their respective trade associations, and the UK authorities clearly show that the by-products arise both unintentionally and unavoidably. The costly and complicated extraction process of ball clay and china clay and the fact that more waste is produced than china clay and ball clay producers are able to find a market for, shows that ball clay and china clay are not intentionally extracted to produce exempt by-product materials for aggregate use.
- (427) In addition, ball clay and china clay commercially operate their businesses differently than quarries that supply aggregates for construction purposes, as they have to honour long term contracts to ensure a constant production of the respective end products. This means that they can neither quarry more, nor less than what they need to obtain the quantity of ball clay and china clay provided in their contracts, thus the amount of extraction by-products would remain the same. The introduction of the AGL for ball clay and china clay by-products would only affect the financial situation of the respective businesses without achieving any environmental benefits.
- (428) Unlike the by-products from limestone and cut-stone, by-products of ball clay and china clay would never be quarried for their own sake in order to produce more exempted aggregates. The exemption for by-products of ball clay and china clay does not lead to more extraction of the freshly quarried ball clay and china clay and their selling value is much lower. There is no proximity in price like in the case of limestone and cut stone. In fact, the price difference is much greater. Thus, there is no risk that the exemption might lead to a deliberate increase of fresh quarrying. The exemption for by-products from the extraction of ball clay and china clay encourages their use instead of freshly extracting new aggregates and is in line with the principles underpinning the AGL.

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

- (429) Coal, lignite, slate and shale and the substances listed in Section 18(3) of the Finance Act 2001 are normally not quarried for their use as aggregates, but are quarried for other purposes. Prior to the adoption of the Opening Decision, the UK authorities had explained that the exemption is meant to encourage use rather than disposal in waste tips of the spoils. This both improves the visual landscape and reduces the need to extract other materials for aggregates use.
- (430) In the Opening Decision, the Commission observed, first, that there may be a difference between the exempted material and non-exempted material in that the exempted materials constitute the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3). They are an inevitable by-product of this extraction, which will normally occur not for the sake of the extraction for aggregates use but for the sake of extracting the concerned materials and substances which are (normally) not used as aggregates. On this basis, the spoil of the extraction of coal, lignite, slate, shale and the substances listed under Section 18(3) does not seem to be in a comparable situation with taxed aggregates in the light of the objective of the AGL.
- (431) The Commission doubted, however, whether this difference is sufficient to demonstrate that the tax exemption is justified by principles underpinning the AGL. It considered the difference from taxed aggregates is justified only if the exemption is limited to the inevitable spoil of the extraction of those substances. The Commission considered this to be the case as the exemption is limited to material that constitutes at 100 % the spoil of the separation process.
- (432) The Commission doubted the difference in situation with exempted materials as compared with non-exempted materials that occur as the spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces. In addition, the Commission wondered whether the exemption can be justified in the light of the objective assigned to the AGL if, for instance, slate and shale or any of the other substances listed in Section 18(3) would be extracted to be used as aggregates.
- (433) The Commission received extensive comments from interested parties which are presented in the relevant sections in relation to the exemptions for coal, lignite, slate or shale.

5.6.4.1. *Comments received by the Commission*

(a) *Comments from the UK authorities*

- (434) The UK authorities maintain that the exemptions from the AGL distinguish between waste materials that arise as the by-product of the extraction of a non-aggregate mineral (such as waste from china and ball clay extraction), which are exempt, and waste materials that are the by-product of the extraction of aggregate (such as waste from limestone), which remain subject to the tax.
- (435) As regards spoil from coal extraction, the UK authorities maintain that the negligible price of shale and colliery spoil show that there is little to incentivise extracting additional coal in order to obtain extra by-product, whether or not that by-product is exempt from the levy.
- (436) According to the UK authorities, the exemption for waste arising from slate quarrying does not lead to more slate extraction for the purpose of obtaining slate chippings, in particular because slate production already produces large quantities of waste slate chippings, only about 10 % of which is currently used as aggregate and because it would not be economically feasible to operate the quarry for such purposes.

- (437) The UK authorities maintain that the distinction between slate waste on the one hand and cut stone and limestone waste on the other hand stems from the objective of discouraging the additional fresh extraction of limestone for aggregate use while not discouraging the production of non-aggregate material. Even where limestone is being extracted for non-aggregate purposes or rock is being extracted to produce cut stone, the spoil which is created is at the same time deliberately being extracted for use as aggregate and is well-suited for that use. The quarrying generates high quality aggregates which would still be extracted for sale on their own, even if there were no local demand for lime or cut stone. The same is apparently not true as regards to spoil from slate, shale, coal, lignite, clay and the substance mentioned in Section 18(3). The UK authorities maintain that, there is no evidence that any quarry deliberately extracts slate, shale, coal, lignite, clay or the Section 18(3) substances specifically in order to obtain the spoil for use as aggregate. Also, according to the UK authorities, the exemption does not encourage additional quarrying in order to obtain spoil for use as exempt aggregates.
- (438) However, according to the UK authorities, exempting spoil from the extraction of limestone (whether or not it is to be used for a non-aggregate purpose such as lime) and of rock for cut stone would be likely to encourage additional quarrying in order to obtain spoil for use as an exempt aggregate. That is because the spoil consists of the same substance as the principal quarried material, is relatively close in value to the price of the principal material, and is suitable for use as a high quality aggregate material. To exempt such materials from the tax would be likely to encourage additional quarrying and would defy the AGL's environmental logic.
- (439) The UK authorities maintain that they considered at some point introducing an exemption for waste from primary aggregates production or from the production of the higher quality aggregates. However, the consultation with the industry showed that this would not be feasible as the range of quarries' products varies significantly and what some quarries consider high grade aggregates would be the waste produced by other quarries. The UK authorities maintain that apart from the significant risk of tax avoidance, providing an exemption for 'waste' arising from aggregate quarrying would therefore also be contrary to the logic and overarching environmental goal of the AGL. It would, in effect, serve to reduce the relative price of lower grade aggregates, thereby increasing demand and potentially leading to an increase in aggregate quarrying (and associated environmental damage) at the sites concerned.
- (440) According to the UK authorities, a slate quarry would produce high quality architectural products selling for in excess of GBP 200 per tonne. Around 5 % of the slate extracted is suitable for this purpose due to the geological formation of the slate, and so a large amount of waste slate is produced. This waste slate is suitable for sale for some aggregate purposes, and a small proportion of the waste created is sold for between GBP 2 and GBP 8 per tonne, with the remainder piled in heaps. The UK authorities maintain that the cost of producing any tonne of product for use as an aggregate is higher than a typical drill and blast aggregates operation which the limestone or granite quarries could operate since slate is being taken from various processes and handled many times before being crushed. The marketing strategy is to maximise the value of the resource at its disposal, increasing the yield of high value material.

5.6.4.2. *Assessment by the Commission*

- (441) The Commission already concluded in recital 366 above that since it has been evidenced that shale has been deliberately extracted for use as aggregate at least by one quarry, its exemption under Section 17(4)(a) of the Finance Act 2001 is not justified by the principles underpinning the AGL.
- (442) The Commission has also already established above in recitals 205, 333, 367 and 368 that coal, lignite, slate and the substances listed in Section 18(3) cannot or are not freshly extracted for use of aggregate and thus are not in the same legal and factual situation as taxed materials.
- (443) In addition, the Commission assessed the difference between these exemptions and spoil of limestone extraction when the limestone is extracted to produce lime or when compared with the spoil of the extraction of rock to produce cut stone with one or more flat surfaces in the context of establishing the underpinning principles of the AGL as detailed in recitals 149 to 158.

- (444) As regards spoil of slate extraction, which could be used as aggregate and also consist of slate, the Commission notes that no fresh slate quarrying would take place deliberately for obtaining these products due to their low value (see recitals 226 and 237-240). Spoil from slate extraction achieves a selling price between GBP [...] and GBP [...] per tonne. High quality architectural slate products appear to have a selling price starting from GBP 200 per tonne and rising to above GBP 1 000 per tonne. Only a small part of the spoil from slate extraction can actually find a market and is sold even with the exemption from the AGL. Moreover, slate extraction is an extremely costly process for which more costs are incurred than in the case of regular quarrying. According to the UK authorities the cost of producing slate spoil amounts to GBP 5,7 to GBP 6,5 per tonne (recital 263). This demonstrates that it does not make economic sense to deliberately extract slate solely to benefit from the exempted spoil of its extraction. Thus this exemption is unlikely to increase the fresh extraction.
- (445) In accordance with the typical revenue of slate quarries, the specialised architectural products, although only 5 % of production, bring revenues to the quarries that are 2,54 to 3,52 times higher than the revenues brought by slate spoil (see recital 263).
- (446) Given that spoil from slate extraction can and is used as aggregates it could be considered in a comparable factual and legal situation as other taxed materials.
- (447) The Commission therefore concludes that the exemption from the AGL for spoil from slate extraction represents, first, an exemption for spoil from extraction of a material which is not freshly extracted for aggregates use, and, second, does not lead to any additional fresh quarrying of materials, but can increase the use as aggregates of a material that would otherwise be discarded or tipped as waste. Thus this exemption is justified by the 'shift of demand' objective of the AGL.
- (448) The same applies for spoil of coal, lignite and of the substances in Section 18(3) of the Finance Act 2001 which are either not aggregates or not extracted for aggregates use.
- (449) Firstly, the extraction of lignite does generate spoil. In accordance with the information from the UK authorities, lignite is itself a by-product of ball clay extraction in Devon. Lignite deposits in Northern Ireland are not exploited.
- (450) Secondly, as submitted by interested parties and by the UK authorities, spoil from coal extraction, which can include shale, are either not suitable for aggregates use, for example, fireclay, or are generally tipped and consolidated. Some spoil or waste from coal extraction is suitable for use as aggregates and it can, thus, replace freshly extracted aggregates.
- (451) Pricing information as regards the price of coal (GBP 50) versus the price for which coal spoil sells (GBP 1 to 2), when there is demand for such products, shows that the exemption for spoil of coal cannot lead to more extraction of coal just for obtaining the exempted materials.
- (452) The exemption from the AGL for spoil of coal extraction helps achieve the environmental scope of the AGL.
- (453) Thirdly, as explained in Section 5.6.2, the substances listed in Section 18(3) of the Finance Act 2001 are not deliberately extracted for aggregates use as the majority of them are not aggregates or are not suitable for use as aggregates. The only substances suitable for lightweight aggregates are perlite, pumice and vermiculite which are not extracted in the United Kingdom. Moreover, the UK authorities have shown that the substances listed in Section 18(3) of the Finance Act 2001 either do not generate spoil that could be used as aggregates, are themselves a spoil of the extraction of something else, or are no longer extracted. Therefore, the exemption for the spoil of the substances listed in Section 18(3) of the Finance Act 2001, if any, cannot lead to more extraction of the main material so that the exempted aggregate product is obtained.
- (454) Therefore, the Commission can now conclude that the exemption of aggregates consisting wholly of the spoil from any process by which coal, lignite or slate has been separated from other rock after being extracted or won with that other rock or of the spoil from any process where the substances in Section 18(3) have been separated from other rock after extraction or won with that other rock is in a different factual and legal situation than materials taxed under the AGL in light of the objective of the AGL.

- (455) Spoil of shale extraction when the shale is deliberately extracted for aggregates use is comparable with spoil from the extraction of any other taxed material (for instance limestone, granite and gritstone). The Commission notes that it has received very little information as regards the cost of shale extraction and the price which shale achieves when it is extracted as a primary product of a quarry. It has received some pricing information for shale that is used for brick-making, shale as by-product of another material or shale together with clay. However, the fact that a deliberate extraction of shale for aggregates use takes place (see recitals 350 and 351) sheds doubt on the achievement of the environmental purpose of the AGL by such exemption as also found by the General Court ⁽⁷⁷⁾.
- (456) The spoil of any process by which the shale has been separated from other rock can be still used as aggregates. The possibility to sell spoil from the extraction of shale for aggregates use exempted from AGL gives an extra leverage to shale producers and can, potentially, encourage fresh extraction of the shale as pointed by the General Court ⁽⁷⁸⁾. As the main product, shale appears in some instances to be deliberately extracted for aggregates use. Spoil from the process of obtaining shale could also potentially be sold as aggregates. Therefore, there is no guarantee that the exemption for spoil of shale that is deliberately extracted for commercial exploitation as aggregate does not lead to more fresh extraction of shale, thus undermining the environmental objective of the AGL.
- (457) The spoil of shale extraction, when the shale is deliberately extracted for commercial exploitation as aggregate, falls into the scope of the normal taxation rule of the AGL and are not in a different factual and legal situation than materials taxed under the AGL in light of the environmental objective of the AGL. In addition, the exemption for such spoil cannot be justified under the nature and logic of the AGL as shown above in recital 456.
- (458) With regard to shale as spoil occurred with the quarrying of shale for non-aggregates use (for instance for brick-making) the Commission considers — on the basis of the available information — that albeit being in the comparable legal and factual situation as other taxed materials, it could not be demonstrated that the exemption of such spoil can lead to an increase of fresh quarrying of the shale for non-aggregates use. Given the relatively low price of shale as by-product when sold for aggregates use (GBP [...] to GBP 4,4 per tonne including transportation costs), it is highly unlikely that the exemption for the spoil from shale extraction might lead to an increase of shale quarrying. In any event such increase of fresh quarrying of shale for non-aggregate use would not be contrary to the objective of the AGL.
- (459) Shale producers would have to show what uses the shale they produced had in order to claim an exemption from the AGL for the spoil, i.e. if it was commercially exploited for aggregates use.

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

- (460) Prior to the adoption of the Opening Decision, the UK authorities had indicated that the primary purpose of the concerned industrial process (e.g. coal-fired generation of electricity, smelting iron ore to produce steel) is to produce a product which is not used as aggregates. The spoil, waste and by-products concerned are for instance industrial slag (blast furnace slag, basic oxygen furnace steel slag, electric arc furnace steel slag and combustion ash).
- (461) The purpose of the exemption is to encourage use rather than disposal in waste tips (shift in demand). This both improves the visual landscape and reduces the need to quarry virgin aggregate.
- (462) The Commission doubted that the application of the exemption to materials that are mainly (i.e. as of 50 %) composed of the spoil or waste from, or by-products of any industrial combustion process or the smelting or refining of metal would still be in line with the nature and logic of the AGL.
- (463) The Commission has received several comments from interested parties in this regard.

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

⁽⁷⁸⁾ See footnote 77.

5.6.5.1. *Comments received by the Commission*

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

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

(b) Comments received from QPANI on 8 January 2014

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

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

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

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

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

(e) Comments of the UK authorities

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

⁽⁷⁹⁾ Argon Oxygen Decarburisation.

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

5.6.5.2. *Assessment of the Commission*

- (471) The Commission has already concluded in recital 124 of the Opening Decision that aggregates consisting wholly of, or being part of anything consisting mainly of, the spoil or waste from, or by-products of any industrial combustion process or from the smelting or refining of metal ('by-products of industrial combustion processes or from the smelting or refining of metal') are not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL.
- (472) Both the UK authorities and the Mineral Products Association have demonstrated that aggregates consisting mainly of by-products of industrial combustion processes or from the smelting or refining of metal are not in the same legal and factual situation as taxed material in the light of the objective assigned to the AGL.
- (473) Indeed the Commission received submissions showing that by-products of industrial combustion processes or from the smelting or refining of metal have a high value as aggregates and have various uses. The BAA submitted the example of a limestone quarry that produces primarily agricultural lime, but that competes with by-products of industrial combustion processes or from the smelting or refining of metal on the market of their secondary products, i.e. limestone aggregates. This shows that the exemption for by-products of industrial combustion processes or from the smelting or refining of metal is even more justified, as an unavoidable by-product such as this, is actually replacing other freshly extracted aggregates such as limestone aggregates.
- (474) The Commission has already addressed the difference between by-products from the extraction of limestone for the production of agricultural lime and exempted by-products of non-aggregate processes in recitals 151 to 158.
- (475) The BAA claims that by-products of industrial combustion processes or from the smelting or refining of metal should not benefit from an exemption under the AGL as the environmental impact from steel works is much higher than that of aggregates' extraction. This may be the case. However, steel works are a process that is unrelated to the AGL. The exemption for by-products of industrial combustion processes or from the smelting or refining of metal merely serves the selling of these as aggregates so that they can replace fresh extraction for aggregates use.
- (476) Therefore, the Commission considers that the comments received do not constitute a reason to cause it to depart from its initial assessment from the Opening Decision (recital 124).
- (477) In relation to the exemption which extends to material which is mainly, but not wholly, the by-product of industrial combustion process or metal smelting/refining, the UK authorities explained that additional chemicals are sometimes required to stabilise the material to render it suitable for aggregate use.
- (478) The Commission notes that the Extractive Waste Directive (Directive 2006/21/EC of the European Parliament and of the Council) ⁽⁸⁰⁾ describes in Article 3.3 'inert waste' as waste that does not undergo any significant physical, chemical or biological transformations and therefore should not entail pollution risks. The example provided by the UK authorities (in recital 469) involving the use of 'borax' could be interpreted to relate to an example of an additional chemical that could increase the risk of pollution, depending on the amounts used, its concentration and the areas (soil, water body, etc.) affected. Nevertheless, the use of borax does not fall in the scope of the present Decision.

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

- (479) The Mineral Products Association proposed that where materials are mixed with materials which are subject to the levy, the tax liability should be in proportion to the amount of taxable material in the mixture. As the AGL is structured, this is already the case. The aggregate material which has been 'mixed with another material other than water' is deemed to have been commercially exploited, and as such, would already be liable for the levy (Section 19(1)(d) of the Act).
- (480) The Commission therefore concludes that the exemption under Section 17(4)(c)(i) and (ii) of the Act falls within the principles underpinning the AGL and does not constitute a selective advantage.

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

- (481) Concerning clay, the UK authorities had explained, prior to the adoption of the Opening Decision, that because of its plastic properties, clay is not usually considered a rock. The exemption clarifies this and avoids the need to identify and charge the AGL on any sand or stone naturally occurring together with the clay.
- (482) The Commission, however, noted that, in geological terms, clay is considered a rock and that it can be used as aggregate ⁽⁸¹⁾. In so far as a material wholly or mainly consisting of clay was extracted to be used as aggregate, it did not consider clear how the exemption could be justified on the basis of the normal taxation principles or to what extent it may be deemed in a different situation from taxed materials in the light of the objective of the AGL.
- (483) The Commission has received the following comments from the BAA.

5.6.6.1. *Comments received by the Commission*

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

- (484) The BAA maintains that clay can be used as aggregate without being chemically or physically altered. They claim that clay falls under the definition of aggregate provided by the Opening Decision. It can be used for a number of aggregate uses including construction fill. The BAA provides a chapter of a book as regards the uses of clay in civil engineering and construction. According to the BAA, clay is also used in large quantities by the UK Highways Agency for highway works. BAA maintains this is a use for aggregates purposes. Clay falls into one of the categories of acceptable materials provided by the specification for highway works in the United Kingdom. It can be used as cohesive fill for highway works. The BAA has provided examples of quarries that allegedly extract clay suitable for highway works. Moreover, clay is suitable for specific aggregates uses for which other rocks are not suitable, i.e. lining and capping of landfill sites and lining ponds and canals.
- (485) The BAA has provided a list of eight quarries that, allegedly, extract clay for use as aggregates. The list is extracted from the BGS *Directory of Mines and Quarries 2010*. Moreover, the BAA provided examples of two quarries extracting clay suitable for sea wall/flood defence, engineering projects, landfill capping, pond lining, fill material and land reclamation, all, supposedly, aggregate uses. The material extracted also falls into the category of cohesive material that is suitable for highway works. The BAA further provides an example of the use of clay from one of the quarries for the construction of a road.
- (486) The BAA maintains therefore that there are numerous quarries that produce and sell clay for aggregates use and not only for ceramic processes. According to the BAA, there are also a number of quarries where clay is interbedded with other materials from which material consisting mainly of clay would be exempted.

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

(b) *Comments from the UK authorities*

- (487) The UK authorities maintain that clay is readily distinguished from other types of very fine-grained sedimentary rock by its plasticity and ability to be cut and shaped with a knife or trowel (definition in the Report ⁽⁸²⁾). These plastic properties of clay make it unsuitable for most aggregate purposes because it swells as it absorbs water and cracks when it dries out.
- (488) According to the UK authorities, most clay is soft and non-granular and without chemical or physical transformation is suitable only for use as fill in earthworks, e.g. landfill linings and flood defences. Clay is generally not used for foundation fill beneath buildings because its low-strength, compressibility and susceptibility to shrinking and swelling is highly likely to cause the building to move beyond its permissible limits, causing it to crack and fail. Hard, granular aggregate is preferred for this purpose because it will form a much more stable platform for the building. Thus, untreated clays are generally considered unsuitable for 'typical aggregate use' (such as building foundation fill, concrete manufacture, road metal or mortar). These uses account for the vast proportion of production in the United Kingdom. 'Typical aggregate use' almost always requires a hard granular material — usually sand, gravel and/or a crushed hard rock such as limestone, igneous rock or sandstone, or granular material recycled from demolition waste or road planning. The only circumstances in which clay can be utilised for 'typical aggregate use' is where the clay has been pelletised and heated to over 1 000 °C in an industrial process to form a lightweight hard pellet which can be used as a granular aggregate in concrete for some specialised but minor applications. The UK authorities state that they have been unable to identify any quarry where it can be said that clay is being extracted specifically for use as aggregate.
- (489) However, according to the UK authorities, the properties of clay make it suitable for non-aggregate applications where the clay remains hydrated and its impermeability to water is a key requirement. The UK Authorities do not consider that lining and capping landfill sites uses material as an aggregate — it is not the bulk of the material that is required, but impermeability to water and leachates. Specialist uses of clay include lining landfill sites, lining watercourses and lakes or ponds and flood defences. Clay used for these purposes is not an aggregate use; rather than being used as bulk fill where the hard, granular properties of the material are required, the clay — which is neither hard, nor granular — is used to create a barrier through which liquid has restricted passage.
- (490) In response to the BAA's observation that clay may be used for road works, the UK authorities note that the Highways Agency has informed the UK authorities of the uses of clay. The UK authorities maintain that clay excavated from the site of a road construction project may be used, due to its permeability for bulk earthworks such as fill and embankment construction where it does not need to be transported (i.e. clay is not specifically quarried, it is a by-product of the construction of the road). Clay may be treated with lime or cement to improve its road-bearing capacity. It may be used in lining drainage channels (where its permeability is important) or as backfill for minor structures where it is not required to hold large weights. The UK authorities note that excess clay excavated from roadwork sites may be sent to landfill as a waste material and occasionally commercial bodies may heat-treat clay to produce lightweight aggregates for road construction.
- (491) The UK authorities, quoting the Highways Agency, explain that earthworks materials are divided into granular (class 1) and cohesive (class 2) categories. Granular categories are aggregates — materials used to provide stable, bulk fill. Cohesive materials are not aggregates, but comprise materials with a smaller particle size, such that they behave cohesively, i.e. they are sticky and have limited permeability to water.
- (492) According to the UK authorities, clay can only be used as a granular material if it is heat-treated and pelletised. It can, however, be used as a cohesive material without heat-treatment. In these uses, the clay cannot be substituted by aggregate materials, e.g. crushed granite or limestone, as these are granular materials. Clay can be substituted by pulverised fuel ash (e.g. from coal-fired power stations) as this too has cohesive properties.

⁽⁸²⁾ See footnote 64.

- (493) According to the UK authorities, unlike clay, armour rock for sea defences is formed of aggregate. This is a bulk role where the hard, granular properties of uncut, irregular pieces of rock form a stable material which protects softer land from erosion by the sea. Rock armour sea defences are very different to the use of clay in flood defences; rock armour resists erosion caused by water rather than containing water by being impermeable to it. The requirements of the specification depend on the severity of the marine environment, but density and aggregate abrasion value are key properties.
- (494) The UK authorities claim that there is no clear evidence, including in the material identified by the Commission or in the material BAA submitted to the General Court, which shows that clay is being extracted for use as an aggregate in the United Kingdom. The General Court's view was expressly qualified as being 'subject to evidence to the contrary' (see paragraphs 86-91 of its judgment in T-210/02 RENV). The UK authorities have investigated the suggestions submitted by the BAA as regards quarries that would be exploiting clay solely for aggregates use and concluded this is not the case. The information extracted from confidential tax records have been provided to the Commission.
- (495) The UK authorities have contacted a quarry which BAA had claimed used their clay for building a road. According to the UK authorities, the quarry explained that clay is used for road building as a stable non-permeable layer to raise the road out of the flood plain on which the stone aggregate and tarmac are placed. It is not used to replace stone aggregate as it would not be suitable without treatment
- (496) The UK authorities maintain that the material characteristics and value of clay makes its extraction for use as aggregates inherently unlikely.
- (497) According to the UK authorities, naturally occurring clay, soil or organic matter does not have 100 % purity. In defining the materials clay, soil, vegetable or other organic matter as exempt from the aggregates levy, it was therefore necessary to allow for materials which mainly comprise these materials.

5.6.6.2. *Assessment by the Commission*

- (498) The interested parties and the UK authorities disagree as to the use of clay as aggregate. Only if such a use can be established would clay be in a factual and legal situation comparable with such of taxed materials.
- (499) Clay is distinguished from other materials by its properties of plasticity, ability to be cut and shaped with a knife or trowel and non-permeability, which make it unsuitable for most aggregate purposes because it swells as it absorbs water and cracks when it dries out.
- (500) The BAA claimed that uses of clay for landfill lining, flood defences and as cohesive material for road works are aggregate uses. The UK authorities, however, mention that these are not aggregate uses of clay. Given that all these uses are based on the specific qualities of non-permeability and plasticity of clay and not on the bulk of the material, the Commission considers that the UK authorities are entitled to view clay used for landfill lining, flood defences and as cohesive material for road works as a non-aggregate use.
- (501) The Commission asked the UK authorities to access confidential tax records in regard to the eight clay quarries the BAA submitted as extracting clay for aggregates use. The information received by the Commission from the UK authorities show that none of these quarries are exploiting clay for aggregates use. Some of the sites were not even quarries, but landfills.
- (502) Following the information received the Commission notes that clay is not extracted for use as aggregate. It is not used for aggregate purposes and cannot be used for aggregates purposes unless it is subjected to physical transformations, i.e. it is pelletised and heated to over 1 000 °C in an industrial process to form a lightweight hard pellet.

- (503) The Commission therefore concludes that clay cannot be used and is not extracted for use as aggregate and is, thus, in a different legal and factual situation than taxable materials in view of normal taxation rule of the AGL
- (504) Moreover, as clay does not have 100 % purity, material consisting mainly of clay is also in a different legal and factual situation than taxable materials in view of the normal taxation rule of the AGL.

5.7. CONCLUSION ON SELECTIVITY

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

5.8. ADVANTAGE

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

5.9. STATE RESOURCES AND IMPUTABILITY

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

5.10. DISTORTION OF COMPETITION AND EFFECT OF TRADE

- (509) There is trade between Member States in the aggregates sector and producers of the exempted aggregates are in competition with other aggregate producers. The Commission has also received extensive submission as to the distortions of competition caused by the exemptions from the AGL. Moreover, the United Kingdom has a natural land border with the Republic of Ireland and aggregates trade across this border is extensive ⁽⁸³⁾.
- (510) Therefore, the exemptions from the AGL for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; might distort competition and have an effect on trade.

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

5.11. CONCLUSION ON THE EXISTENCE OF AID

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

6. LEGALITY OF THE AID

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

7. ASSESSMENT OF THE COMPATIBILITY OF THE STATE AID

7.1. LEGAL BASIS

- (514) Given the environmental purpose of the AGL, the Commission had examined in the Opening Decision the compatibility with the internal market of exemptions and reliefs from the AGL in accordance with Article 107(3)(c) TFEU and in the light of guidelines on State aid for environmental protection.
- (515) As mentioned in recital 513 above, the result of the annulment of the Commission decision is that the aid must be deemed unlawful. In accordance with the Commission notice on determination of the applicable rules for the assessment of unlawful State aid ⁽⁸⁶⁾, paragraph 82 of the 2001 EAG and paragraph 205 of the 2008 EAG the Commission had assessed the compatibility of the tax exemptions and reliefs under the 2001 EAG in so far as they were applied between 1 April 2002 and 31 March 2008 and under the 2008 EAG as far as they were applied as from 2 April 2008 and until 31 March 2014, the date of the suspension of the exemptions.
- (516) The Commission has received comments from the BAA and argumentation from the UK authorities as regards the compatibility of the exemptions from the AGL. The Commission will only present and address the comments relating to the exemptions from the AGL for shale and products consisting mainly of shale when used as aggregate and shale spoil when extracted together with shale that is used as aggregate.
- (517) Mention should be made that both the comments from the BAA and the argumentation submitted by the UK authorities relates mostly to all or some of the exemptions as regards to which the Commission raised doubts in the Opening Decision and there are few specific arguments relating exclusively to shale.

⁽⁸⁴⁾ See Case C-199/06 CELF [2008] ECR I-469, paragraphs 61 and 64.

⁽⁸⁵⁾ See Case C-199/06 CELF [2008] ECR I-469, paragraphs 63 and 66 to 68.

⁽⁸⁶⁾ Commission notice on determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

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

7.1.1. COMMENTS RECEIVED BY THE COMMISSION

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

- (519) The BAA considers that the tax exemptions, exclusions and tax reliefs from the AGL cannot be found compatible with the internal market in accordance with Article 107(3)(c) TFEU and the Environmental Aid Guidelines and provide extensive comments in this regard. They claim that, the application of these exemptions undermines the environmental objective pursued by the AGL, namely, the shifting of demand towards alternative sources of aggregates.
- (520) The UK authorities maintain that none of the exemptions under investigation relate to material which is deliberately extracted for use as aggregate. They claim that, the exemptions as regards to which the Commission expressed doubts in the Opening Decision only extend to materials that arise unintentionally and unavoidably during non-aggregate extraction. In accordance with the UK authorities, they have not found any evidence that the exempted materials are being deliberately extracted for use as aggregate.
- (521) In the UK authorities' view the use of unintentional by-product or waste as aggregate is environmentally preferable to the undertaking of additional aggregate quarrying. They claim that the exemptions do not amount to State aid. Each exemption under investigation leads to an improvement in environmental protection in at least one of the following two ways:
- (i) the exemption helps to shift demand away from further aggregate quarrying; and/or
 - (ii) the exemption helps to reduce the build-up of waste.
- (522) The United Kingdom contends that if any of the exemptions under investigation give rise to State aid, that aid is in any event compatible with the internal market in accordance with Article 107(3)(c), including in the light of the 2001 Guidelines and the 2008 Environmental Aid Guidelines and/or on the basis of the direct application of Articles 107(3)(b) or (c) TFEU.
- (523) The UK authorities maintain that the exemptions to the AGL fall outside the strict scope of State Aid Guidelines and that their compatibility should be assessed directly under Articles 107(3)(b) or (c) TFEU. The UK authorities quote the case N 629/2008 in relation to the United Kingdom's carbon reduction commitment scheme. The Commission considered that since the respective scheme and its modalities were designed at protecting the environment through the re-distribution of resources in favour of undertakings which protect the environment the most, the guidelines were not applicable and proceeded to an assessment directly under the Treaty.
- (524) The UK authorities claim that the 2008 EAG, in the chapter regarding tax exemptions, regard situations in which an undertaking is exempted from the scope of environmental tax because of: (a) concerns over the impact of the tax on the competitiveness of certain undertakings; (b) other economic concerns; and (c) the inability of the Member State to impose the tax at a higher rate without granting some exemptions to certain undertakings. They claim that, the Guidelines are designed to ensure that exemptions from environmental taxes do at least contribute indirectly to the environmental aim of the tax to be introduced and that the exemptions do not undermine the general environmental objective being pursued.
- (525) The UK authorities submit that the objective of the AGL as a whole is the protection of the environment and the exemptions granted from the scope of the AGL are deliberately designed to achieve the twin objectives of: (a) shifting demand from freshly extracted aggregate to waste and other by-products; and (b) reducing the build-up of waste tips. Therefore, the exemptions contribute to and ensure that the objective of the AGL is fulfilled. They are one of the key ways in which the environmental objective of the AGL is achieved. Therefore the UK authorities contend that, it may be the case that, neither the 2001, nor the 2008 EAG are applicable to the measure.

- (526) Relying directly on Article 107(3) TFEU, therefore, the United Kingdom submits that the purpose of any aid arising from the exemptions under investigation can be categorised as either: (i) aid to promote the execution of an important project of common European interest i.e. the protection of the environment (Article 107(3)(b) TFEU); or (ii) aid to facilitate the development of certain economic activities (the use of recycled aggregate or waste products as aggregate) where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c)).
- (527) The UK authorities maintain that, the exemptions are a necessary and proportionate means of achieving the environmental objective of the AGL and any aid arising from the exemptions would lead to very little or no distortion of competition. The exemptions therefore do not adversely affect trading conditions to an extent contrary to the common interest.
- (528) The Commission will assess the measure under the 2001 EAG, the 2008 EAG and conduct an alternative assessment directly under Article 107(3)(c) TFEU. As explained below, the Commission considers that Article 107(3)(b) TFEU cannot be applied to the measure at hand.

7.2. ASSESSMENT UNDER THE 2001 EAG

- (529) Paragraph 47 of the 2001 EAGH provides that: 'When adopting taxes that are to be levied on certain activities for reasons of environmental protection, Member States may deem it necessary to make provision for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. In general, such exemptions constitute operating aid caught by Article 87 of the EC Treaty. In analysing these measures, it has to be ascertained among other things whether the tax is to be levied as the result of a Community decision or an autonomous decision on the part of a Member State.'
- (530) Paragraph 48 further provides that: 'If the tax is to be levied as the result of an autonomous decision on the part of a Member State, the firms affected may have some difficulty in adapting rapidly to the new tax burden. In such circumstances there may be justification for a temporary exemption enabling certain firms to adapt to the new situation.'
- (531) In this connection, the Commission noted in the recital 149 of the Opening Decision that the AGL is a tax to be levied on the extraction of aggregates for reasons of environmental protection. The Commission further noted that the AGL is to be levied as a result of an autonomous decision by the UK authorities.
- (532) The complainant had ⁽⁸⁷⁾ contended that some of the exemptions have been granted in order to protect the international competitiveness of the producers of exempted materials. This would suggest that certain firms may have some difficulty in adapting rapidly to the new tax burden and, in that case, the exemptions from the AGL could be assessed under paragraphs 47 and 48 of the 2001 EAG.
- (533) At the time of the Opening Decision, the UK authorities had not provided any compatibility grounds for the measure and the Commission did not have sufficient elements to conclude whether the conditions laid down in paragraphs 47 and 48 of the 2001 EAG were met. Nor did the Commission have sufficient elements to conclude whether the exemptions could be regarded as compatible with the internal market based on provisions other than paragraphs 47 and 48 of the 2001 EAG.
- (534) The BAA contends that the exemptions from the AGL could not be found compatible in accordance with the 2001 EAG. According to the BAA, the exemptions for shale, slate and clay do not make a significant contribution to protecting the environment (paragraphs 50 and 51(2)(a)). The exemptions, by their very nature, undermine the general objectives pursued and do not have an appreciable positive impact in terms of environmental protection.
- (535) The BAA maintains that the exemptions for shale, slate and clay do not constitute temporary exemptions justifiable under paragraphs 47 and 48. They claim that the AGL intends to make a material such as shale quarried for use as aggregate competitive.

⁽⁸⁷⁾ Recital 150 of the Opening Decision

- (536) The BAA maintains that the exemptions do not constitute operating aid which may be authorised under paragraph 51. No agreements have been concluded under which the recipient firms undertake to achieve environmental protection objectives during the period of the exemptions. Further, according to the BAA, the alternative condition under paragraph 51(1)(b) has not been met, as the firms eligible for the reduction have not paid a significant proportion of the AGL.
- (537) The UK authorities contend that the result of applying the AGL to the exempted materials would be to increase production costs for operators in the specific market sectors which could not be passed on to their customers. This would lead to a marked decrease in the amount of waste and by-products being sold for use as aggregate, and a corresponding increase in the quarrying of fresh aggregate.
- (538) The UK authorities claim that, the effect of applying the AGL to the exempted materials would be to undermine its environmental objective as it would no longer operate to shift demand to unavoidable waste and by-products generated by the extraction of these materials.

7.2.1. ASSESSMENT BY THE COMMISSION

- (539) The UK authorities rely exclusively on paragraphs 47 and 48 of the 2001 EAG to justify the compatibility of the measures at issue.
- (540) They seem to argue that the quarries exploiting the exempted aggregates will encounter serious difficulties in dealing with the tax burden, as summarised in recital 537 above.
- (541) The Commission, however, notes that the 2001 EAG only permit temporary exemptions enabling firms to adapt to the new situation which is not the case for the exemptions under the AGL. The exemptions at hand are not limited in time and have applied already for 12 years. The application of the exemptions has been temporarily suspended due to the formal investigation procedure of the Commission, however, the suspension legislation mentions expressly that all exemptions will be reinstated once the Commission's investigations is complete if the results are positive.
- (542) The Commission therefore concludes that paragraphs 47 and 48 of the 2001 EAG could not serve as basis for declaring the exemptions from the AGL for shale and products consisting mainly of shale when used as aggregate and shale spoil when extracted together with shale that is used as aggregate compatible with the internal market.
- (543) The Commission further notes that no other provisions of the 2001 EAG could serve as a basis for determining the compatibility of the AGL as shale producers do not pay a significant portion of the tax (paragraph 51(1)(b)) and no agreements have been concluded between the UK authorities and the shale producers (paragraph 51(1)(a)).
- (544) On the basis of the above the Commission concludes that the exemptions from the AGL for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate cannot be found compatible with the internal market on the basis of the 2001 EAG.

7.3. ASSESSMENT UNDER THE 2008 EAG

- (545) Given the environmental purpose of the AGL, with the occasion of the Opening Decision, the Commission had also examined the tax exemptions and exclusions under chapter 4 of the 2008 EAG that concerns operating aid in the form of reductions of environmental taxes.
- (546) Environmental taxes are defined in paragraph 70(14) of the 2008 EAG as 'taxes whose specific tax base has a clear negative effect on the environment or which seek to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment.'

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

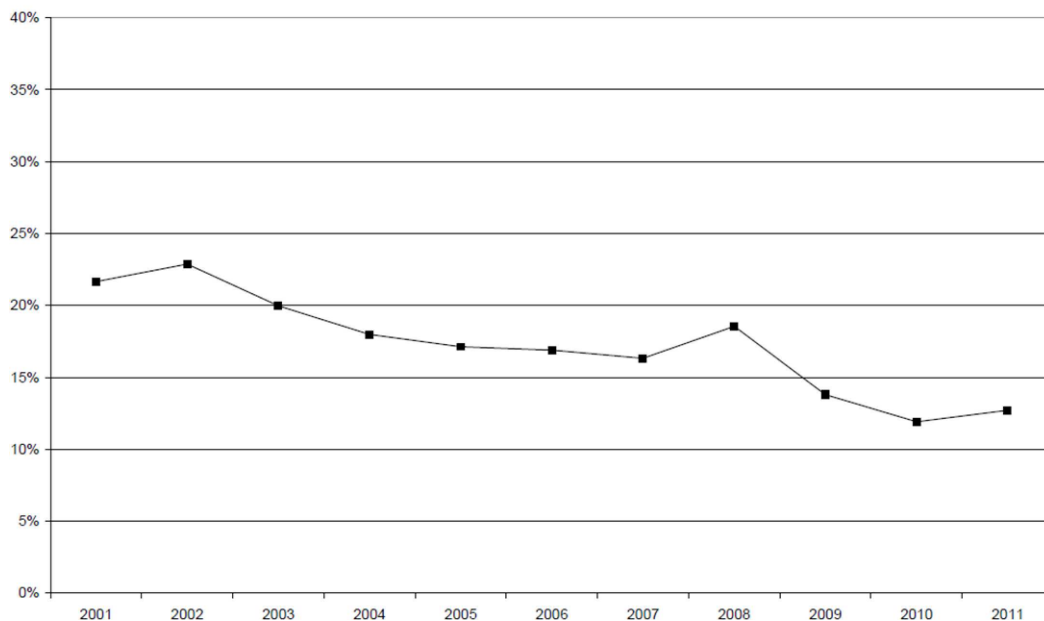
7.3.1 ENVIRONMENTAL BENEFIT

- (548) In accordance with paragraph 151 of the 2008 EAG, aid in the form of reductions from environmental taxes will be considered compatible with the internal market provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reductions do not undermine the general objective pursued. As explained in paragraph 57 of the 2008 EAG, reductions from environmental taxes concerning certain sectors or categories of undertakings are accepted under Chapter 4 of the 2008 EAG if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation, and to create further incentives to improve on environmental protection. The Commission considered that this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation.
- (549) The Commission considered that, in this case, the possibility to grant exemptions for certain materials might have enabled the United Kingdom to introduce the AGL.
- (550) The BAA maintains that the exemptions do not fulfil the criteria enshrined by the 2008 EAG and could not be found compatible on this basis.
- (551) The BAA claims that, the exemptions do not contribute to an improvement of the level of environmental protection and, in fact, undermine the general objective pursued (paragraph 151 of 2008 EAG).
- (552) The BAA refers to a quarry mentioned in the *Cornish Building Stone and Slate Guide 2007* as a slate and shale quarry producing walling stone to illustrate that quarries are exempted just because they produce shale and slate, thus undermining the objective of the tax as it creates even greater demand in the construction industry for such materials. As per their submission, the BAA is aware ⁽⁸⁸⁾ of a number of instances where quarry operators have opened slate and shale quarries, simply as a result of and in order to benefit from the advantages deriving from the AGL exemptions. Moreover, quarries subject to the AGL have experienced a significant reduction in sales of low-value by-product or waste such as scalplings and quarry fines. Stockpiles of these materials have increased by over 500 %. According to the BAA, this demonstrates that the AGL has completely failed to achieve its environmental objective as some piles are replaced with others.
- (553) The BAA submits examples of lime quarries the primary product of which is un-taxed agricultural lime, and which have accumulated such high heaps of waste and unsold by-product, that the production of agricultural lime is impeded even with increased demand.
- (554) The BAA claims that points 158(b) and 158(c) of 2008 EAG aim at preventing the placing of a business at a competitive disadvantage on the basis that it is subject to taxation whereas its direct competitors are not. However, according to the BAA, in this instance, it is clear that competitors of the producers which benefit from the exemption are in fact subject to taxation and are unable to sell their products due to the disadvantages caused by the AGL exemptions.
- (555) The BAA claims that the exemption for shale is not necessary and proportionate (paragraphs 155 to 159). The BAA alleges that the exemptions for slate, clay and shale are not based on objective criteria and that operators producing the same products are treated very differently, based on the geology of their area. Moreover, none of the criteria for proportionality are met and the exemptions go beyond a period of 10 years.

⁽⁸⁸⁾ No evidence has been provided.

- (556) The BAA have provided to the Commission a separate letter from a quarry regarding the effects of the AGL on their sales of low value products (secondary aggregates), i.e. sub-bases, scalpings, crusher-run, quarry fines which have fallen by two thirds.
- (557) The BAA has provided to the Commission a study of the effects on aggregates production since the introduction of the AGL in 2002 drafted by BDS Marketing Research Ltd in February 2014 for the BAA.
- (558) The findings of the study are as follows:
- (559) An aggregates levy of GBP 2 per tonne can represent a half or a third of the total cost of lower value aggregates to the customer.
- (560) The conclusion of the study is that the main effect of the AGL has been an increase in the use of exempted aggregates (primary and by-product) at the expense of taxed by-products of taxed high value materials. Quarrying companies have found it difficult — often impossible — to find markets for these remaining lower value materials. As a result, quarrying companies have had to landfill these materials. The net change has therefore been a wider use of untaxed aggregates (primary and by-product) at the expense of taxed by-product aggregates which previously were sold, but are now a waste material. One waste material has simply been replaced by another waste material. On occasions, this has involved sterilising good quality reserves.
- (561) The report mentions that since 2001 sales of primary (high value) aggregates fell by 24,9 %, due to the recession. Sales of taxed by-product aggregates have fallen by 60 %, i.e. 31,5 million tonnes, since introduction of the AGL in 2002. Sales of taxed by-products amounted in 2001 to 52 190 and in 2011 to 20 648 and sales of taxed primary (high value) aggregates fell from 188 843 in 2001 to 141 754 in 2011. The sales decrease is also presented in a graph:

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



- (562) Three detailed graphs are included as regards the evolution of sales of taxed by products in the following categories: hardstone, sandstone, limestone and sand and gravel. While for sand and gravel the sales appear to have maintained at a constant level with a recent slight increase, the sales of the former three materials appear to have declined.
- (563) Volumes of exempt aggregates sold appear to have increased from less than 5 million tonnes to nearly 30 million tonnes since the introduction of the AGL. These figures exclude quarries that produce only exempt aggregates as these sites are not required to produce returns. Thus, according to the study, the total increase in exempt volumes

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

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

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

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

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

- (i) contribute, at least indirectly, to an improvement in the level of environmental protection; and/or
- (ii) enabled the United Kingdom to introduce the AGL as the exemptions made it feasible to adopt higher environmental taxes for other undertakings engaged in the production of aggregate, which further incentivises the achievement of the AGL's environmental objective and results in an overall improvement of cost internalisation.

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

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

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

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

- (570) The UK authorities argue that even if the Commission were to find that there is evidence that any of the exempted materials are deliberately extracted for use as aggregate, the exemptions afforded to these materials would still directly contribute to the achievement of the AGL's environmental objective. They claim that, if there is any evidence that any exempted materials are in fact being deliberately extracted for use as aggregate, this would at most be on a very small scale at a strictly limited number of quarries. According to the UK authorities, if it were the case that a very limited amount of deliberate quarrying of the exempted materials for use as aggregate took place, that would not alter the fact that there is an objective justification for exempting the relevant materials. The justification would be that (a) the materials are not normally extracted for use as aggregate; and (b) the quarrying of these materials generates a large amount of unavoidable by-product and waste which can be used as aggregate when the right commercial incentives are present.
- (571) The UK authorities contend that even if a small number of quarries were to be deliberately extracting exempt material for use as aggregate, the exemptions remain justified if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation and providing further incentives to achieve the AGL's environmental objective.
- (572) The UK authorities provided argumentation in this regard for colliery spoil shale.

7.3.1.1. *Assessment by the Commission*

- (573) The Commission has already established that the AGL is a tax pursuing an environmental objective.
- (574) However, a general exemption for shale appears to undermine the environmental objective of the AGL as it has the potential to encourage the extraction of shale and shale spoil, as also found by the General Court ⁽⁸⁹⁾.
- (575) Shale is a material which can be used as aggregate, albeit in somewhat limited occasions as low-grade aggregate, and which is being used as aggregate and extracted specifically for use as aggregate, as the interested parties submissions and evidence received by the Commission show. Shale extracted specifically for use as aggregate is, in fact, a freshly extracted material and an exemption simply incentivises further extraction.
- (576) Therefore, given that the Commission has found cases where shale is deliberately extracted for commercial exploitation as aggregate, a general exemption for shale only makes its extraction more competitive and encourages further extraction.
- (577) In addition, shale is currently exempted when it is extracted as a by-product of material which is taxed (such as gritstone, sandstone and limestone). The Commission noted above in recital 365 that the exemption does differentiate between shale and other taxed materials, such as other by-products of the main extraction of gritstone, sandstone and limestone. The Commission also considered whether such tax differentiation could be justified by the objective of the AGL. However, the Commission has not received any evidence from the UK authorities or from interested parties showing that this exemption contributes to the achievement of the AGL's objective which is to reduce the fresh quarrying of material for aggregates purposes.
- (578) Moreover, the exemption does not help reduce the build-up of waste in general as it simply replaces the build-up of heaps of shale with the build-up of heaps of taxed low quality aggregates which can no longer find a buyer.
- (579) The UK authorities claim that the exemption for shale made it feasible to adopt higher taxes for other undertakings; however they did not provide arguments for such claim as to allow the Commission to consider this justification in its assessment. The only argumentation provided by the UK authorities in this regard relates to colliery spoil, the exemption for which was already considered by the Commission not to constitute State aid.
- (580) The UK authorities claim that even if the Commission found evidence that shale is extracted for commercial exploitation as aggregate, the exemption would still serve an environmental purpose due to the limited amount of deliberate quarrying. However, the Commission has found that only the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil

⁽⁸⁹⁾ See footnote 77.

of shale that is deliberately extracted for commercial exploitation as aggregate; constitute State aid, and not in general the exemption for shale and spoil from the extraction of shale. Therefore, the assessment of the Commission already differentiates shale in view of its deliberate quarrying for commercial exploitation as aggregate and does not regard the large amount of shale and unavoidable spoil of shale when it is not deliberately quarried for commercial exploitation as aggregate. Therefore, the justification of the UK authorities based on the limited exploitation as aggregate cannot serve as a basis for a common assessment of all shale and all shale spoil.

(581) In line with the findings of the General Court ⁽⁹⁰⁾, where there are quarries deliberately extracting shale for commercial exploitation as aggregates, there is no longer any guarantee that the exemption does not lead to more fresh extraction of the exempted material.

(582) The Commission therefore concludes that a general exemption for shale and shale spoil undermines the general environmental objective pursued by the AGL as it may encourage fresh quarrying of such material.

7.3.2. PROPORTIONALITY

(583) Taxation of aggregates has not been harmonised at Union level and the Commission has therefore analysed proportionality of the proposed measure in the light of paragraph 159 of the 2008 EAG.

(584) With respect to proportionality, each beneficiary of a reduction or exemption must in accordance with paragraph 159 of the 2008 EAG fulfil one of the following criteria:

(a) It must pay a proportion of the national tax which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiaries can benefit at most from a reduction corresponding to the increase in production costs from the tax, using the best performing technique and which cannot be passed on to customers.

(b) It must pay at least 20 % of the national tax unless a lower rate can be justified.

(c) It can enter into agreements with the Member State whereby they commit themselves to achieve environmental objectives with the same effect as what would be achieved under points (a) or (b) above, or if the Community minima were applied.

(585) The UK authorities claim that whilst the exemptions do not ensure that the beneficiary pays at least 20 % of the national tax, a complete exemption can be justified by the limited distortion of competition.

(586) According to the UK authorities, even combined, the exempt materials under investigation make up only a very small proportion of the aggregates market in the United Kingdom. The UK authorities submit, using data available from the Office for National Statistics, the Department for Local Communities and Government and the Department for Business, Innovation and Skills, that of the total of 205 million tonnes of aggregate sold in Great Britain each year, only 6 million are derived from the materials subject to the Commission investigation, of which 3 million are derived from china clay and ball clay waste. According to the Mineral Products Association, the largest trade body for aggregate producers in the United Kingdom, the exemptions under investigation would account for only around 3 % of the UK aggregate market.

(587) The UK authorities submit that the impact on competition of the exempted materials is limited by the costs of transporting the aggregate. They maintain that the transport cost amounts to 8,55 pence per tonne. On average then, the exemption from the GBP 2 per tonne levy will only give the producer of the exempt material a competitive advantage within a 23-mile radius. According to the UK authorities, in case of a round trip the exempt material will only be able to be transported for an extra 11,6 miles. Moreover, the UK authorities claim that, the quantities supplied are generally very small as the exempt materials are only suitable for low-grade aggregates. If more traditional aggregates are required for a project, no distortion of competition will occur.

⁽⁹⁰⁾ See footnote 77.

7.3.2.1. *Assessment by the Commission*

- (588) Information received by the Commission discloses the exemption for shale significantly distorts competition.
- (589) Numerous interested parties claimed that shale is used as aggregates and has a significant impact on local markets, especially in Northern Ireland. Apparently, in Northern Ireland there have been hundreds of thousands of tonnes of shale imported from Donegal, in Ireland. Shale from Ireland is sold in construction markets across the whole of Northern Ireland. Construction projects along the border with Ireland have used exempt aggregates from Ireland classified as shale.
- (590) Interested parties also pointed to a particular problem with shale deposits that are being used on large construction sites, especially along the Glasgow-Edinburgh corridor. Around 1 million tonnes of shale was used for roads construction. This has affected competition between different quarries and prevented other quarries from selling their low value by-products.
- (591) Moreover, the Commission notes that the market for shale aggregates is rather local and that the national market for aggregates in the United Kingdom does not offer a good assessment base. Due to the low prices of the shale aggregates and the high transportation costs, as also pointed out by the UK authorities, they can only travel for a limited distance in order to supply customers and be able to compete with other low-grade aggregates producers. Therefore, an assessment of this type would be more relevant on a local level. The information received by the Commission from interested parties point to the fact that the exemption for shale displaces sales of low-grade aggregates that are taxed with which they compete on a local level.
- (592) The Commission therefore concludes that a general exemption for shale and shale spoil distorts competition on local aggregates markets. The arguments of the UK authorities as regards the limited distortion of competition of the exemption for shale cannot be accepted. Therefore, such justification cannot serve the exclusion of the payment of 20 % of the AGL.
- (593) The measure is therefore not proportional as required by paragraph 159 of 2008 EAG.
- (594) The Commission concludes, without considering it is required to assess also the necessity of the measure, that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate are not compatible with the internal market on the basis of the 2008 EAG.

7.4. *ALTERNATIVE ASSESSMENT UNDER ARTICLE 107(3)(b) TFEU — AID PROMOTING THE EXECUTION OF AN IMPORTANT PROJECT OF COMMON EUROPEAN INTEREST*

- (595) As mentioned above, the UK authorities contend that the exemption for products consisting wholly or mainly of shale and shale spoil could be found compatible with the internal market on the basis of Article 107(3)(b) TFEU as promoting environmental protection as a project of common European interest. The UK authorities did not provide any arguments for the assessment of the compatibility of the measures on such basis.
- (596) The Commission has set out in paragraph 147 of the 2008 EAG conditions in which it would consider that aid may be considered compatible with the common market according to Article 107(3)(b) TFEU.
- (597) Those conditions are the following:
- (a) the aid proposal concerns a project which is specific and clearly defined in respect of the terms of its implementation including its participants, its objectives and effects and the means to achieve the objectives. The Commission may also consider a group of projects as together constituting a project;

- (b) the project must be in the common European interest: it must contribute in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection, such as by being of great importance for the environmental strategy of the European Union. The advantage achieved by the objective of the project must not be limited to the Member State or the Member States implementing it, but must extend to the Community as a whole. The project must present a substantive contribution to the Community objectives. The fact that the project is carried out by undertakings in different Member States is not sufficient;
 - (c) the aid is necessary and presents an incentive for the execution of the project, which must involve a high level of risk;
 - (d) the project is of great importance with regard to its volume: it must be substantial in size and produce substantial environmental effects.
- (598) Furthermore, in order to allow the Commission to properly assess such projects, the common European interest must be demonstrated in practical terms: for example, it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental objectives of the Community (paragraph 148 EAG 2008).
- (599) The Commission notes that while the AGL serves a certain policy of a particular Member State it does not seem to relate to a project and *a fortiori* not a project which would be 'specific and clearly defined in respect of the terms of its implementation'.
- (600) Furthermore, it does not appear possible for the measure to qualify as a project of common European interest as it remains a policy that is national in scope.
- (601) In addition, since the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; do not seem to have themselves any environmental benefit as they simply encourage the extraction of such material, it cannot be said how such exemptions contribute to an increase in environmental protection.
- (602) More importantly, as the General Court made clear in Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani*, 'an aid measure can benefit from the derogation provided for in [Article 107(3)(b) of the Treaty] only if it does not benefit mostly the economic operators of one Member State rather than the Community as a whole' ⁽⁹¹⁾. That criterion is not fulfilled where the national aid scheme merely seeks to improve the competitiveness of the undertakings concerned, in the case at hand to incentivise the use of one type of aggregate.
- (603) Consequently, the Commission considers that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; cannot be found compatible with the internal market on the basis of Article 107(3)(b) TFEU as promoting environmental protection as a project of common European interest.

7.5. ALTERNATIVE ASSESSMENT UNDER ARTICLE 107(3)(c) TFEU — DEVELOPMENT OF CERTAIN ECONOMIC ACTIVITIES OR OF CERTAIN ECONOMIC AREAS

- (604) For an assessment of the aid measure under Article 107(3)(c) of the Treaty, it should be examined if the aid in question:
- (a) meets a clearly-defined objective of common interest;
 - (b) is necessary, appropriate and proportionate for achieving this objective;
 - (c) does not affect competition and trade between Member States to an extent contrary to the common interest.

⁽⁹¹⁾ Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.*, ECLI:EU:T:2008:537, paragraph 337.

- (605) As a preliminary remark, the Commission notes that measures involving operating aid are in principle incompatible under Article 107(3)(c).
- (606) The AGL contributes to environmental protection as already established above in recital 87 in line with the findings of the General Court. Environmental protection could be regarded as an objective of common EU interest.
- (607) According to the UK authorities, the exemptions from the AGL granted for products consisting wholly or mainly of shale and shale spoil, also pursue the objective of environmental protection by seeking to shift demand from freshly extracted aggregates to shale (wholly or mainly) and to shale spoil. The UK authorities claim that these materials are not traditionally extracted for use as aggregates, and that they have no indication that they are intentionally extracted for use as aggregates.
- (608) The UK authorities provided information as to the state of the aggregates sector before the introduction of the AGL and the necessity to introduce a tax that would diminish the fresh extraction for aggregates use while providing suitable alternatives.
- (609) The Commission notes that, in principle, the exemptions from the AGL served as further means to fulfil its environmental purpose.
- (610) There are also indications that the same decrease in the extraction of fresh aggregates could not have been achieved without the AGL and its exemptions. In this regard, numerous comments from interested parties point to the fact that materials exempted under the AGL have successfully replaced freshly extracted aggregates products. Both high quality primary products aggregates, but, particularly, lower quality secondary aggregates have been replaced by exempted materials. This does not include: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate.
- (611) Shale appears to have various uses as aggregate and to also be specifically extracted for aggregates use as detailed in recital 341.
- (612) Therefore, an exemption for shale and spoil of deliberately quarried shale only makes its extraction more competitive and risks encouraging further shale extraction. As explained in recitals 575 to 580, shale that is deliberately extracted for commercial exploitation as aggregate is similar to taxed materials freshly extracted for aggregates use, the same is applicable to shale extracted as a by-product of taxable materials which is the same as other by-products of taxable materials which are taxed. The exemptions only make one category of freshly extracted material (shale) less expensive than the others. This can encourage shale's fresh extraction. This conclusion is supported by the findings of the General Court ⁽⁹²⁾.
- (613) Shale is a rock and its quarrying has similar environmental effects to other minerals' quarrying. There have been no claims made by the UK authorities aiming to show that shale is a more environmentally friendly alternative to other sources of aggregates even if it is specifically obtained for commercial exploitation as aggregate. Interested parties have also argued that the exemption from the AGL damages the environment even more than the extraction process itself as the exemption allows the shale to be transported farther and still compete with other taxed materials. Transportation is ensured by lorries which pollute the air and damage the roads due to their weight. The Commission notes that the cost of transportation represents a very high part of the cost of selling shale (see recital 292) meaning that shale producers use the margin offered by the AGL to transport the material farther than they usually would and compete on a wider area with other quarries.
- (614) In addition, although arguing in general that the exemptions under investigation aim at helping to reduce the build-up of waste, the UK authorities have not demonstrated that the exemptions considered as state aid with regard to shale indeed can contribute to such reductions. The Commission considers that these exemptions rather simply replace the build-up of heaps of spoil from shale fresh extraction for aggregates use and shale as by-products from extraction of taxed materials with the build-up of heaps of taxed low quality aggregates which can no longer find a buyer.

⁽⁹²⁾ Case T-210/02 RENV, *British Aggregates Association*, ECLI:EU:T:2012:110, paragraph 89.

- (615) The Commission therefore concludes that even if environmental protection is an objective of common interest, a general exemption for shale and spoil of shale when freshly extracted, as currently in place, actually risks to undermine this interest and does not represent an appropriate instrument for achieving it.
- (616) The Commission further notes, as also described in recitals 589 and 590, the highly distortive nature of the operating aid granted to shale producers which, in accordance with interested party submissions, has driven other aggregates producers off the market or has displaced other low-grade aggregates that normally compete with shale as they cannot compete with the low prices shale producers can offer.
- (617) Since the Commission found that the factual and legal situation of: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; is comparable to that of taxed aggregates under AGL, the tax exemption of these materials may be justified only in accordance with the environmental objectives of the AGL if it could be demonstrated that the environmental objectives of the AGL can be nevertheless pursued by these materials.
- (618) However, as explained above in recitals 611 to 615 and in line with the findings of the General Court ⁽⁹³⁾, the Commission considers that since shale is specifically extracted for commercial exploitation as aggregate and that since there are no indications that it would be more environmentally friendly than other aggregates, the environmental objectives of the AGL cannot be pursued by exemptions for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate.
- (619) The Commission has not received any compatibility grounds from the UK authorities as regards shale or spoil of shale that are deliberately extracted for commercial exploitation as aggregate that it could take into account in its assessment on the compatibility of the said AGL exemptions with the internal market.
- (620) Therefore, the Commission concludes that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; cannot be regarded as compatible with the internal market on the basis of Article 107(3)(c) TFEU.

8. CONCLUSION AND RECOVERY

- (621) The Commission concludes that the exemptions from the AGL granted for: (i) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and (ii) spoil of shale that is deliberately extracted for commercial exploitation as aggregate; which have been unlawfully implemented, represent State aid that is incompatible with the internal market.
- (622) According to the Treaty and established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽⁹⁴⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁹⁵⁾.
- (623) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽⁹⁶⁾.

⁽⁹³⁾ See footnote 77.

⁽⁹⁴⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽⁹⁵⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽⁹⁶⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-3671 paragraphs 64 and 65.

- (624) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ⁽⁹⁷⁾ states that ‘where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]’.
- (625) Thus, given that the exemptions from the AGL granted for the material specified in recital 620 of this Decision were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the aid was put at the disposal of the beneficiary (i.e. the day from which the beneficiary would have been obliged to pay the AGL if the unlawful and incompatible exemptions from the AGL had not existed) until the day when the advantage of the beneficiary ceased to exist. The sums to be recovered should bear interest until effective recovery.
- (626) As the exemptions constitute forgone revenues by the UK authorities, the recovery of the aid entails that the beneficiaries of the exemptions should pay the AGL, for the period of its application, together with interest until effective recovery.
- (627) The Commission acknowledges that shale material which: (i) is extracted as by-product of coal extraction; or (ii) is used in ceramic processes; or (iii) is used in place of clay, slag or other materials as a source of aluminosilicate in the manufacture of cement; or (iv) is otherwise demonstrably used for other than aggregate purposes; should not be considered commercially exploited as aggregate and should therefore be excluded from recovery.
- (628) There should be no obligation to recover aid that had been granted under the scheme which fulfils all the conditions set out in a *de minimis* regulation or in a block exemption regulation adopted on the basis of Articles 1 and 2 of Council Regulation (EC) No 994/98 ⁽⁹⁸⁾ but applicable at the time the aid was granted.
- (629) As cumulation is excluded for the same eligible costs, where the total amount of aid received by a beneficiary is more than EUR 200 000, the UK authorities should recover it in its entirety, as the *de minimis* regulations enacted on the basis of Article 2 of Regulation (EC) No 994/98 which were applicable at the time the aid was granted cannot be made use of.
- (630) In order to define the beneficiaries of the unlawful and incompatible aid and the respective aid amounts, the UK authorities should first determine all companies which produced shale and products consisting mainly of shale during the period between 1 April 2002 and the present (‘shale producers’). The UK authorities should then, by means of all available sources of information, including public information and confidential tax records, establish the amounts of shale material specified in recital 621 of this Decision commercially exploited by these shale producers. Should it not be possible to establish these amounts on the basis of the available information, the UK authorities should request the shale producers to demonstrate to what extent the shale material they produce is (and to what extent it is not) the material specified in recital 621 of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme consisting of the exemptions from the aggregates levy established for in Section 17(4)(a) and 17(3)(f)(i) of the Finance Act 2001 as amended by the Finance Act 2002 and the Finance Act 2007 granted for:

- (a) material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including here shale occurring as by-product of fresh quarrying of other taxed materials; and

⁽⁹⁷⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽⁹⁸⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

- (b) aggregates consisting wholly of the spoil from any process by which shale that is deliberately extracted for commercial exploitation as aggregate has been separated from other rock after being extracted or won with that other rock;

put into effect by the United Kingdom in breach of Article 108(3) TFEU are incompatible with the internal market.

2. The tax exemptions, tax exclusions and tax reliefs established in the following provisions of the Finance Act 2001, as amended by the Finance Act 2002 and the Finance Act 2007:

- Section 17(3)(e), 17(3)(f)(i) and (ii) (except for the materials listed in Article 1(1) of this Decision),
- Section 17(4)(a) (except for the materials listed in Article 1(1) of this Decision), Section 17(4)(c)(i) and (ii), Section 17(4)(f) (as far as clay is concerned),
- Section 18(2)(b), and
- Section 30(1)(b) (in so far as it relates to an exempt process within the meaning of Section 18(2)(b)),

do not constitute State aid.

Article 2

The United Kingdom of Great Britain and Northern Ireland shall abolish the aid scheme in so far it concerns the materials referred to in Article 1(1).

Article 3

Individual aid granted under the scheme referred to in Article 1(1) does not constitute aid if it fulfils the material conditions laid down by the Regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the aid was granted.

Article 4

Individual aid granted under the scheme referred to in Article 1(1) which fulfils the conditions laid down by a regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 and applicable at the time the aid was granted or by any other approved aid scheme is compatible with the internal market.

Article 5

1. The United Kingdom shall recover the incompatible aid granted under the scheme referred to in Article 1(1) from the beneficiaries.
2. The aid to be recovered shall include interest from the date on which it was put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁹⁹⁾.

Article 6

1. Recovery of the aid granted under the scheme referred to in Article 1(1) shall be immediate and effective.
2. The United Kingdom shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

⁽⁹⁹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

Article 7

1. Within two months following notification of this Decision, the United Kingdom shall submit the following information to the Commission:

- (a) a list of all entities producing the material referred to in Article 1(1) between 1 April 2002 and the date of submission of the list;
- (b) for each of the entities referred to at (a) above:
 - (i) the total amount of material referred to in Article 1(1) commercially exploited since 1 April 2002;
 - (ii) the total amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned in order to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The United Kingdom shall use all possible sources of information for compiling the list of shale producers and the total amount of material referred to in Article 1(1) commercially exploited by them since 1 April 2002, from public sources and confidential tax information, such as: tax, sales and other records held by the companies themselves, tax records including profit tax records, the companies' register, the land registries, statistical data, planning permits/consents, data held by the local authorities and the county councils, including, without limitation, Her Majesty's Revenues and Customs registration data for the purposes of the aggregates levy before and after 1 April 2014, data from the Mineral Planning Authorities, the Annual Minerals Raised Inquiry, the database BritPits and British Geological Survey data, the *UK Minerals Yearbook* and the *Cornish Building Stone and Slate Guide 2007*.

3. The United Kingdom shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1(1) has been completed. It shall immediately submit to the Commission, upon the Commission's request, any information on the measures already taken and planned to be taken in compliance with this Decision.

It shall also provide detailed information concerning the amounts of aid and recovery interest recovered from the beneficiaries.

Article 8

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 27 March 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION DECISION (EU) 2016/289**of 8 June 2015****on the State aid SA.37792 (2014/C) (ex 2013/N) which Slovenia is planning to implement for the Cimos Group***(notified under document C(2015) 3770)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.37792 (2013/N) ⁽²⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽³⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 21 November 2013, Slovenia notified the Commission of the restructuring aid it intended to implement for the Cimos Group ⁽⁴⁾ ('Cimos', 'the Company'). The notified measure was preceded by the granting of a rescue aid which the Commission approved on 2 July 2013 ⁽⁵⁾.
- (2) By letter dated 9 April 2014, the Commission informed Slovenia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid ('the opening decision'). Slovenia provided comments on that decision by letter dated 10 June 2014. Slovenia provided additional information by letters dated 24 September 2014 and 3 October 2014. The Commission met the Slovenian authorities on 4 November 2014. The Commission requested additional information by letter dated 18 December 2014, to which Slovenia replied on 30 January 2015.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁶⁾. The Commission called on interested parties to submit their comments.
- (4) The Commission received comments from one interested party. It forwarded them to Slovenia, which was given the opportunity to react. Slovenia has not replied to the comments of the interested party.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of Articles are, in substance, identical. For the purposes of this Decision references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ OJ C 156, 23.5.2014, p. 63.

⁽³⁾ See footnote 2.

⁽⁴⁾ Since the beneficiary of the rescue aid was the Cimos Group and the restructuring aid must be assessed at the same level, Slovenia clarified that it considers the Cimos Group to be the beneficiary of the restructuring aid. Henceforth all references to Cimos or to 'the Company' should be understood as references to the Cimos Group.

⁽⁵⁾ Commission Decision of 2 July 2013 in the case SA.36548 (2013/N) — Rescue aid for Cimos (OJ C 287, 3.10.2013, p. 1) ('the rescue aid decision').

⁽⁶⁾ See footnote 2.

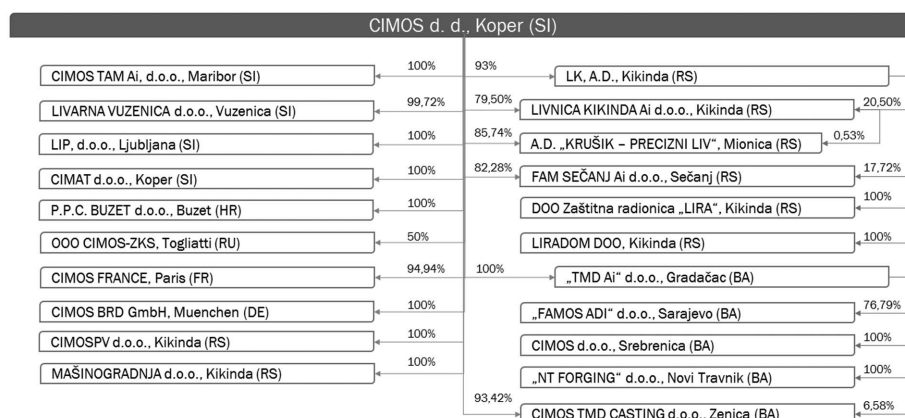
- (5) By letter dated 27 January 2015, Slovenia waived its right under Article 3 of Regulation No 1/1958 ⁽⁷⁾ to have this Decision adopted in Slovenian and agreed that the authentic language of this Decision should be English.

2. DESCRIPTION

2.1. BENEFICIARY

- (6) Cimos is a Slovenian-based manufacturer of automotive components, one of the largest industrial companies in Slovenia and a major employer. It has recently reported annual sales of over EUR 400 million and employed 6 855 people ⁽⁸⁾, of which over 2 500 in Slovenia.
- (7) Apart from its core business, the Company was also active in other sectors through its Machine Building and Tooling ('Machine') Division and its Energy and Agricultural Machinery ('Agriculture') Division. It has recently sold them or integrated them into the Automotive Division, which is now the Company's only business.
- (8) Slovenia estimates that Cimos's share in the European market is below 15 % for most product families, with the exception of central housings and nozzle rings turbo systems where it is estimated at 17 % and 21 %, respectively. Cimos's main competitors include Edscha and FlexNGate, Le Bélier, Streit and NWS.
- (9) As of 31 August 2014, Cimos consisted of a parent company, Cimos d.d., and 21 subsidiaries with operations in Slovenia, Croatia, France, Germany, Serbia, Bosnia and Russia. The organisational structure of Cimos is shown in the figure below.

The organisational structure of Cimos



- (10) The Slovenian State holds indirectly — through State-controlled companies or municipalities — over 39 % shares of Cimos. The ownership structure and control, as of 31 August 2014, was as follows:

Table 1

Ownership structure of Cimos

Shareholder	Share (%)	Control
Modra Zavarovalnica d.d.	21,4	Public

⁽⁷⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

⁽⁸⁾ As of 31 May 2014, including temporary employees.

Shareholder	Share (%)	Control
Banka Koper d.d.	20,4	Private
Cimos d.d.	13,3	Private
Kovinoplastika Lož d.d.	13,1	Private
D.S.U. d.o.o.	6,9	Public
Others	24,9	Public and private

Source: Restructuring plan

- (11) In recent years the Company has experienced significant financial difficulties. Having generated small profits in 2010 and 2011, Cimos reported significant net losses of EUR 97,9 million in 2012 and EUR 122 million in 2013. As a result, net assets turned negative falling to minus EUR 103,3 million in 2013. Debt (long-term and short-term liabilities), already at a high level in previous years, further increased in 2013 and the debt-to-equity ratio soared due to falling net assets. The liquidity situation deteriorated as the ratio of current assets to current liabilities fell from 0,85 in 2010 to 0,5 in 2013. Selected financial data of the Company are presented in Table 2.

Table 2

Selected financial data of Cimos Group in 2010-2013

	(EUR million)			
	2013	2012	2011	2010
Sales revenue	409,2	445,6	480,7	444,8
Net result	– 122,0	– 97,9	3,4	4,1
Net assets	– 103,3	22,5	139,3	133,1
Debt	610,4	569,3	581,6	594,2
Current ratio	0,5	0,54	0,85	0,85

Source: Consolidated financial statements for the years: 2013, 2012, 2011, and 2010.

- (12) Cimos's difficulties result mainly from severe liquidity problems and over-indebtedness. In 2000-2008 the Company grew rapidly, financed primarily through external borrowings. This was followed by a decrease of demand linked to the economic crisis coupled with poor investment decisions and mismanagement. As a result, the Company has amassed considerable debt and found itself unable to refinance or settle its financial liabilities.
- (13) Cimos has also considerable trade payables which disrupts the supply chain and threatens the very existence of the Company if the suppliers took steps to limit their exposure.

2.2. DEBT RESTRUCTURING PROCESS

- (14) In June 2012, Cimos signed a restructuring agreement with its banks to postpone the repayment of debt. The agreement was extended several times but the Company did not manage to regain liquidity on its own and in April 2013 had to ask for rescue aid from the State in order to avoid bankruptcy.

- (15) The Company then negotiated with the consortium of bank creditors ('Club Banks') a comprehensive Master Restructuring Agreement ('MRA') that was to set forth the terms and conditions of a voluntary debt restructuring. The voluntary debt restructuring was the main element of the restructuring plan that Slovenia notified in November 2013. Cimos expected that the MRA would be signed by the end of 2013.
- (16) In February 2014, however, following the receipt of an audit report, the management of Cimos became aware of the fact that Cimos met the criteria for insolvency related to capital inadequacy under the Slovenian law. The Club Banks had increasing concerns as to whether the voluntary restructuring and the MRA could be achieved. In particular, they were concerned that too much of the restructuring burden was placed on the major creditors and that the required operational restructuring was not sufficiently tackled in the restructuring plan.
- (17) To address these concerns, the bank creditors decided not to pursue the conclusion of the MRA but to initiate instead a compulsory settlement ('CS') procedure supervised by a court, with the aim to ensure that a broader set of stakeholders, including customers, suppliers and other creditors, would participate in the Company's restructuring to a greater extent and with firmer obligations than under the voluntary MRA process. On 3 June 2014, the court imposed the CS on Cimos. In parallel, the bank creditors started discussions with other stakeholders to agree on their contribution to the restructuring.
- (18) As the CS creditors ⁽⁹⁾ reached a conclusion on the terms of the compulsory debt restructuring and the contribution of other stakeholders (the State, customers, suppliers, lessor and banks outside the CS) was agreed, the originally notified restructuring plan, which was based on the MRA, had to be updated in light of the outcome of the CS process. Consequently, on 3 October 2014, Slovenia submitted the updated restructuring plan ⁽¹⁰⁾.
- (19) A key element of the CS under the Slovenian law is the submission to the court of the Plan of Financial Restructuring ('PFR') which sets out the agreed terms of the restructuring. The CS creditors submitted the PFR on 3 November 2014. According to Slovenia, once the PFR has been submitted, it may not be changed. Slovenia confirmed that all stakeholder groups have committed to the PFR.
- (20) The PFR was examined by an independent certified business appraiser who, in line with Slovenian insolvency law, issued an opinion confirming that Cimos is insolvent, that there is a more than 50 % probability that the implementation of PFR will enable the financial restructuring of Cimos to make it liquid and solvent in the short and long term and that there is more than 50 % probability that the creditors of Cimos will be given more favourable terms of repayment of their claims than if bankruptcy proceedings were initiated by the Company. The appraiser found that in the event of bankruptcy the ordinary financial creditors would recover 3,88 % of their claims, whereas in the event of the compulsory settlement they would recover 23,94 % of their claims.

2.3. THE NOTIFIED MEASURES

- (21) The updated restructuring plan provides for the implementation of the measures summarised below.
- (22) Measure 1: A 60 % reduction (EUR 21,7 million) of the State's claim against Cimos resulting from the rescue aid guarantee through a debt for equity conversion, with the remaining 40 % (EUR 14,5 million) to be paid over a 10-year period at an interest rate of EURIBOR + 2,5 %.
- (23) Measure 2: A 60 % reduction (EUR 23,4 million) of the State's claim against Cimos resulting from other guarantees ⁽¹¹⁾ through a debt for equity conversion, with the remaining 40 % (EUR 15,6 million) to be paid over a 10-year period at an interest rate of EURIBOR + 2,5 %.

⁽⁹⁾ The CS creditors are: Abanka Vipava d.d., Banka Celje d.d., Družba za upravljanje terjatev bank d.d. ('DUTB'), Gorenjska banka d.d., Nova Ljubljanska banka d.d., SID — Slovenska izvozna in razvojna banka d.d.

⁽¹⁰⁾ All references to the restructuring plan in the remainder of this Decision mean the updated restructuring plan unless otherwise indicated.

⁽¹¹⁾ These guarantees were granted by the State under the schemes 'Jamstvena shema' and 'Nedelničarska posojila'. The scheme 'Jamstvena shema' has been approved by Commission Decision of 12 June 2009 State aid NN 34/2009 (ex N 321/2009) — Slovenia 'Temporary Framework scheme — Guarantees' and Commission Decision of 16 April 2010 State aid N 105/2010 — Slovenia Amendment to 'Temporary Framework Scheme — guarantees' (NN 34/2009). The scheme 'Nedelničarska Posojila' had been in existence prior to the accession of Slovenia to the EU.

- (24) Measure 3: A combination of a 60 % reduction in the debt (EUR 122 million) through a debt for equity conversion of bank debt, for some banks a haircut (EUR 35,7 million ⁽¹²⁾) and a rescheduling of the remainder (EUR 99,5 million) over a 10-year period at an interest rate of EURIBOR + 2,5 %.

Table 3

Summary of Measures 1-3

(EUR million)

Creditor's name	Principal outstanding	Debt for equity conversion	Haircut	Remaining debt
Measure 1				
Ministry of Finance	36,2	(21,7)	—	14,5
Measure 2				
Republic of Slovenia	39,0	(23,4)	—	15,6
Measure 3				
DUTB	65,8	(39,5)	—	26,3
SID Banka	47,5	(1,0)	(27,5)	19
Banka Celje d.d.	42,4	(25,5)	—	16,9
NLB	26,8	(16,1)	—	10,7
Abanka Vipra d.d.	23,2	(13,9)	—	9,3
International Finance Corporation (IFC)	22,1	(13,3)	—	8,8
Gorenjska Banka d.d.	15,5	(9,3)	—	6,2
NKBM	5,7	(3,4)	—	2,3
Total Measure 3	249	(122)	(27,5)	99,5

Source: Restructuring plan.

- (25) Measure 4: A New Money Facility amounting to EUR 39,5 million, consisting of: (i) a commercial loan from the banks ('New Money Banks' ⁽¹³⁾) for the amount of EUR 20 million with interest at 6-month EURIBOR + 5 % p.a. supported by collateral and (ii) a loan by the Company's private customers ('New Money Customers' ⁽¹⁴⁾) for the amount of EUR 19,5 million on an unsecured basis and with no interest.
- (26) Measure 5: A voluntary restructuring of debt by suppliers ⁽¹⁵⁾ with a financial impact of EUR 21,8 million.
- (27) Measure 6: A voluntary restructuring of debt by a lessor ⁽¹⁶⁾ with a financial impact of EUR 6 million.

⁽¹²⁾ Includes debt to be written off by creditors who have not supported the CS.

⁽¹³⁾ The New Money Banks are: Abanka Vipra d.d., Banka Celje d.d., Družba za upravljanje terjatev bank d.d., Gorenjska banka d.d., Nova Ljubljanska banka d.d., SID — Slovenska izvozna in razvojna banka d.d., Nova kreditna banka Maribor d.d.

⁽¹⁴⁾ The New Money Customers are: Audi, BMW, Bosch Mahle, Borg Warner, Eaton Corporation, Ford Motor Company, GM/Opel, Honeywell Turbo Technologies, Magna-Steyr and PSA.

⁽¹⁵⁾ The measure involves more than 1 000 individual contracts with different suppliers and includes haircuts, lump sum arrangements, delayed repayment and rescheduling of trade payables.

⁽¹⁶⁾ Hypo Leasing d.o.o. (now trading as Heta Asset Resolution d.o.o.).

- (28) Measure 7: A voluntary rescheduling of debt by the banks outside the CS ⁽¹⁷⁾ with the expected financial impact of EUR 3 million.
- (29) Measure 8: Customer funding of capital expenditure, in the form of a loan, for the amount of EUR 9,8 million.
- (30) Slovenia considers that only the conversion of the State's claim resulting from the rescue aid guarantee to equity for the amount of EUR 21,7 million (part of Measure 1) constitutes State aid.

3. THE RESTRUCTURING PLAN

- (31) As mentioned in recital 18, the originally notified restructuring plan has been updated in light of the modified terms of restructuring proposed under the CS. The key features of the updated plan are the same as those of the originally notified plan. The modifications consist, essentially, in expanding the financial restructuring measures to include a wider scope of stakeholders and in strengthening the operational restructuring measures to take account of the implications of the CS.
- (32) According to the plan the Company's difficulties originate from the debt-financed expansion, declining operational effectiveness and a downturn in the automotive market caused by the global economic and financial crises.
- (33) The revenue growth in 2000-2008 averaged more than 20 % p.a. and was primarily financed through external borrowing, in most cases with short-term loans, resulting in a mismatch between long-term assets and short-term liabilities used to finance those assets. During that period the net debt of the Company increased seven times and has remained at high level since then. The Company found itself unable to repay this debt, let alone finance the necessary capital investment. In addition, Cimos accumulated considerable trade payables, as it financed operations largely through extending payment periods to suppliers. Failure to pay suppliers on time not only added to liquidity problems but also disrupted operations, which in the automotive industry rely upon just-in-time delivery.
- (34) The main reasons for the Company's declining operational effectiveness include poor quality, high scrap rates, lower customer service, overcapacity leading to high overheads, inability to reduce costs leading to deterioration of margins and supply shortages caused by a failure to respect supplier payment terms.
- (35) The global economic crisis and credit crunch reduced demand for new cars and related demand for automotive components. Cimos's sales revenue fell in 2008 and 2009, grew briefly in 2010 and 2011 and declined again in 2012 and 2013. As the Company did not manage to reduce costs, it became unprofitable and was not able to generate enough cash flows on its own to service debt.
- (36) With the aim to address the reasons for difficulty, Cimos has prepared a restructuring plan which provides for the implementation of financial and operational restructuring measures described below.
- (37) The restructuring period is not explicitly set in the restructuring plan. The plan provides that the restructuring effectively started in February 2014 and that the restructuring measures shall be implemented by 2016, with the full benefits to be obtained by 2018 (it takes two to three years for the benefits of some measures to take effect in the forecasts). In view of this, given that the Company is forecasted to return to long-term viability by 2017 under all scenarios, the Commission considers that the restructuring period runs from February 2014 to the end of 2017.

3.1. FINANCIAL RESTRUCTURING

- (38) The originally notified restructuring plan provided for the State to convert the claim resulting from the rescue aid guarantee of EUR 35 million to equity and for two public shareholders of Cimos, Modra Zavarovalnica d.d. and D.S.U. d.o.o., to subscribe additional share capital of EUR 6,5 million. In addition, the originally notified plan envisaged the conversion and rescheduling of Cimos's bank debt for the amount of approximately EUR 250-270 million.

⁽¹⁷⁾ The non-Slovenia-based banks, namely Zagrebačka banka, Razvojna banka, Erste bank, Bosnia Bank International, Banka Intesa, Bawag, RZB, Privredna banka Sarajevo, Fond RS and Nova banka.

- (39) Under the updated plan, the restructuring of the State's claim and the bank debt remain a central element of the financial restructuring but will be performed on modified terms agreed under the CS. In addition, other stakeholders including customers, suppliers, the lessor and banks outside the CS, will voluntarily contribute to the financial restructuring through a reduction of their claims or provision of funding. However, the two public shareholders will no longer inject capital, as was envisaged under the originally notified plan.
- (40) Cimos's financial debt consists of a claim by the State against the Company in respect of the rescue aid guarantee of EUR 36,2 million (including accrued interest), the claims by the State against the Company totalling EUR 39 million in respect of other guarantees ⁽¹⁸⁾ and various loans held by a number of banks. The State and CS banks agreed to restructure this debt through a combination of a debt-for-equity conversion, haircut and rescheduling of repayment on the terms described in recitals 22-24. This is aimed to bring the Company's debt to a sustainable and serviceable level. It will also free up cash resources necessary to finance operations and improve Cimos's creditworthiness in the eyes of customers, suppliers and financial creditors.
- (41) Cimos will need additional funds to finance its working capital and repay liabilities arising from the debt restructuring, which is a *sine qua non* of returning to solvency and profitability. To this end, Cimos has agreed with its banks and major customers that they will provide EUR 39,5 million in the form of the New Money Facility on the terms described in recital 25.
- (42) The Company has also concluded agreements with its suppliers on the voluntary restructuring of ordinary operating claims on the basis of supply contracts. The agreement provides for suppliers to restructure their claims through a combination of a one-off repayment of part of their claims and a rescheduling and write-off of the remainder. The financial impact of this measure for the amount of EUR 21,8 million corresponds to the amount of Cimos's payables written off.
- (43) Cimos has entered into an agreement with Hypo Leasing d.o.o. (now trading as Heta Asset Resolution d.o.o.), a lessor, on the voluntary restructuring of claims resulting from finance lease agreements. On the basis of the agreement, the lessor will receive a one-off repayment (including penalty interest) of EUR 2,3 million, write-off EUR 6 million, which is the declared financial impact of this measure, and reschedule repayment of the remaining debt over 4 years with a 1-year grace period.
- (44) Outside the CS, Cimos has concluded, or is in a final stage of negotiations to conclude, bilateral agreements on debt restructuring with the Company's non-Slovenian banks. The financial impact of this measure, consisting of an extension to the loan maturities, changes to interest and a moratorium on the repayment of principal, is estimated at EUR 3 million.
- (45) Capital expenditure ('capex') has been reduced in recent years due to limited available cash, which led to under-investment and poor maintenance of the equipment. Cimos intends to bring capex to the level necessary to carry out the restructuring. This will be funded partly by customers, partly by Cimos. The customers have agreed to fund customer-specific tooling and machinery expenditure in the form of a loan to Cimos for the amount of EUR 9,8 million. Cimos will fund the remaining necessary capex from its own resources.
- (46) In order to further improve liquidity, Cimos reached an agreement with customers to shorten the payment period from 30-60 days to a week, until June 2015. The measure is estimated to improve liquidity by approximately EUR 10 million.
- (47) Finally, Cimos plans to obtain borrowing of EUR 25 million on market terms to finance operations in 2018-2019, after the end of the restructuring period.

3.2. OPERATIONAL RESTRUCTURING

- (48) As regards operational restructuring, the originally notified restructuring plan provided for the implementation of lean management, consolidation of production capabilities, enhancement of business unit roles and responsibilities, procurement improvement, inventory optimisation and human resource restructuring. These measures are being implemented, though under the updated plan they have been strengthened and expanded to take account of the business implications of the CS.

⁽¹⁸⁾ See footnote 11.

- (49) In particular, the operational restructuring measures will have more impact on the group headcount, labour costs and overheads than originally planned, with the aim to generate net profit and cash at the earliest possible stage. To achieve this goal, in view of the higher than initially assumed expected decline in sales and an increase of maintenance costs, the modified measures are expected to generate higher cost savings than initially planned.
- (50) The Company's booked business will drop in time as three quarters of the projects in progress are expected to be completed by 2019. A decline in existing business will have to be compensated by new projects. To this end, the Company will implement measures in sales, including most importantly the retention of long-term customers by cooperating with them right from the product development stage, penetration of new markets with the existing products and development of new products for the existing and new markets. Sales revenue is forecasted to decrease in 2015-2018 and start growing in 2019. The measures are not expected to generate additional costs.
- (51) Cimos plans to reduce headcount from 6 855 employees in May 2014 to [...] (*) employees in [...], which is expected to generate annual cost savings of EUR [...]. The associated costs of severance pay are estimated at EUR [...] and will be incurred in [...].
- (52) The Company has decided to reduce the number of plants from 20 to 13 in 2014-2016 in order to consolidate production capacity and focus on core business. The divestment proceeds are expected to amount to EUR 5,1 million, which will improve liquidity. In addition, in 2013-2014 Cimos sold its subsidiaries, TPS Labin, TPS Novi Knezevac (Agriculture Division), Litostroj Power (Energy Division) and Cimos Titan (Machine Division), which generated total proceeds of approximately EUR 25 million.
- (53) The plan provides for quality measures to improve work processes, e.g. materials flow, internal packaging, cutting tool handling and stock management. In addition, measures will be implemented to improve manufacturing processes, including the transformation and relocation of certain production lines, the replacement or abandonment of certain input materials and the renewal, repair and replacement of work equipment. The annual benefits from the implementation of these measures are expected to grow from EUR 0,9 million in 2015 to EUR 5 million after 2017.
- (54) In the area of supply chain the Company intends to reduce the number of [...], decrease premium freight costs by reducing the backlog of production for known customers, simplify material flows between the plants and reduce [...] by awarding the contracts via calls for tenders. The expected reduction in the supply chain costs will ultimately reach EUR 5,3 million per year from 2018 onwards. Until then the savings are expected to gradually increase, from EUR 1,8 million in 2015 to EUR 4,1 million in 2017.
- (55) The Company also plans to improve purchasing process by negotiating volume discounts with its existing suppliers [...] to secure more advantageous prices as well as by centralising the purchasing function. The current liquidity problems have led many suppliers to refuse to deal with Cimos which restricted its ability to optimise costs by switching suppliers. This is expected to change after the exit from the CS procedure. The benefits from the improved purchasing process are expected to reach EUR 11,3 million in 2015-2018.
- (56) The overhead cost reduction measures are mainly focused on lowering the costs of services (utility, IT, telecom, cleaning and security), other operating costs (e.g. bank charges, rental costs) and discontinuing non-business related promotion activities (donations to the local sport clubs). The measures are expected to bring savings of EUR 0,3 million in 2015 and EUR 0,6 million per year thereafter.
- (57) Under the inventory optimisation measure Cimos plans to better control obsolete stock, implement consignment stocking, increase the frequency of deliveries, reduce inventory of raw materials and increase inventory of finished goods, with the aim to deliver better customer service.

3.3. OVERVIEW OF THE RESTRUCTURING COSTS AND SOURCES OF FINANCING

- (58) According to the restructuring plan the total restructuring costs amount to EUR 350,7 million and are planned to be financed from an own contribution for the amount of EUR 329 million and from the State aid for the amount of EUR 21,7 million. The restructuring costs and the sources of financing are summarised in Table 4.

(*) Business secret.

Table 4

Restructuring costs and sources of financing

(EUR million)

Restructuring cost item		Source of financing	
Trade creditor repayment	113,1	Declared own contribution	329,0
Past and 2014 trading losses	65,2		
Capital expenditure	18,3	Notified State aid (rescue aid converted to equity)	21,7
Repayment of customer funded capex	9,8		
Loss on disposal of Litostroj Power	17,5		
Loss on disposal of Cimos Titan	2,5		
Repayment of debt relating to Litostroj Power	21,4		
Severance payments	8,4		
Restructuring advisor fees	3,0		
Lease penalty interest and default repayment	2,3		
Limited equity and minimum cash headroom	49,0		
Interest on rescue aid	1,2		
Repayment of New Money	39,0		
Total costs	350,7	Total sources of financing	350,7

Source: Restructuring plan

- (59) The declared level of own contribution amounts to 94 % of total restructuring costs.

Restructuring costs

- (60) Due to limited liquidity Cimos has accumulated considerable trade payables, which must be repaid in order to ensure continued supplies and stability of operations. The Company has repaid trade payables of EUR 20,5 million before the initiation of the CS and has to repay a further EUR 92,6 million owed at the outset of the CS. The total repayment amounts to EUR 113,1 million.
- (61) As of 2014 the Company's forecasted accumulated losses amounted to EUR 211,4 million and negative equity — to EUR 155,6 million. According to the CS rules, in order for a restructured company to be considered viable upon exit from the CS, the equity cannot be negative. Thus the accumulated losses must be covered. The above amount has to be adjusted by items shown separately in Table 4 (losses on disposal, severance payments, restructuring advisor fees, lease penalty interest and trade creditor repayment). The balancing figure amounts to EUR 65,2 million and represents past trading losses to be covered during the restructuring.

- (62) As mentioned in recital 45, the capex has been insufficient in recent years due to liquidity shortages. This often led to delays in production and inability of Cimos to meet its commitments towards customers. The capex foreseen in the plan is intended to assure that Cimos will meet its future contractual obligations and thus is essential for the restoration of viability.
- (63) Part of the capex for the amount of EUR 9,8 million will be funded by customers in the form of a loan. This loan will have to be repaid by Cimos and thus it constitutes a cost of restructuring.
- (64) On selling its subsidiaries, Litostroj Power (Energy Division) and Cimos Titan (Machine Division) Cimos recognized a loss on disposal of EUR 20 million, which increases the accumulated losses described in recital 61.
- (65) The proceeds from sale of Litostroj Power for the amount of EUR 21,4 million were used by Cimos to repay bank loans, as was required by the financing facility agreements.
- (66) The redundancies planned as part of the operational restructuring will generate severance payment costs of EUR 8,4 million.
- (67) The Company has hired consultants to assist the management board in planning and execution of the restructuring process. The associated cost of professional services is estimated to amount to EUR [...].
- (68) As part of the deal sealed with the lessor (see recital 43) Cimos must settle part of its obligations upfront, including penalty interest.
- (69) In order to operate on the market on its own merits, it is not enough for Cimos to cover accumulated losses. It is a common practice in the automotive industry that customers require a sufficient debt to equity ratio for a bidder to participate in tenders. If Cimos is to bid for orders, which is necessary to achieve planned sales targets and ultimately return to viability, it must have minimum equity headroom estimated at EUR 39 million. In addition, it needs EUR 10 million to secure sufficient cash safety margin necessary to stabilise liquidity and regain trust on the market after the exit from the insolvency procedure.
- (70) The interest on the amount the Company has borrowed on the market thanks to the rescue aid guarantee, accrued by 3 June 2014, namely the start of the CS, amounts to EUR 1,2 million and must be repaid as part of the restructuring.
- (71) Cimos will also have to repay the debt resulting from the New Money Facility, described in recital 41. The associated restructuring cost, as notified by Slovenia, amounts to EUR 39 million.

Sources of financing

- (72) The notified sources of own contribution include the New Money Facility (see recital 41), Cimos- and customer-funded capex (see recital 45), proceeds from the sale of the subsidiary Litostroj Power (see recital 52), the benefits of financial restructuring measures described in Section 3.1 and Cimos's contribution to the suppliers' debt restructuring (see recital 42). The sources of own contribution are analysed in detail in Section 8.8.
- (73) The notified State aid consists of the conversion of the State's claim against Cimos resulting from the rescue aid guarantee to equity for the amount of EUR 21,7 million.

3.4. RESTORATION OF LONG TERM VIABILITY

- (74) The restructuring plan provides for a restoration of viability in 2015 under the realistic scenario and in 2017 under the pessimistic scenario, thanks to the implementation of the restructuring measures in 2014-2016. Selected projected financial data under the realistic scenario are presented in Table 5.

Table 5

Selected projected financial data under the realistic scenario

(EUR million)

	2014	2015	2016	2017	2018	2019
Net sales	370,4	358,1	327,2	321,8	316,0	345,0
EBIT	– 7,7	10,1	10,7	11,6	12,1	18,8
Net profit/loss	– 77,8	2,1	2,9	4,2	5,0	11,1
Operating cash flow	2,9	19,0	32,1	40,5	34,1	27,6
Equity	– 155,6	53,2	56,2	60,4	65,4	76,4
Return on capital	—	3,9 %	5,2 %	7,0 %	7,6 %	14,5 %

Source: Restructuring plan.

3.5. COMPENSATORY MEASURES

- (75) As a compensatory measure Cimos proposes to divest three business units within the automotive segment, its core business, namely the plants in [...]. The plants were profitable and accounted for around 4 % of Cimos's total revenue prior to restructuring.
- (76) In addition, the Company has divested three non-core business units, namely its Agriculture, Energy and Machine Divisions, which accounted for around 20 % of Cimos's total revenue in the pre-restructuring period and were profitable.

Table 6

Financial performance of the divested businesses prior to restructuring

	2011		2012		2013	
	Share in Cimos's revenue (%)	Gross profit, EUR m	Share in Cimos's revenue (%)	Gross profit, EUR m	Share in Cimos's revenue (%)	Gross profit, EUR m
[...]	1,1	2,3	1,0	1,5	1,0	1,2
[...]	0,9	0,9	0,8	0,8	1,0	1,0
[...]	1,6	1,9	1,4	1,5	2,0	2,2
Total core business	3,6	5,1	3,2	3,8	4,0	4,4
Agriculture	0,9	1,5	1,2	2,7	0,9	1,2

	2011		2012		2013	
	Share in Cimos's revenue (%)	Gross profit, EUR m	Share in Cimos's revenue (%)	Gross profit, EUR m	Share in Cimos's revenue (%)	Gross profit, EUR m
Energy	11,4	22,6	12,2	28,1	9,7	14,4
Machine	5,0	5,3	6,8	6,6	8,5	6,3
Total non-core business	17,3	29,4	20,2	37,4	19,1	21,9

Source: Reply to the request for information from 30 January 2015.

- (77) After the above divestments, Cimos's only remaining business will be the Automotive Division, its core activity.

3.6. THE OPENING DECISION

- (78) On 9 April 2014, the Commission opened the formal investigation procedure. In the opening decision the Commission expressed doubts in respect of the restoration of long-term viability, compensatory measures and own contribution.
- (79) The restoration of long-term viability seemed questionable. According to the financial projection contained in the originally notified restructuring plan, the Company was expected to generate net losses and negative cash flows even after the restructuring. In addition, the capability of the originally notified restructuring plan to restore Cimos's viability relied largely on the conclusion of the voluntary debt restructuring agreement. As no agreement had been reached by the time of the opening decision, this assumption was considered not realistic. This was confirmed by subsequent events. The parties failed to reach agreement on the voluntary debt restructuring and the creditors initiated instead the CS procedure.
- (80) The proposed compensatory measures, consisting of the sale of Agriculture, Machine and Energy Divisions, did not seem to concern the Company's main market and there was no evidence that all the activities to be discontinued were not loss-making prior to the restructuring, as required in point 40 of the Rescue and Restructuring Aid Guidelines ⁽¹⁹⁾ ('the Guidelines').
- (81) Finally, the recapitalisation of Cimos by two public shareholders and the expected cash benefits from the restructuring of bank debt, including largely debt held by State-owned banks, which were originally notified as sources of own contribution, seemed to involve State aid. If proved true, they would not comply with the Guidelines, which provide that own contribution must be free of aid. The only acceptable source of own contribution at the time of the opening decision, namely the proceeds from the sale of Agriculture Division, accounted for only 0,5 % of the restructuring costs, which means that it was well below the required 50 % threshold.

4. COMMENTS FROM SLOVENIA

- (82) In the reply to the opening decision Slovenia informed the Commission that the content of the notified restructuring plan would be updated in light of the outcome of the CS procedure initiated on 3 June 2014.
- (83) As the negotiations on the CS were ongoing, Slovenia did not provide details on the modifications, however it confirmed that the recapitalisation of Cimos by two public shareholders was no longer being considered. As regards the other originally notified measures, Slovenia submitted that they could not be assessed until they are sufficiently well defined under the CS. Nevertheless, Slovenia provided comments on some of the issues raised in the opening decision.

⁽¹⁹⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

- (84) Referring to the Commission's doubts on the imputability of the actions of State-owned banks to the State, Slovenia replied that all of them operate on the market in accordance with commercial principles. Their decisions on Cimos were based on purely economic interests, were not influenced by governmental bodies and were taken in parallel with private creditors who also initiated the CS.
- (85) As regards DUTB, Slovenia argued that its involvement in the restructuring of Cimos was free from political interference. Four out of seven of its board members are non-Slovenian and have strong international expertise and credibility. Credit and asset management decisions are made in an operational committee structure with clearly defined mandates and competencies.
- (86) The participation of SID Banka ('SID') in the restructuring of Cimos would be independent from the Slovenian government. Transactions above certain limits must be authorised by the supervisory board, whose members are appointed by the government, however they shall be independent from the government. Slovenia acknowledged that the mission of SID as a development bank differs from the goals of commercial banks (e.g. maximizing profits), but argued that SID's corporate governance is subject to the same rules as in the private banks.
- (87) Slovenia took note of the Commission's doubts regarding the restoration of long-term viability and declared that it would ensure that these doubts would be addressed in the updated restructuring plan.
- (88) As regards the compensatory measures, Slovenia submitted that the restructuring aid for Cimos may be approved without compensatory measures as Cimos's market share is small to negligible and the Company is located in an assisted area. It also argued that neither the case law nor the Guidelines suggest that compensatory measures must take place exclusively on the company's main markets post restructuring. Finally, Slovenia submitted that the divestment of Agriculture, Machine and Energy Divisions would significantly affect Cimos's competitive position on the automotive segment by limiting resources that had been previously available thanks to profits generated by the divested businesses.
- (89) Concerning the own contribution, Slovenia submitted that the debt restructuring, to the extent that it does not involve State aid, qualifies as an own contribution.

5. COMMENTS FROM INTERESTED PARTY

- (90) The Commission received comments from one interested party, Cimos. Cimos fully endorsed the observations submitted by Slovenia in the reply to the opening decision. It also emphasized the Company's socioeconomic importance for the country and the region and expressed confidence in the restoration of viability.

6. OTHER COMMENTS

- (91) Between September 2014 and March 2015, the Commission received several letters from a private citizen, Ms Olga Filakovic, representing a Canadian company, Hormess International Limited. In her letters Ms Filakovic alleges that Cimos's balance sheet was fraudulently increased by at least EUR 20 million of laundered money, which (with interest accrued) adds up to EUR 35 million granted by Slovenia as part of the restructuring aid; that her company is entitled to be paid damages and — as a creditor — is seeking from Cimos and Slovenia EUR 60 million, a receivable which is allegedly registered at the District Court of Koper; and that Cimos falsified financial documentation in order to hide debts owed to her clients in relation to an office building that Cimos did not own but sold for EUR 9,75 million.
- (92) The Commission notes that interested third parties were invited to submit comments by means of a notice published together with the opening decision in the Official Journal of the EU on 23 May 2014 ⁽²⁰⁾. The deadline for submission of comments expired on 23 June 2014. Nevertheless, in response to Ms Filakovic's request, the Commission has taken into account the information she has provided in the present investigation. The allegations are assessed in recital 160 below.

7. COMMENTS FROM SLOVENIA ON THE OBSERVATIONS OF INTERESTED PARTIES AND OTHER COMMENTS

- (93) Slovenia has not replied to the comments from Cimos.

⁽²⁰⁾ See footnote 2.

- (94) As regards comments from Ms Filakovic, in response to the Commission's request for information from 18 December 2014, Slovenia has rejected all allegations and declared them as completely false, not understandable and not supported by any evidence. In particular, Slovenia clarified that the financial statements of Cimos have been audited by an independent auditor, as part of the mandatory requirements of the CS procedure, who has issued an unqualified audit opinion. Concerning the alleged damages of EUR 60 million, Slovenia assured that Cimos does not have any obligation whatsoever against Hormess International. In December 2014, Hormess International and a Slovenian company SOF ING d.d. lodged a claim of approximately EUR 61 million with the court in the CS proceedings over Cimos, however the claim has not been included in the examination of claims performed by the administrator of the CS and therefore is not registered at the District Court in Koper as part of the CS proceedings. Finally, in relation to the sale of an office building, Slovenia confirmed that Cimos was the owner of the building, which was sold to the company Berny Commerce d.o.o. in 2001, which duly registered itself in the land register as owner in 2002, and that no associated claim against Cimos exists.

8. ASSESSMENT OF THE AID

8.1. EXISTENCE OF STATE AID

- (95) Article 107(1) of the Treaty stipulates that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (96) It follows that, for a measure to be qualified as State aid within the meaning of Article 107(1) of the Treaty, the following cumulative criteria must be met: use of State resources imputable to the State, selective advantage to the beneficiary, and distorting effects (or threat thereof) on competition and trade between Member States.

Measure 1

- (97) The measure is to be granted by the Ministry of Finance, therefore it clearly involves State resources and is imputable to the State.
- (98) The measure is to be provided to one specific undertaking only, namely Cimos. The measure consists of a debt-for-equity conversion for the amount of EUR 21,7 million and a rescheduling for the amount of EUR 14,5 million of the State's claim against Cimos resulting from the rescue aid guarantee ⁽²¹⁾. In the opening decision the Commission concluded that the debt-for-equity conversion of the State's claim constitutes State aid. This conclusion remains valid and is not contested by Slovenia.
- (99) Slovenia argues that the rescheduling of the State's claim does not constitute aid because it is to be performed in line with the debt owed by Cimos to the other CS creditors. The Commission considers that the rescue aid guarantee and the rescheduling of the State's claim resulting therefrom are part of a single operation even if they involve different financial instruments. In this sense the rescheduling merely prolongs the advantage conferred on Cimos by the rescue aid. This is also confirmed by the fact that, on 3 November 2013, when Slovenia notified a conversion of its total claim resulting from the rescue aid to equity, the other current CS creditors did not agree to restructure Cimos's debt. In view of that, the Commission considers that the rescheduling of the State's claim provides Cimos with a selective advantage.
- (100) In addition, without prejudice to the conclusion reached in the previous recital, the Commission notes that neither the conversion nor the rescheduling of the State's claim would comply with the market economy operator principle, as explained in recitals 104-107 below.
- (101) Finally, the measure is apt to improve the competitive position of Cimos on the automotive market that is open for competition from other Member States. Therefore, it distorts or threatens to distort competition and affects trade between Member States.

- (102) In view of the assessment in recitals 97-101, the Commission considers that Measure 1 constitutes State aid.

⁽²¹⁾ This guarantee was called on by the relevant banks, resulting in a claim by the State against the Company.

Measure 2

- (103) The measure is to be granted by the Republic of Slovenia, therefore it clearly involves State resources and is imputable to the State.
- (104) According to case law, economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽²²⁾ (the market economy operator principle, or 'MEOP'). This principle has been developed with regard to different economic transactions. In particular, to identify the presence of State aid in cases of transactions related to debt claims, it is necessary to compare the behaviour of public creditors to that of hypothetical private creditors that find themselves in a similar situation ('MEOP test').
- (105) Any prudent market economy creditor would normally carry out its own *ex-ante* analysis of the financial outcome of a debt restructuring, for example by comparing the expected recovery amount in the scenario of debt restructuring with the expected recovery amount in the alternative scenario, in the present case, the bankruptcy of Cimos.
- (106) Therefore, if a Member State argues that the economic transaction is in line with the MEOP test, it must provide evidence showing that the decision to carry out the transaction was taken on the basis of an assessment that a rational private creditor would have carried out to determine the transaction's profitability.
- (107) In the present case Slovenia has not provided evidence to demonstrate that by accepting the debt restructuring terms the State acted as a rational market creditor. Slovenia refers to the report of an independent appraiser of the PFR, who found that all creditors in aggregate would recover more from the CS than from the bankruptcy of Cimos ⁽²³⁾. The report does not, however, indicate how much the State alone would recover if it chose the alternative scenario. It cannot be excluded that, while the creditors as a whole might be better off by accepting the CS, the State could have recovered more from its individual claims if it had chosen the alternative scenario. In any case the analysis performed at the level of all creditors would not be sufficient for an individual private creditor to decide on the course of action as there could be differences in relation to the collateral held, the ranking of the claims, etc. Therefore, the Commission considers that the measure at hand conferred a selective economic advantage on Cimos.
- (108) The assessment of the impact of Measure 1 on competition and trade, described in recital 101, is also valid for Measure 2.
- (109) In view of the assessment in recitals 103-108, the Commission considers that Measure 2 constitutes State aid.

Measure 3

- (110) The Commission observes that Gorenjska Banka is a private entity, while IFC belongs to the World Bank Group, therefore the actions of these two entities are not imputable to the State.
- (111) The other banks participating in Measure 3, NLB, Abanka, Banka Celje and NKBM, are majority-owned by the State, which holds the majority of votes in the management and supervisory boards. This is an indication of imputability. However, the Commission has not found any evidence from the Articles of Association, the governance structure or from any other source indicating that the State influenced the decisions of the banks concerned on adopting the measure in question, in the sense of the *Stardust-Marine* case law ⁽²⁴⁾. On the contrary, Slovenia submitted internal documents demonstrating that each of the banks assessed the proposed restructuring terms based on economic considerations and in line with their standard internal decision-making processes. In addition, NLB's debt-to-equity conversion in the case Adria Airways was also not considered as imputable to the State ⁽²⁵⁾. For these reasons the Commission considers that the decisions of NLB, Abanka, Banka Celje and NKBM to participate in Measure 3 are not imputable to the State.

⁽²²⁾ Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 60-61.

⁽²³⁾ According to the report, ordinary financial claims would be recovered at the rate of 3,88 % in the scenario of bankruptcy and 23,94 % in the scenario of CS.

⁽²⁴⁾ Case C-482/99 *French Republic v Commission (Stardust Marine)* [2002] ECR I-4397.

⁽²⁵⁾ See Commission Decision (EU) 2015/494 of 9 July 2014 on the measures SA.32715 (2012/C) (ex 2012/NN) (ex 2011/CP) implemented by Slovenia for Adria Airways d.d. (OJ L 78, 24.3.2015, p. 18).

- (112) DUTB is a State-owned company established in 2013 to facilitate the restructuring of banks that are facing severe liquidity and solvency problems. Again, the State-ownership is an indication of imputability, however it is not *per se* sufficient to consider the measure imputable to the State. The Commission has found evidence indicating that DUTB was independent in its decision-making in respect of Cimos. First, according to the founding legal act of DUTB, decisions such as the one on Cimos, do not require government authorisation. Second, the governance structure of DUTB mimics the operational organisation of a bank, in that the decisions are taken by a credit committee. The particular decision on Cimos was taken by the highest-ranking board credit committee. Three out of seven board members are non-Slovenian and all but one come from the financial sector. The only one member of board representing the public administration (an ex-State secretary in the Ministry of Finance) voted against the restructuring of Cimos, but was outvoted by the other board members. Finally, Slovenia submitted internal documents demonstrating that DUTB also assessed the proposed restructuring terms on the basis of economic considerations. Therefore, the Commission considers that the decision of DUTB to participate in Measure 3 is not imputable to the State.
- (113) In this context it is also noted that, without prejudice to the conclusions reached in recitals 110 and 112 above, all the creditors mentioned in recital 111 as well as DUTB performed *ex-ante* analyses comparing different courses of action and finding that they would recover more from Cimos's restructuring than from its liquidation. Therefore, the agreement of these creditors to the debt-to-equity conversion can also be considered in line with MEOP and thus no to involve economic advantage to Cimos.
- (114) SID Banka is a 100 % State-owned Slovenian export and development bank. All members of SID's Supervisory Board, which authorised the decision on Cimos, were appointed by the government and, moreover, three out of seven of them are employed by the State. According to Article 8 of the Slovene Export and Development Bank Act, all decisions by SID have to be taken with the vision of the development of Slovenia in mind. Slovenia itself acknowledges that the mission of SID as a development bank differs from the goals of commercial banks (e.g. maximizing profits). SID agreed on the least favourable conditions of the debt restructuring among all CS creditors, in that it approved a 58 % haircut of debt, while none of the remaining CS creditors approved any haircut but rather opted for a debt-to-equity conversion offering a possibility of future capital gains from the acquired shareholding in Cimos. Slovenia has not substantiated why SID accepted more unfavourable terms than other CS creditors. The Commission has already held in previous decision that the guarantees provided by SID amounted to State resources and constituted aid ⁽²⁶⁾. In view of this, the Commission considers that SID's decision to participate in Measure 3 is imputable to the State.
- (115) Slovenia has not provided any reliable evidence to demonstrate that the decision of SID to participate in Measure 3 was taken on the basis of market considerations. Slovenia claims that SID would recover EUR 9,9 million from the CS and would have to pay an extra EUR 6,7 million in case of Cimos's liquidation, that is to say that the difference between the two scenarios is EUR 16,6 million. This claim is not, however, supported by any analysis showing how these amounts were determined. Slovenia has submitted such analyses made by the other CS creditors. In addition, the recovery amounts raise doubts. It is not clear why SID would incur additional losses in case of liquidation, given that the market value of SID's collateral amounts to EUR 4,5 million. On the other hand, the recovery amount in case of restructuring does not seem to take into account the loss of EUR 27,5 million due to the haircut. Any rational market creditor would perform financial analysis before deciding on the course of action. On the basis of the available evidence the Commission considers that SID did not perform such analysis before agreeing on the haircut, that is to say that it did not behave as a rational market creditor. Consequently, the measure granted by SID conferred a selective economic advantage upon Cimos.
- (116) The assessment of the impact of Measure 1 on competition and trade, described in recital 101, is also valid for the measure granted by SID.
- (117) In view of the assessment in recitals 110-116, the Commission considers, on the one hand, that Measure 3 constitutes State aid to the extent that it was granted by SID. On the other hand, debt restructuring under Measure 3 by Gorenjska Banka, IFC, NLB, Abanka, Banka Celje, NKBM and DUTB does not involve State aid.

⁽²⁶⁾ See Commission Decision of 12 June 2009 State aid NN 34/2009 (ex N 321/2009) — Slovenia 'Temporary Framework scheme — Guarantees'.

Measure 4

- (118) None of the customers contributing to the New Money Facility is State-controlled, therefore their decisions are not imputable to the State. As regards the contribution of the New Money Banks, their decisions on Cimos have been assessed as not imputable to the State in recitals 110 and 112 above, with the exception of SID. In addition, the publicly-owned banks participated in the New Money Facility on the same terms as the private bank Gorenjska Banka and IFC.
- (119) Moreover, the participation of the banks is matched by the private customers who have agreed to provide funding to Cimos for the same amount but at significantly less favourable terms. The customers' contribution is unsecured and does not bear interest. The contribution by the New Money Banks, on the other hand, is secured by super senior collateral and bears an interest of 6-month EURIBOR + 5 % p.a., that is to say higher than a rate envisaged for the companies in financial difficulties with high collateral in the Commission's reference rate communication ⁽²⁷⁾, which seeks to approximate the market rate.
- (120) The provision of the New Money Facility is crucial for the Company's return to viability. Without it, Cimos would not be able to pay its suppliers in the short term and thereby to continue operations. In this sense, it is also economically rational for the creditors, which have accepted the debt restructuring, to increase marginally their exposure, in order to increase the likelihood of the Company's return to viability and the ultimate recovery of their remaining debt.
- (121) As regards SID, however, the Commission notes that in addition to contributing to the New Money Facility on the same terms as the other banks, it also grants State aid (see above Measure 3). Furthermore, due to its legal status as public development bank, all its actions are imputable to the State. Measures 3 and 4 are granted at the same point in time and pursue the same objective, i.e. restructuring of Cimos. According to the case law, their compliance with the MEOP test therefore has to be assessed together ⁽²⁸⁾. Without it being necessary to perform a detailed calculation, it is clear that the overall terms for SID are not *pari passu*. Therefore, the contribution of SID to the New Money Facility has to be considered as State aid.
- (122) In view of the assessment in recitals 118-120, the Commission considers that Measure 4, with the exception of the contribution of SID, does not constitute State aid.

Measure 5

- (123) None of the suppliers involved in the voluntary restructuring of their debt towards Cimos is owned or controlled by the State, therefore their decisions to participate in Measure 5 are not imputable to the State and thus Measure 5 does not constitute State aid.

Measure 6

- (124) The lessor, Hypo Leasing d.o.o., belongs to Hypo Group Alpe Adria ('HGAA Group'), which is owned by the Austrian State. The Commission has not found any evidence indicating that the lessor pursued any interests other than commercial interests or that Austria influenced its decision on the restructuring of Cimos's lease obligations. It would appear unlikely that Austria would exert pressure on the HGAA Group to grant State aid to a company in difficulty located in another Member State. The Commission also notes that HGAA is limited as to the terms on which it may conduct business by the commitments contained in the Commission's State aid decision ⁽²⁹⁾. In addition, Austria undertook in that decision not to grant any further aid to companies in the HGAA Group.
- (125) Therefore, the Commission considers that the decision of the lessor to restructure its exposure towards Cimos is not imputable to the State and thus Measure 6 does not constitute State aid.

⁽²⁷⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

⁽²⁸⁾ Case T-1/12 *France v Commission* ('Sea France') [2015] ECR II-0000, paragraph 34 with further references.

⁽²⁹⁾ Commission Decision 2014/341/EU of 3 September 2013 — State aid SA.32554 (09/C) — Restructuring aid for Hypo Group Alpe Adria implemented by Austria (OJ L 176, 14.6.2014, p. 1).

Measure 7

- (126) The banks participating in the voluntary debt restructuring are not State-controlled and therefore their decisions to participate in Cimos's restructuring are not imputable to the State. Thus Measure 7 does not involve State aid.

Measure 8

- (127) None of the customers committing to provide funding in respect of capex is State-controlled, therefore their behaviour is not imputable to the State. Thus Measure 8 does not constitute State aid.

Conclusion on the existence of State aid

- (128) The Commission concludes that Measures 1, 2 and part of Measures 3 and 4 (to the extent they were granted by SID) constitute State aid.
- (129) The State aid amounts to EUR 80,3 million, corresponding to the debt for equity conversion by the State and the debt for equity conversion, the haircut and the contribution to the New Money Facility by SID ⁽³⁰⁾. In addition, the State aid includes up to EUR 16,6 million embedded in the debt rescheduling. The aid element embedded in the debt rescheduling was determined as the difference between the nominal value of the State's claims and SID's loans as of the CS date and the NPV of these claims and loans calculated according to the repayment schedule, as accepted by the creditors under the CS, i.e. assuming a 10-year repayment period with a grace period of 2 years, an interest rate of EURIBOR + 2,5 %, discounted at an appropriate discount rate ⁽³¹⁾. The precise amount of aid embedded in the debt rescheduling cannot be established as e.g. the future EURIBOR rate is not known.

8.2. LEGALITY OF STATE AID

- (130) In accordance with Article 3 of Council Regulation (EC) No 659/1999 ⁽³²⁾, aid shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid ('standstill obligation').
- (131) According to the reply of Slovenia from 30 January 2015 to the Commission's request for information the CS procedure was planned to be resolved by April 2015. To the Commission's knowledge, however, no restructuring aid has been granted to Cimos to date. Therefore, it appears that Slovenia has complied with the standstill obligation so far.

8.3. COMPATIBILITY OF STATE AID

- (132) Article 107(3)(c) of the Treaty provides that State aid can be authorised where it is granted to promote the development of certain economic sectors and where this aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (133) Slovenia has notified the measures as restructuring aid under the Guidelines. In view of the previous Commission decision concerning the rescue aid to Cimos and the financial difficulty of Cimos described below, the Commission agrees that the present case involves a restructuring aid which must be assessed in the light of the criteria under the Guidelines in order to establish whether it may be compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

⁽³⁰⁾ EUR 6,7 million.

⁽³¹⁾ The discount rate was determined on the basis of the reference rate for Slovenia applicable to a company in difficulty. According to the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6), the reference rate is also to be used as a discount rate for calculating present values.

⁽³²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

8.4. FIRM IN DIFFICULTY

- (134) According to points 12(a) and 14 of the Guidelines ⁽³³⁾ only firms in difficulty are eligible for restructuring aid. In order to qualify as a firm in difficulty the company must fulfil the criteria listed in point 10 or point 11 of the Guidelines.
- (135) Under point 10, a firm is considered to be in difficulty when:
- (a) in the case of a limited liability company, more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;
 - (b) in the case of a company where at least some members have unlimited liability for the debt of the company, more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;
 - (c) whatever type of company concerned, it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- (136) In the opening decision, the Commission observed that Cimos, being a limited liability company, fulfilled the criteria listed in point 10(a) of the Guidelines. According to the consolidated financial statements as of 31 December 2012, it had lost more than half of its registered capital (108 %) and more than one quarter thereof over the preceding 12 months (137 %) ⁽³⁴⁾. Therefore the Commission considered that Cimos qualified as a firm in difficulty based on point 10(a) of the Guidelines.
- (137) Since then the financial situation of Cimos has further deteriorated. As of 31 December 2013, the Company reported a negative equity of EUR 103,3 million. According to preliminary (unaudited) results for the first 10 months of 2014, Cimos recorded a net loss of EUR 74,3 million, which means that its negative equity increased even more. In earlier cases ⁽³⁵⁾, the Commission concluded that, where a company has negative equity, there is an *a priori* assumption that the criteria of point 10(a) of the Guidelines are met, which would be the case for Cimos. The General Court also concluded ⁽³⁶⁾ that a company with negative equity is a company in difficulty.
- (138) In addition, since 3 June 2014, the court imposed the compulsory settlement procedure on Cimos under the Slovenian insolvency law at the request of its creditors. Therefore it also fulfils the condition of point 10(c) of the Guidelines.
- (139) According to point 12 of the Guidelines, newly created firms are not eligible for rescue or restructuring aid. A firm is in principle considered as newly created for the first three years following the start of operations in the relevant field of activities. Cimos started operations in 1972, was registered in its present form in 1975 and has been operating in the current field of activities ever since. Therefore it cannot be considered as a newly created firm.
- (140) Point 13 of the Guidelines establishes that a firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.
- (141) Cimos does not belong to or is not being taken over by a larger business group. Therefore the criteria set out in point 13 of the Guidelines do not preclude it from being eligible for restructuring aid.

⁽³³⁾ Since the restructuring aid was notified on 21 November 2013, it should be assessed under the 2004 Guidelines (see footnote 19). According to point 136 of the 2014 Guidelines (Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1)) 'notifications registered by the Commission prior to 1 August 2014 will be examined in the light of the criteria in force at the time of notification'.

⁽³⁴⁾ The loss of capital over the preceding 12 months is bigger than the total loss of capital because Cimos reported accumulated profits in the past.

⁽³⁵⁾ Commission Decision in case C 38/2007 *Arbel Fauvet Rail* (OJ L 238, 5.9.2008, p. 27).

⁽³⁶⁾ Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-585, paragraphs 95 to 106.

- (142) The Commission concludes that Cimos has been a firm in difficulty since 2012 and is eligible for restructuring aid.

8.5. THE 'ONE TIME, LAST TIME' PRINCIPLE

- (143) According to point 73 of the Guidelines, if the firm concerned has already received rescue or restructuring aid in the past, including any un-notified aid, and where less than 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the restructuring plan has been halted (whichever is the latest), the Commission will not allow further rescue or restructuring aid.
- (144) Slovenia informed the Commission that the Company has not received any rescue or restructuring aid in the last 10 years, apart from the notified rescue aid approved by the Commission, as described in recital 1 ⁽³⁷⁾.

8.6. RESTORATION OF LONG-TERM VIABILITY

- (145) In order to consider a measure compatible under points 34-37 of the Guidelines, the restructuring plan must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. The plan should enable the company to cover all its costs after restructuring and the expected return on capital must be enough to enable the restructured firm to compete on the marketplace on its own merits. The restructuring plan must describe the circumstances that led to the difficulties, thereby providing a basis for assessing whether the proposed restructuring measures are appropriate.
- (146) The restructuring plan provides for Cimos to return to long-term viability in 2015 under the realistic scenario of the financial projections and in 2017 under the pessimistic scenario (see Table 5). The Company is expected to generate net profits and positive operating cash flows, which means that it would be in a position to cover all its costs after completing the restructuring, including depreciation and financial charges. The expected return on capital is forecasted to be 7,6 % to 14,5 % in 2018 and 2019 respectively, i.e. in the post-restructuring period. Given that the yield on the Slovenian 10-year government bonds, commonly seen as an approximation of a return on a risk-free investment, is approximately 1 %, the expected return on capital gives investors a reasonably adequate risk premium and can be considered enough to enable Cimos to compete in the marketplace on its own merits.
- (147) The financial projections are based on prudent assumptions. The sales are initially forecasted to decrease due to expected loss of customers caused by financial distress associated with the CS process. The revenue is forecasted to drop from EUR 358,1 million in 2015 to EUR 316 million in 2018 before it starts to grow in 2019. This is significantly less than in the pre-restructuring period when revenue exceeded EUR 400 million. The current forecast is also much lower than the one contained in the originally notified plan where sales were predicted to remain stable at EUR 400 million in the period 2015-2017. In view of that and taking into account that the business already booked accounts for more than 95 % of planned sales in 2015 and 2016 and for more than 80 % of planned sales in 2017, as well as considering the expected benefits of the implementation of the sales restructuring measures, it is reasonable to consider that the sales forecast contained in the updated restructuring plan is achievable.
- (148) The costs have been forecasted on the basis of historical results, taking into account the expected benefits of the implementation of the restructuring measures. The Commission notes that significant cost savings are related to the measures over which the Company has relatively high influence, such as a workforce reduction or consolidation of production facilities, which increases the likelihood that they will be implemented as planned. The workforce reduction in particular should lead to a decrease of variable costs, while the disposal of loss-making plants should decrease depreciation and improve profitability. The CS creditors and other stakeholders (customers, suppliers, the lessor) have agreed to a debt restructuring, which ensures that the financial restructuring measures will also be implemented as planned. This, among other benefits, will significantly decrease the Company's finance costs. Therefore, the planned cost savings also appear achievable.

⁽³⁷⁾ In 2009-2010, Cimos was granted State guarantees under the schemes described in footnote 11. At that time the Company was not an undertaking in difficulty, therefore the guarantees did not constitute rescue or restructuring aid and thus do not breach the 'one time, last time' principle.

- (149) In the opening decision the Commission questioned the restoration of viability on the basis that at that time the banks had not agreed on Cimos's debt restructuring. This doubt has now been removed as the banks agreed to restructure Cimos's debt under the CS process.
- (150) According to the restructuring plan Cimos will need additional funding totalling EUR 25 million in 2018 and 2019 to finance operations. The Commission notes that, on the basis of the restructuring schedule, by that time the Company will have implemented the core restructuring measures and will have returned to profitability. The initial deleveraging (through a debt-for-equity conversion, write-off and partial repayment) will improve Cimos's credit rating and will release a portion of assets currently pledged to creditors to be used as future collateral. This should enable Cimos to obtain the necessary financing on the market as planned.
- (151) The restructuring plan sets out the circumstances that led to Cimos's difficulties, namely over-indebtedness and operational inefficiency. The Commission notes that the plan provides for the measures aimed precisely to address these difficulties.
- (152) The conversion of debt for equity by major creditors will lead to a reduction of their claims by 60 %. As a result, the overall financial liabilities of Cimos will decrease from EUR 422 million in 2013 to EUR 184 million in 2017. The debt to equity ratio will decrease from 17,7 in 2012 (last year when equity was positive) to 3 in 2017, a much more sustainable level. In addition, the remaining 40 % of debt held by CS creditors is to be repaid on more favourable terms, including an extended repayment period and a 2-year payment holiday. This will further reduce the current and future repayment burden. The ratio of EBITDA to interest, which measures the ability of a company to service debt, is forecasted to increase from 1 in 2013 to 5,4 in 2017.
- (153) Moreover, the suppliers agreed to reduce their claims, which will further reduce the overall debt and ensure continuity of operations. All of the financial restructuring measures, including notably the agreement by customers to shorten payment periods, will additionally improve liquidity. The cash flows eased by not having to repay the restructured debt or by receiving payments from customers earlier, will be also available to finance the implementation of the operational restructuring measures aimed at tackling the second reason for difficulty, namely the operational inefficiency.
- (154) Under the operational restructuring Cimos embarked on a number of cost-saving measures, including most notably the reduction of workforce, consolidation of operations by decreasing the number of plants, reduction of overheads and improved process management. The Company wants to refocus its operations on the core automotive business. The operational restructuring measures are planned to generate total annual cost savings of EUR 27 million, much higher than under the originally notified restructuring plan. By decreasing costs they will improve profitability, which at the reduced level of employment and capital, will translate into increased operational efficiency.
- (155) In view of the findings in recitals 152-154 the Commission considers that the proposed restructuring measures are appropriate to tackle the reasons for difficulty identified in the restructuring plan.
- (156) The contribution of private banks, customers and suppliers to the financial restructuring is a sign of their confidence in Cimos and gives an additional reason to consider that the restructuring plan is capable of restoring long-term viability.
- (157) The independent business appraiser of the PFR also concluded that the restructuring plan is likely to make Cimos liquid and solvent in the short and long term.
- (158) Furthermore, the Commission notes that the duration of the restructuring plan is limited to less than four years, running from February 2014 to 2017. Such a restructuring period appears appropriate given the scope of the planned restructuring measures, their implementation schedule and the expected date for the restoration of viability.
- (159) The Commission observes that the updated restructuring plan is not a new plan but only a development of the originally notified plan on the basis of the outcome of the CS. It pursues exactly the same restructuring goals as the originally notified plan, namely reduction of over-indebtedness, restoration of liquidity, improvement of

operating efficiency and refocusing operations on the core automotive segment. The most significant restructuring measure in terms of financial impact, the conversion and rescheduling of the financial debt, remains the same, albeit on slightly modified terms and through a compulsory rather than voluntary procedure. The other restructuring measures are not substantially different than under the originally notified plan but have been strengthened to achieve greater cost-savings. Both the originally notified and the updated plans are based on the same business model and strategy. The Commission has already approved similar updates of notified restructuring plans in previous decisions ⁽³⁸⁾.

- (160) Concerning the allegations of Ms Filakovic, described in recital 91, the Commission notes that the financial statements of Cimos were examined by an independent auditor who issued an unqualified opinion about them and did not report anything on the alleged fraud and money laundering. Concerning the granting by Slovenia of EUR 35 million to Cimos as part of the restructuring aid, the Commission notes that in July 2013 it approved a EUR 35 million rescue aid guarantee for Cimos ⁽³⁹⁾. The guarantee, which is to be converted to equity as part of the restructuring aid, does not entail any transfer of monetary resources to Cimos, therefore it cannot be financed from money laundering. Finally, as regards the alleged claims of Ms Filakovic's company and her clients against Cimos, on the basis of available information, the Commission has not identified any such claims. In view of that, the Commission considers that the allegations are unsubstantiated and do not affect the assessment of the restructuring aid.
- (161) In view of the foregoing, the Commission concludes that the proposed restructuring measures are capable of restoring long-term viability of the Company within a reasonable timescale and on the basis of realistic assumptions.

8.7. AVOIDANCE OF UNDUE DISTORTIONS OF COMPETITION (COMPENSATORY MEASURES)

- (162) Pursuant to points 38-42 of the Guidelines, compensatory measures must be taken to ensure that the aid's adverse effects on trading conditions are mitigated as far as possible. The aid shall not unduly distort competition. This usually means a limitation of the presence which the company can enjoy on its markets at the end of the restructuring period. The compensatory measures should be in proportion to the distortive effects of the aid and, in particular, to the size and relative importance of the firm on its market or markets. The closure of loss-making activities cannot be considered as valid compensatory measures. The degree of compensatory measures must be established on a case-by-case basis and with regard to the objective of restoring the long-term viability of the firm. Moreover, according to point 7 of the Guidelines the Commission will request compensatory measures which minimise the effect on competitors.
- (163) The compensatory measures should not compromise the ability of the company to return to long-term viability after the implementation of the restructuring plan, as provided in point 38 of the Guidelines.
- (164) Cimos has proposed two compensatory measures:
- divestment of its Agriculture, Machine and Energy Divisions;
 - divestment of three plants in the automotive segment, in [...].
- (165) Regarding the first compensatory measure, Cimos has already sold the three divisions concerned. They accounted in total for around 20 % of the Company's revenue and were profitable prior to restructuring.
- (166) The Commission notes that only compensatory measures which affect the beneficiary's presence on its main market can be considered sufficient ⁽⁴⁰⁾. Therefore, in principle the sale of these divisions cannot be accepted as a compensatory measure as such. Nevertheless, by divesting the non-core divisions Cimos has not only lost its market share in secondary segments but also has significantly weakened its competitive position and ultimately its market presence on the core automotive market. This is because the profits that Cimos would have earned

⁽³⁸⁾ See e.g. Commission Decision (EU) 2015/494 of 9 July 2014 on the measures SA.32715 (2012/C) (ex 2012/NN) (ex 2011/CP) implemented by Slovenia for Adria Airways d.d. (OJ L 78, 24.3.2015, p. 18); Commission Decision 2013/151/EU of 19 September 2012 on the State aid SA.30908 (11/C, ex N 176/10) implemented by the Czech Republic for České aerolinie, a.s. (ČSA — Czech Airlines — Restructuring plan) (OJ L 92, 3.4.2013, p. 16).

⁽³⁹⁾ See footnote 5.

⁽⁴⁰⁾ Joined cases T-115/09 and T-116/09 *Electrolux AB and Whirlpool Europe BV v Commission* (FagorBrandt) [2012] ECR II-000.

from the divested divisions (approximately EUR 90 million in the period 2011-2013), which were profitable prior to restructuring, could have been otherwise used to finance the expansion on the core market.

- (167) Regarding the second compensatory measure, all plants concern Cimos's main market and were profitable prior to restructuring, as shown in Table 6. They represent a reduction of capacity by 15 % in terms of the number of plants and account for around 4 % of the total revenue and 4,5 % of the automotive segment revenue. By divesting these plants Cimos will give up market share to its competitors, lose customers and narrow its product range.
- (168) After the divestments mentioned in recital 164 Cimos's only remaining business will be the Automotive Division, which is the Company's core and the only activity left and thus it is indispensable for the restoration of viability. The Automotive Division has already been downsized through divestment of plants by way of compensatory or restructuring measures. In view of that, any further divestments could indeed jeopardise the objective of restoring the long-term viability.
- (169) The implementation of the compensatory measures coupled with the divestment of assets envisaged as part of the restructuring plan will significantly reduce Cimos's capacity and prevent it from gaining an undue competitive advantage thanks to the restructuring aid.
- (170) Moreover, according to point 56 of the Guidelines, the conditions for authorising aid are less stringent as regards the implementation of compensatory measures in assisted areas. The Commission notes that Cimos is located in an assisted area according to Article 107(3)(c) of the Treaty.
- (171) Therefore the proposed measures constitute a genuine compensation for the distortion of competition caused by the granting of the aid and are adequate to ensure that the adverse effects on trading conditions resulting from the aid are minimised.
- (172) Consequently, the aforementioned compensatory measures are considered to comply with points 38-42 of the Guidelines.

8.8. AID LIMITED TO THE MINIMUM, OWN CONTRIBUTION

- (173) According to points 43-45 of the Guidelines, the aid must be limited to the strict minimum, necessary to enable the restructuring to take place. The beneficiary is expected to make a significant contribution to the restructuring plan from its own resources, including the sale of assets not essential to the company's survival, or from external financing at market conditions. Such contribution must be real, i.e. actual, excluding all future profits such as cash flow and is a sign that the markets believe in the feasibility of the return to viability of the company. It must not include any further State aid. For large enterprises, such as Cimos, the share of own contribution must be at least 50 % of restructuring cost.
- (174) According to Slovenia the own contribution proposed by Cimos accounts for 94 % of the total restructuring cost and consists of the sources listed in Table 7.

Table 7

Sources of own contribution

Source	EUR million
New Money Facility	39
Cimos funded capex	8,5
Customer funded capex	9,8

Source	EUR million
Consideration for the sale of Energy Division (Litostroj Power)	18,0
Debt for equity conversion and non-accrual of interest on bank debt (without SID)	120,2
Non-accrual of interest on loans	5,3
Haircut of suppliers	21,8
Haircut of lessor	6
Haircut of bank debt	8,3
Debt for equity conversion and haircut of SID's debt	28,5
Debt for equity conversion of State guarantees	23,4
Non-accrual of interest on the rescue aid	1,2
Cimos contribution to funding of supplier compromise	39,0
Total declared own contribution	329,0

Source: Restructuring plan.

- (175) The New Money Facility is confirmed by the funding agreement, on the basis of which the New Money Banks and New Money Customers agreed to provide Cimos in total with EUR 38,4 million (EUR 19,2 million each) on the terms described in recital 25. Slovenia informed the Commission that the difference as compared to the notified amount of its own contribution from this source equalling to EUR 39 million relates to the customer Eaton who paid in the funds in early January 2015 and will approach the banks to provide the additional funding (the agreement provides for equal funding by the customers and the banks). The Commission does not have evidence that Eaton indeed paid the funds and that the banks provided the equivalent funding. In addition, as concluded in Section 8.1, the participation by SID in the New Money Facility amounting to EUR 6,7 million constitutes State aid and thus cannot be considered as a source of own contribution. The Commission concludes that the New Money Facility for the amount of EUR 31,7 million constitutes a valid source of own contribution.
- (176) Between January and September 2014, Cimos spent EUR 17,6 million on capex from its own resources. Therefore, the total amount of EUR 8,5 million, as proposed by Cimos, can be accepted as its own contribution.
- (177) Cimos has signed bilateral agreements with its customers, on the basis of which they will provide a loan for Cimos to finance the capex. As none of the customers concerned is State-owned, this contribution is real and free of State aid and can be accepted.
- (178) On 12 May 2014, Cimos sold its subsidiary, Litostroj Power, to a private company from the Czech Republic for EUR 21,4 million. Cimos has proposed EUR 18 million as its own contribution from this source. The contribution is real and free of State aid, therefore it can be accepted.
- (179) The own contribution in the form of the debt for equity conversion by the banks, to the extent it was assessed as not involving State aid, has been determined as a financial benefit for Cimos resulting from not having to repay the loans which have the present value of EUR 121 million ⁽⁴¹⁾. Instead of repaying these loans Cimos will have them converted to equity, which does not entail any future cash outflows with respect to these loans. The liquidity released by the conversion is available for Cimos to finance the restructuring costs. By accepting the conversion the CS creditors have assumed a risk of capital loss if Cimos's equity loses value after the conversion, which is a sign of their confidence in the restoration of viability.

⁽⁴¹⁾ Of which Cimos has notified EUR 120,2 million as its own contribution.

- (180) According to the CS terms no interest will accrue on the bank loans mentioned in the previous recital from 3 June 2014 (the date of the initiation of the CS) until the court's decision confirming the CS, which represents an additional benefit for Cimos for the amount of EUR 5,3 million.
- (181) The haircut granted by the suppliers and the lessor is confirmed by agreements, as described in recitals 42 and 43 respectively, therefore it is real. It will free liquidity available for financing the restructuring costs, which otherwise would have to be spent on the repayment of the associated payables.
- (182) The haircut of bank debt for the amount of EUR 8,3 million corresponds to the expected contribution from 'non-supportive' creditors, who have not agreed to the terms of CS, but will be outvoted by the majority of supportive creditors. In the absence of agreement by the banks concerned, the Commission does not consider this contribution as real, nor as a sign of their confidence in the restoration of Cimos's viability.
- (183) As concluded in Section 8.1, the conversion and haircut of SID's debt constitutes State aid. For that reason it cannot be considered as a source of own contribution.
- (184) Likewise, the debt for equity conversion of the State's claims resulting from the guarantee schemes and non-accrual of interest on the State's claim resulting from rescue aid guarantee (after 3 June 2014) have been assessed as constituting State aid and, as such, cannot be considered as own contribution.
- (185) Finally, the restructuring plan provides that Cimos's contribution to funding of supplier compromise (the repayment of rescheduled debt) will be funded from 'future profits'. Slovenia informed the Commission that this debt amounts to EUR 34,2 million, as the remaining EUR 4,8 million has been already repaid to suppliers. According to point 43 of the Guidelines own contribution must exclude future profits. Therefore, the Commission considers only EUR 4,8 million as a legitimate own contribution from this source.
- (186) On the basis of these considerations, the Commission concludes that an own contribution for the amount of EUR 226,1 million meets the criteria of the Guidelines. This amount accounts for 64,5 % of total restructuring cost, which is above the 50 % threshold required for large enterprises.

Conclusion on the compatibility of the restructuring aid

- (187) The Commission concludes that the restructuring aid meets the compatibility conditions of the Guidelines.

9. CONCLUSION

- (188) The Commission concludes that Measures 1, 2 and part of Measures 3 and 4 (to the extent they were granted by SID) constitute State aid within the meaning of Article 107(1) of the Treaty, which is compatible with the internal market on the basis of Article 107(3)(c) of the Treaty read in conjunction with the Guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Slovenia is planning to implement for the Cimos Group, amounting to EUR 96,9 million, is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty.

Implementation of the aid amounting to EUR 96,9 million is accordingly authorised, subject to the condition set out in Article 2.

Article 2

Slovenia shall submit regular reports on the implementation of the restructuring plan submitted on 3 October 2014. The first report shall be submitted to the Commission not later than six months after the date of this Decision. Subsequent reports shall be sent to the Commission at least once a year until the end of 2017.

Article 3

This Decision is addressed to the Republic of Slovenia.

Done at Brussels, 8 June 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION DECISION (EU) 2016/290**of 16 December 2015****concerning aid measures implemented by Verband der deutschen Milchwirtschaft e.V. in connection with the German Milk and Fat Law SA.35484 (2013/C) (ex SA.35484 (2012/NN))***(notified under document C(2015) 9052)***(Only the German text is authentic)**

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments pursuant to the provision cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) By letters dated 28 November 2011 and 27 February 2012, the European Commission (hereinafter 'the Commission') asked Germany for additional information concerning the 2010 annual report on State aid in the agricultural sector which Germany had submitted in accordance with Article 21(1) of Council Regulation (EC) No 659/1999 ⁽²⁾. Germany answered the Commission's questions by letters dated 16 January 2012 and 27 April 2012. In the light of Germany's answers, it emerged that Germany had granted financial support to the German dairy sector pursuant to the 1952 *Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten* (hereinafter 'the Milk and Fat Law' or 'the MFG').
- (2) By letter dated 2 October 2012, the Commission informed Germany that the measures in question had been registered as non-notified aid under registration number SA.35484 (2012/NN). By letters dated 16 November 2012, 7, 8, 11, 13, 14, 15 and 19 February, 21 March, 8 April, 28 May, 10 and 25 June and 2 July 2013, Germany submitted further information.
- (3) By letter of 17 July 2013 (C(2013) 4457 final) (hereinafter 'the Opening Decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of certain sub-measures carried out in accordance with the MFG. In the same letter, the Commission indicated that other sub-measures covering either the period 28 November 2001 to 31 December 2006 or the period from 1 January 2007 or covering both periods were compatible with the internal market, did not constitute State aid within the meaning of Article 107(1) TFEU or did not fall within the scope of the State aid rules (hereinafter 'the Positive Decision').
- (4) For all other sub-measures, including the measures implemented in the period since 28 November 2001 by Verband der deutschen Milchwirtschaft e.V. (hereinafter 'VDM') in connection with the MFG which are the subject of this Decision, the Commission based its Opening Decision on the belief that aid had been granted and expressed doubts as to the compatibility of the measures with the internal market.
- (5) By letter dated 20 September 2013, Germany submitted comments concerning the Opening Decision.
- (6) The Opening Decision was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments within one month.

⁽¹⁾ OJ C 7, 10.1.2014, p. 8.

⁽²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽³⁾ See footnote 1. A corrigendum was previously submitted to Germany by letter dated 9 December 2013.

- (7) The Commission received 19 sets of comments from interested parties. One of these parties asked the Commission not to disclose its identity and gave sound reasons for this. A total of six sets of comments received between 6 and 10 February 2014 related to the sub-measures involving VDM.
- (8) The comments received were transmitted to Germany by letters of 27 February, 3 March and 3 October 2014 without the identity of the abovementioned interested party being disclosed.
- (9) Germany did not initially respond to the comments submitted by interested parties in February 2014. Germany responded to an additional opinion dated 8 July 2014 by letter dated 3 December 2014.
- (10) On 6 June 2014 the Commission asked Germany for additional information, which Germany provided by letter of 16 July 2014.

2. DESCRIPTION

- (11) Described below are the measures implemented by VDM in connection with the Milk and Fat Law, designated in the Opening Decision as sub-measures BW 6, BY 9, HE 5, NI 10, NW 9, RP 8, SL 6 and TH 6, and in respect of which the Commission expressed doubts as to their compatibility with the internal market.

Reasons that prompted the Commission to initiate the procedure provided for in Article 108(2) TFEU

- (12) The MFG is a Federal law which entered into force in 1952 and has since been amended several times, most recently on 31 October 2006. It constitutes the legal framework for the measures at issue, and its validity is unlimited in time.
- (13) Section 22(1) of the MFG authorises the German *Länder* to impose a milk levy on dairies based on the quantities of delivered milk. According to the information made available by Germany, nine (out of 16) German *Länder* made use of this authorisation, i.e. Baden-Württemberg, Bavaria, Brandenburg, Hessen, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Thuringia. The levies imposed by the *Länder* amount to up to EUR 0,0015 per kg of milk.
- (14) Germany has explained that the milk levy imposed in the respective *Länder* is not applicable to imports. By contrast, exports may be subject to the milk levy.
- (15) Section 22(2) of the MFG provides that the revenues generated by the milk levy may be used solely for:
 - 1. improving and sustaining quality on the basis of certain implementing provisions;
 - 2. improving hygiene during milking and the delivery, processing and distribution of milk and milk products;
 - 3. milk yield recording;
 - 4. advice to operators on matters relating to the dairy industry and ongoing training of young employees;
 - 5. advertising aimed at increasing the consumption of milk and dairy products;
 - 6. performance of the tasks conferred by the MFG.
- (16) Section 22(2a) of the MFG provides that, by derogation from paragraph 2, the revenues generated pursuant to paragraph 1 may also be used to:
 - 1. reduce increased structural collection costs in respect of the supply of milk and cream from the producer to the dairy,
 - 2. reduce increased transport costs in respect of the supply of milk between dairies where such supply is necessary to ensure the supply of drinking milk to the recipient dairies' sales area, and
 - 3. improve quality regarding the central distribution of milk products.

- (17) Section 22(4) provides that contributions and fees paid by dairies or their associations to establishments in the dairy industry for the purposes set out in paragraph 2 may be offset in full or in part by the revenues generated by the milk levy.
- (18) Germany explained that the financing of VDM as provided for in point 6 of Section 22(2) of the MFG involves the performance of public service duties (*Leistungsverwaltung*), and not the exercise of a prerogative as a public authority (*Eingriffsverwaltung*) restricting the rights of the parties concerned — and the positive granting of benefits. A substantive statutory basis was not necessary because the statutory reservation of powers under Article 20(3) of the German Constitution (*Grundgesetz*) did not cover this area. Authorisation in the respective *Land* budgets and the corresponding grant by administrative act were sufficient in this case.
- (19) In the individual *Länder*, the applicable *Land* budget regulations provided the legal basis for the release of appropriations.
- (20) The legal basis for the collection of the milk levy in the respective *Länder* was provided by the following regulations:
- (21) Baden-Württemberg: Regulation of the Ministry of Food and Rural Affairs amending the Regulation on the collection of levies from the dairy industry of 18 May 2004 (GBl.S.350), as amended by Regulation of 24 January 2006 (GBl.S.40).
- (22) Bavaria: Regulation on a levy for milk (BayMilchUmlV) of 17 October 2007.
- (23) Hessen: Regulation on the collection of a levy to promote the dairy industry of 1 December 1981
- (24) Lower Saxony: Regulation on the collection of a levy within the dairy industry of 26 November 2004 (Nds. GVBl. (Lower Saxony Law Gazette), No 36/2004, p. 519), as last amended by the Regulation amending the Regulation on the collection of a levy within the dairy industry of 22 December 2005 (Nds. GVBl., No 31/2005, p. 475)
- (25) North Rhine-Westphalia: Regulation on levies to promote the dairy industry of 30 November 1965
- (26) Rhineland-Palatinate: *Land* Regulation on the collection of a levy within the dairy industry of 15 October 2002, as last amended by the First *Land* Regulation amending the *Land* Regulation on the collection of a levy within the dairy industry of 4 July 2009
- (27) Saarland: Regulation on the collection of a levy within the dairy industry of 9 December 1982.
- (28) Thuringia: Thuringian Regulation of 29 December 1999 on the collection of a levy to promote the dairy industry
- (29) Baden-Württemberg, Bavaria, Hessen, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Thuringia all grant financial support for the measures implemented by VMD at issue. Between 2001 and 2011, the total budgetary resources earmarked (all *Länder* combined) amounted to approximately EUR 4 million.
- (30) Germany further explained that, in those *Länder* that do not collect a milk levy, payments were made to VDM on a voluntary basis by Milcherzeugervereinigung in Schleswig-Holstein e.V., Arbeitsgemeinschaft Milch e.V. in Mecklenburg-Western Pomerania, Landeskontrollverband Berlin-Brandenburg e.V., Interessengemeinschaft der Erzeugerzusammenschlüsse in Sachsen e.V. and by the dairy industry in Saxony-Anhalt through Landesvereinigung der Milchwirtschaft in Niedersachsen. Payments were calculated according to the quantity of milk produced in the *Land* in question, taking account of the financial capacity of the organisations concerned.
- (31) Baden-Württemberg has also pointed out that the collection of the levy was suspended in Baden-Württemberg on 31 December 2012. The dairy industry in Baden-Württemberg contributed to funding VDM in both 2013 and 2014 through Milchwirtschaftlicher Verein Baden-Württemberg e.V. (from members' contributions).

- (32) According to Germany, VDM's tasks include in particular:
- protecting and promoting the interests of the dairy industry,
 - comprehensive consulting with regard to all dairy-industry issues at both national and international level,
 - representing dairy-industry interests during the legislative process vis-à-vis ministries, parliamentary bodies, committees and working parties within national and international technical associations and organisations, and
 - organising events on current developments and trends.
- (33) According to Germany, VDM is a member of the International Dairy Federation (IDF) and represents the German National Committee within that organisation. In particular, VDM bore full responsibility for coordinating Germany's collaboration within IDF. VDM nominated experts to sit on IDF bodies on behalf of the member associations and the Federal Government and adopted a position on international matters vis-à-vis the German national committee. It represented the interests of the entire dairy sector in collaboration with its members and in close cooperation with the Federal Government and the representatives of the *Länder*.
- (34) Acting on behalf of the entire dairy sector, VDM was also involved in standardisation and harmonisation at national and international level in cooperation with the competent standards organisations such as ISO, IDF, CEN and DIN. It also advised the Federal Government and the IDF regarding the *Codex Alimentarius*. By issuing statements, handbooks and guidelines VDM helped to ensure that the dairy industry and the authorities spoke with one voice where environmental and safety-related matters were concerned. Finally, VDM produced instruction materials for the sector and oversaw the entire technical standardisation process. Technical standards were essential in the dairy sector, helping to ensure that safe and high-quality food was produced
- (35) VDM was likewise a network consisting of members' associations, representatives of the Federal Government, the *Länder* and the scientific community. All participants were consulted on the direction of national and international food law, on dairy science, the analysis of milk and dairy products, and nutrition. They were also consulted on issues relating to environmental, climate and animal protection. In this respect VDM promoted cooperation throughout the sector. Indeed, one of the association's aims was to support the dairy industry and promote technical progress within it.
- (36) No single undertaking active in producing, processing or trading in milk was represented as a member within VDM. Its membership was made up solely of associations and scientific institutions. According to VDM's website its members include groups such as Milchindustrie-Verband e.V., Deutscher Bauernverband e.V., Bundesverband der Privaten Milchwirtschaft e.V., ZV Deutscher Milchwirtschaftler e.V., Bundesverband Molkereiprodukte and Arbeitsgemeinschaft Deutscher Rinderzüchter e.V. ⁽⁴⁾.
- (37) Germany considers that the financial support given to VDM did not constitute aid because VDM was not an undertaking, i.e. it was not an economic operator. VDM did not pursue any economic activity. VDM was an amalgamation of stakeholders at a variety of levels in the German dairy industry's value chain but was not economically active in its own right. Under the German corporate tax system, VDM was regarded as a professional association and was thus entitled to certain tax advantages which were not available to companies engaged in economic activities.
- (38) Germany argues that, in accordance with Article 183 of Council Regulation (EC) No 1234/2007 ⁽⁵⁾, 'without prejudice to the application of Articles 87, 88 and 89 (now Articles 107, 108 and 109) of the Treaty as provided for in Article 180 of the said Regulation, a Member State may impose a promotional levy on its milk producers in respect of marketed quantities of milk or milk equivalent in order to finance the measures on promoting consumption in the Community, expanding the markets for milk and milk products and improving quality'.
- (39) In its comments of 20 September 2013, Germany argued that, according to decisional practice, federations and associations (such as VDM) were regarded as undertakings within the meaning of Article 107(1) TFEU only in exceptional cases and provided they also pursued an economic activity themselves (e.g. leasing of immovable property; selling of television rights) ⁽⁶⁾.

⁽⁴⁾ <http://www.idf-germany.com/der-verband/mitglieder-und-foerderer/>

⁽⁵⁾ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

⁽⁶⁾ Judgment of the Court of 26.1.2005, Piau v Commission, Case T-193/02, ECLI:EU:T:2005:22, paragraph 69; Commission Decision of 26 April 2006, N277/2003 — Transfer of nature conservation areas.

- (40) Its activities continued to include representing the dairy industry at national and international level (e.g. in the Codex Alimentarius Commission and the DIN Committee). VDM presented the know-how of independent external scientists and experts to the respective bodies in a consolidated and processed form. It acted as a consultant and advisor to Federal and *Land* ministries.
- (41) These activities did not benefit individual undertakings. Rather, they corresponded to the typical tasks of a (non-profit-making) association. It would be misunderstanding VDM's activity to regard it as a commercial lobbyist for the dairy sector whose services could be 'bought' on the market. Its members were also unable to make use of any other 'service providers' for the services offered by VMD. No competition therefore took place. VDM was therefore not economically active on a market.
- (42) Moreover, according to Germany, not even dairies derived an advantage from VDM's services. In particular, VDM did not offer 'targeted consultancy services' for dairy businesses. VDM's activities were instead of a general nature. It informed interested parties, and ultimately the general public, about the direction of national and international food law, dairy science, the analysis of milk and milk products, nutrition and issues relating to environmental, climate and animal protection. In so doing, it disseminated information primarily in generally available publications (via the internet) and organised conferences. It therefore fulfilled a role as a 'multiplier', a typical activity for an association and also crucial to making information generally accessible.
- (43) This 'open' and general form of 'advice' was not a commercial advantage accruing to the dairy industry. It could not be compared to the 'targeted' advice provided by business consultancies. Any possible advantages to dairy businesses resulting from the disclosure of information were not relevant from a State aid point of view. Germany was not aware of any Commission decisions or EU Court judgments in which such a broad understanding of aid had been advocated.
- (44) The possibility of indirect aid was also excluded. For this it would be necessary for the payment made to a third party to be specifically designed to favour the indirect beneficiary or for this advantage to a company or branch to be inherent in the measure. This did not apply in this case. Possible knock-on advantages resulting from measures such as the provision of general information on the direction of national and international food law, dairy science, the analysis of milk and dairy products, nutrition and issues relating to environmental, climate and animal protection were not specific and could not corroborate the existence of aid. In addition, as general measures they did not distort competition.
- (45) In the present case, there was nothing to justify the assumption that a distortion of competition favouring certain undertakings was intended or had occurred. Rather, the contributions to VDM were intended to ensure that it was able to fulfil the non-economic tasks described above.

Reasons that prompted the Commission to initiate the procedure provided for in Article 108(2) TFEU

- (46) In the Opening Decision the Commission noted that VDM was a provider of services since it represented the German dairy sector at various levels and performed specific consultancy services in connection with milk production. The ultimate beneficiaries of these services were the entire dairy sector in Germany, in particular dairies, which constituted undertakings. It had also emerged that all the conditions for the existence of aid were met.

Comments from VDM

- (47) In a letter of 6 February 2014, VDM submitted the following comments concerning the payments made to it.
- (48) The resources from the milk levy could not be regarded as aid granted to VDM. VDM was not an undertaking within the meaning of Article 107 TFEU, and in any event VDM's activities funded from milk levy resources were not a commercial activity, i.e. an economic activity involving the supply of goods or services on a market. This meant that VDM, at least with regard to the activities funded from the milk levy, should not be regarded as an undertaking because the status of undertaking should in each case be determined on a functional basis in relation to a specific activity.

- (49) VDM was not a provider of services on a market. Its activities were instead the typical activities of an association. As an umbrella organisation, VDM consolidated and represented the dairy sector in Germany. It would be wrong in that respect to regard such activities resulting from VDM's membership-based structure as 'services' to its members. Rather, by dint of this structure, VDM fulfilled the task of shaping the dairy sector's democratic opinion in areas such as legislation and standardisation. Representatives of the Federal Government, the *Länder* and the scientific community, which were represented in VDM either on a consultative basis or with voting rights, were also involved in this process. Such typical activities of an association of shaping the opinion of and representing members did not involve the supply of services 'on a market'.
- (50) Even if one were to examine more closely the individual areas in which VDM was active, as set out below, it was apparent that those areas of activity funded from milk levy resources did not involve an 'economic activity' on a given market.
- (51) An essential aspect of the activities of VDM was that of 'comprehensive consulting with regard to all dairy-industry issues at both national and international level'. This accounted for approximately 15 % of the funds which VDM received from the milk levy. This activity, however, did not constitute advice to undertakings in the dairy industry but rather advice to national and international legislative and regulatory bodies, i.e. communication of the opinion of and information concerning the dairy sector prior to legislative and other regulatory activities. In this procedure, VDM acted as an expert and representative of the dairy industry in Germany. But here too VDM did not act as a 'service provider' on a market. Rather, VDM's activities related to communicating the democratically formulated opinion of its members in the legislative process. For this reason, lobbying on behalf of the entire dairy sector in the legislative process vis-à-vis ministries, parliamentary bodies, committees and working groups within national and international technical associations and organisations could not be regarded as an economic activity.
- (52) However, even if this role as advisor to state bodies at national and international level were to be regarded as a service, the state bodies that received this 'service' were not undertakings and thus could not be regarded as recipients of aid within the meaning of 107 TFEU. In view of the fact that it performed the typical activities of an association as described above, VDM could not be regarded as an undertaking or, therefore, as a suitable recipient of aid. Targeted consultancy services in the form of selective advice to undertakings in the dairy sector were, on the contrary, not funded from milk levy resources made available by the *Länder* to VDM.
- (53) Acting on behalf of the entire dairy sector, VDM was also involved in standardisation and harmonisation at national and international level in cooperation with the competent standards organisations such as ISO, IDF, CEN and DIN. It also advised the Federal Government regarding the *Codex Alimentarius*. VDM thus sat on the following CODEX Committees, amongst others, as an advisor to Federal Government:
- CCMMP — Milk and Milk Products (in particular, all dairy product standards of the CCMMP were revised between 2001 and 2011),
 - CCFH — Food Hygiene,
 - CCCF — Contaminants in Foods,
 - CCFA — Food Additives,
 - CCFICS — Food Import Certificates,
 - CCFL — Food Labelling,
 - CCGP — General Principles,
 - CCMAS — Methods of Analysis and Sampling,
 - CCNFS DU — Nutrition and Foods for Special Dietary Uses, and
 - CCRVDF — Residues of Veterinary Drugs in Food.

- (54) This area of standardisation and harmonisation at national and international level accounted for some 45 % of the resources which VDM received from the milk levy. This should not be regarded as an economic activity either. In this case, VDM did not provide services to the market but represented the entire dairy sector as an umbrella organisation in the context of a task performed in the public interest. It was widely acknowledged that its activities relating to standardisation and harmonisation within ISO, IDF, CEN, DIN and the Codex Alimentarius Commission were in the public interest and did not involve any selective aid.
- (55) The Statute of DIN e.V. stated, for example, that 'the task (purpose) of DIN is to initiate, organise, direct and moderate standardisation and harmonisation for the benefit of the public while safeguarding the public interest in the context of an orderly and transparent process. The results of its work shall be used for the purposes of innovation, safety and understanding in business, science, administration and society and of quality assurance, rationalisation, occupational health and safety and environmental and consumer protection'.
- (56) The same is true of the Codex Alimentarius Commission, the purpose of which is described as follows on the organisation's website:

'The Codex Alimentarius Commission, established by FAO and WHO in 1963 develops harmonised international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade'.

- (57) The *Codex Alimentarius* also forms an important basis for food law, i.e. the statutory and administrative rules governing foodstuffs in general and food safety in particular, be it at Community or national level. As the main international food law standard, it had to be taken into account by regulatory bodies from the point of view of food safety and consumer protection in developing or amending food law ⁽⁷⁾.
- (58) VDM did not therefore engage in any economic activity in this area in the sense of offering services on a market. This was corroborated solely by dint of the fact that such standardisation and harmonisation activities were in the public interest, in particular that of consumers, and lacked the existence of a market ⁽⁸⁾.
- (59) A further aspect of VDM's activities related to the provision of general information concerning milk and dairy farming and, in that context, the dissemination of scientific knowledge and new methods in this field in a comprehensible form. In this regard, VDM drew up opinions, handbooks and guidelines with a view to informing all interested parties, including consumers, about issues such as best available techniques in the area of environmental protection, good agricultural practice, water consumption, CO₂ emissions, animal welfare in dairy farming and feeding systems in milk production in a readily comprehensible manner. This accounted for approximately 35 % of the funds which VDM received from the milk levy.
- (60) This was not an economic activity either because it did not involve the provision of specific services in competition with other providers. In view of the fact that no specific activities were performed for the benefit of undertakings in the dairy sector, but rather VDM informed all interested third parties, i.e. the public, about matters relating to milk and dairy farming, its activities involved services which it provided free of charge and which could not be provided for remuneration by a third party. Only small copyright fees were charged for certain publications.
- (61) VDM also supported scientists, in particular young ones, from state universities by refunding on request some of their travelling expenses to dairy-industry events. Since this involved support for private individuals in a non-commercial sector, the pre-requisites for the existence of State aid were also not met.

⁽⁷⁾ VDM refers in this respect, inter alia, to Article 5(3) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1).

⁽⁸⁾ VDM refers in this respect, with regard to the non-economic nature of setting and drawing up standards, to the Judgment of the Court of 12 December 2006, *SELEX v Commission*, ECLI:EU:T:2006:387.

- (62) In addition, two employees of VDM had given lectures at the Fachhochschule Hannover, an activity which should not be regarded as an economic activity either. This area (support for young scientists and lectures given by VDM employees) accounted overall for approximately 5 % of the milk levy resources received by VDM.
- (63) To the extent that the costs of VDM's work within the IDF and its role as the German National Committee within the IDF, e.g. issuing opinions on international matters, were funded by milk levy resources, these activities formed part either of VDM's role as advisor to state bodies or of its standardisation and public information work. Moreover, the participation of VDM representatives in IDF meetings was in itself an indication of its association status and did not therefore constitute an economic activity. The focus of the IDF's work was to contribute to international standards (*Codex Alimentarius*, ISO, CEN) and the provision of general, generic information.
- (64) This did not involve aid to undertakings in the dairy industry either. The fact that state bodies consulted VDM prior to or during legislative and other regulatory procedures and, in order to ensure its independence, regulated its funding on the basis of a mandatory levy did not mean that undertakings that were obliged to finance the provision of information to state bodies through the mandatory levy were being favoured by the State.
- (65) The same applied to the areas of standardisation in the public interest and the support of university scientists, in particular young ones. Finally, the provision of information also lacked any specific favouring of undertakings in the dairy industry. The purpose of that activity was to raise public awareness of issues in the dairy industry and to disseminate knowledge concerning the applicable requirements, rules, standards and the current state of the art in order to ensure high quality and environmental standards in the public interest. Moreover, if undertakings in the dairy industry did derive advantages from VDM's measures, these were non-measurable, indirect knock-on advantages, which were not enough for these measures implemented with a different objective to become State aid. Moreover, if it were to be assumed that aid was being granted to the 'dairy industry', it would not be possible to recover the aid granted because it could not be determined, even to a limited degree, which undertakings had benefited and to what extent, particularly given that the positive effects were not by any means restricted to undertakings in the German dairy industry but also benefited foreign undertakings if they were active in Germany or if the activities — such as international standardisation and *Codex Alimentarius* activities — were of international reach.
- (66) If, contrary to the above, the use of the funds from the milk levy paid to VDM under measures BW 6, BY 9, HE 5, NI 10, NW 9, RP8, SL 6 and TH 6 were to be regarded as State aid, these would in any case be compatible with the relevant secondary legislation.
- (67) If, contrary to VDM's view, VDM's role as an advisor were to be regarded as constituting State aid to undertakings in the dairy industry, this would be permissible technical support within the meaning of paragraph 14 of the 2000-2006 Community Guidelines for State aid in the agriculture sector ⁽⁹⁾ (the '2000-2006 Guidelines') and Section IV.K. of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 ⁽¹⁰⁾ (the '2007-2013 Guidelines').
- (68) VDM also claimed that, for the period 2001-2006, the measures related solely to milk, an Annex I product. The measures were concerned with the dissemination of scientific knowledge, in particular the state of the art and current best practice, forming the basis for the standards co-formulated by VDM or established with its input, or influencing new legislative initiatives. VDM's measures in this area thus regularly related to new techniques within the meaning of paragraph 14.1 of the 2000-2006 Guidelines. Since they involved the determination and dissemination of scientific knowledge, VDM's standardisation and harmonisation activities should therefore also be categorised as technical support.
- (69) Moreover, the dissemination of scientific knowledge and generic factual information (within the meaning of Section IV.K of the 2007-2013 Guidelines) should also be regarded as having been permissible during the period of validity of the 2000-2006 Guidelines since it could be seen as falling within the scope of consultancy services or education and training ⁽¹¹⁾.

⁽⁹⁾ OJ C 28, 1.2.2000, p. 2.

⁽¹⁰⁾ OJ C 319, 27.12.2006, p. 1.

⁽¹¹⁾ VDM refers in this respect, regarding the dissemination of reports and statistics, to the Commission Decision of 27 July 2006, State aid N 425/09, end of paragraph 9.

- (70) Any other interpretation of the 2007-2013 Guidelines would give rise to an inconsistency with regard to advertising measures, which have a much greater impact on the market. These would also have been permissible before 2007 on the basis of the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products (2001/C-252/03) (the 'Advertising Guidelines'). As a surplus product, milk meets the positive criteria set out for advertising.
- (71) This meant that in the dairy sector Member States were, without any further restrictions, permitted to grant State aid covering 100 % of the costs of generic (i.e. neutral in terms of origin and the undertakings involved) advertising for milk. Member States had made extensive use of that possibility⁽¹²⁾. Consequently, if generic advertising for milk and dairy products had been permissible without restriction in the period 2001-2006, there was no reason why generic factual information or the dissemination of scientific knowledge concerning milk and dairy products, which had a much smaller impact on the market, should be made subject to much stricter requirements under the State aid rules.
- (72) It could not have been the intention of substantive State aid law or of the Commission when drawing up the Guidelines to regard a state-funded advertising campaign with the slogan 'Drink more milk!' as permissible advertising aid while at the same time treating a campaign informing consumers in a factual way about the nutritional value and importance to child nutrition of milk as unlawful aid.
- (73) The other conditions set out in paragraph 14 of the 2000-2006 Guidelines were also met. Because the measures were general and neutral in terms of the undertakings involved, they were not automatically restricted to identified groups (paragraph 14.2). A detailed financial breakdown showing how the measures were carried out by individual undertakings was — as explained above — impossible to make in the absence of any direct links to them. Given the relatively small amount of resources allocated to this aspect and the large number of undertakings operating in the dairy sector, the thresholds set out in paragraph 14.3 were nowhere near being reached.
- (74) For the period from 2007, VDM stated that the corresponding measures it implemented should be regarded as constituting the dissemination of scientific knowledge in a readily understandable form and as generic factual information within the meaning of Section IV.K of the 2007-2013 Guidelines, as read in conjunction with Article 14 of Regulation (EC) No 1857/2006. The restriction to SMEs was not applicable here because generic factual information that was neutral in terms of the undertaking(s) receiving it could not be restricted to small and medium-sized enterprises by dint of that neutrality itself. Furthermore, it should be noted that the 2007-2013 Guidelines could not be applied in a self-contradictory manner. Here too, the intention could not have been to make generic advertising for milk and dairy products (which are agricultural products) permissible at an intensity of 100 % (see paragraph 157 of the 2007-2013 Guidelines), while making generic factual information, which has a much lower impact on competition, and the dissemination of scientific knowledge subject to stricter requirements. Otherwise, the Member States would have been encouraged to ensure that generic factual information or the dissemination of scientific knowledge was associated with an invitation to purchase in order to make certain that it constituted a permissible advertising measure.
- (75) In view of the above arguments, VDM asked the Commission to review its assumptions concerning VDM's status as an undertaking and the admissibility of its activities from the point of view of the State aid rules. Owing to the complexity of the procedure, VDM also reserved the right to submit further comments.

Comments by other interested parties

- (76) Between 6 and 10 February 2014, the Commission received a total of six letters from interested parties containing comments concerning the measures at issue implemented by VDM.
- (77) Landesvereinigung der Bayerischen Milchwirtschaft e.V. (letter of 7 February 2014) stated that it supported and highly appreciated the international exchange of experience in which VDM participated as a means of ensuring preventative consumer protection on the basis of knowledge obtained from other countries. This did not give rise to any favouring of individual undertakings.
- (78) In its comments of 6 February 2014, Landesvereinigung Thüringer Milch e.V. referred to the comments submitted by VDM and seconded them.

⁽¹²⁾ With regard to Germany, for example, VDM refers in this respect to State aid case N 571/2002 — Promotion Fund Law.

- (79) In its comments of 6 February 2014, Milchprüfing Baden-Württemberg e.V. indicated that VDM was one of the bodies that had received levy resources in Baden-Württemberg. All of the bodies referred to under the above heading had implemented measures in favour of the dairy industry under Section 22 of the Milk and Fat Law. The allocation of levy resources had been limited to the extent necessary to implement those measures.
- (80) In its comments of 10 February 2014, Milchwirtschaftliche Arbeitsgemeinschaft Rheinland-Pfalz e.V. presented the same arguments as Germany had put forward in its comments of 20 September 2013.
- (81) In its comments of 6 February 2014, Milchwirtschaftlicher Verein Baden-Württemberg e.V. reiterated what Milchprüfing Baden-Württemberg e.V. had stated (see recital 79 above).
- (82) In its letter of 7 February 2014, Landesvereinigung der Milchwirtschaft Niedersachsen e.V. (LVN) did not comment directly on the payments granted to VDM, but it did fundamentally deny the existence of any aid for any of the sub-measures under the MFG.
- (83) On the individual issues, LVN put forward its views that the measures funded by milk levy resources did not involve any loss to the *Land* budget, that the State did not have any power of disposal over the milk levy resources, and that the State did not exercise any control over either the amount of the levy or the content of the measures. Consequently, the payments in question could not be attributed to the State. Moreover, the State neither controlled the level of payments nor was involved organisationally in LVN.
- (84) It also stated that LVN was overseen not by state bodies but rather by the Hannover Chamber of Agriculture, a public self-regulating body which therefore did not come directly under the public administration.
- (85) In supplementary comments submitted on 8 July 2014, LVN referred, inter alia, to the Commission's *Val'Hor* Decision ⁽¹³⁾. In that Decision the Commission had acknowledged that neither the state's power to recognise an interbranch organisation nor its regulatory support in the collection of sector-related 'contributions' (through the possibility, in the case in question, of extending agreements) led to the conclusion that the measures implemented by the interbranch organisation were attributable to the state. Whether state involvement in parafiscal systems of funding led to advantages being attributable to the state as 'State aid' depended on the circumstances in the individual case and on an overall assessment to be made on that basis. The aspects that were relevant to an examination as to whether State aid existed, as developed by case-law, were as follows:
- Who decided about the collection and use of the funds?
 - If this was a private organisation, how did the State influence this decision?
 - From what resources were the payments funded?
 - What type of measures were funded?
 - From whom were the resources collected?
 - Who was responsible for initiating the measure?
- (86) Via its legal representatives, LVN had examined the legal situation in other German *Länder* and had come to the conclusion that the indicators for the existence of State aid developed by case-law were not met, which meant that the MFG could not, overall, be regarded as comprising an aid element.
- (87) According to LVN, it was the *Land* associations that decided to collect the levy from dairies. Under the first sentence of Section 22(1) of the MFG, the levy could only be collected in consultation with the *Land* associations. Under the second sentence of Section 22(1) of the MFG, any increase in the levy had to be requested by the *Land* association.

⁽¹³⁾ Commission Decision 2014/416/EU of 9 April 2014 on State aid scheme SA.23257 (12/C) (ex NN 8/10, ex CP 157/07) implemented by France (interbranch agreement concluded under the auspices of the French Association for developing the horticultural and landscaping sectors and their products — 'Val'Hor') (OJ L 192, 1.7.2014, p. 59).

- (88) The detailed arrangements and amount of the levy were regulated in Lower Saxony and Thuringia by a Levy Collection Regulation (*Umlageerhebungsverordnung* (UmlErhVO)) which had been issued 'in consultation' with the relevant *Land* association.
- (89) The *Land* association in question also determined how the revenues from the levy, which had to be administered separately (see the first sentence of Section 22(3) of the MFG), were to be used. For this reason, they were in some cases even paid into an account belonging to the *Land* association (see, for example, Section 3(1) of the Thuringia Levy Collection Regulation). The *Land* associations thus drew up proposals under their own responsibility in the area as to how the revenues should be used. In Thuringia, for example, this occurred on the basis of applications submitted to the local *Land* association, Landesvereinigung Thüringer Milch (LVTM), by its members (see point 6.3 of the Thuringia Working Guidelines (*Thüringer Arbeitsrichtlinie*)).
- (90) Although the proposals on the use of the resources drawn up by the *Land* associations were 'enacted' (for Lower Saxony, see point 6.2 of the Payment Guidelines (*Zuwendungsrichtlinie*), and for Thuringia, see Section 4 of the Thuringia Levy Collection Regulation) or 'approved' (as in North Rhine-Westphalia and Bavaria) by a state body, this did not mean that the state exercised any significant influence since the only basis for state 'overseeing' was what was laid down by Section 22(2) of the MFG. Consequently, the provisions in question conferred upon state bodies no more power to direct or influence the administration of the funds than in *Doux Élevage* ⁽¹⁴⁾.
- (91) Moreover, the revenues from the levy were indeed used in all *Länder* in accordance with the proposals put forward by the *Land* associations. That in itself was evidence enough — irrespective of the specific legal arrangements that were applicable — that the revenues in question were not imputable to the State ⁽¹⁵⁾.
- (92) According to LVN, each of the *Land* associations had the status of a private body. Their statutes made it clear that they considered themselves to represent the interests of their members, who were recruited solely from the dairy industry (including consumer representatives).
- (93) In Section 14 of the MFG, *Land* associations were described as 'voluntary' organisations made up of businesses and consumers involved in the dairy industry whose purpose it was to ensure the joint representation of their members' economic interests.
- (94) The *Land* associations differed from the *Hoofdbedrijfschap Ambachte*, the opticians' trade association entrusted with collecting and allocating a compulsory levy for advertising measures at issue in *Pearle*. Although that professional association had the status of a public body, the Court of Justice found that State aid did not exist because the advertising measures were funded not by resources made available to state bodies but rather by levies collected from undertakings operating in the sector ⁽¹⁶⁾.
- (95) The *Land* associations, as the bodies competent for collecting and allocating the milk levy, also differed from the agricultural committees in *Plans de Campagne*, which were not involved in defining the measures in question and did not have any discretion in their application ⁽¹⁷⁾.
- (96) The *Land* associations were non-state and entirely private bodies that determined the amount and allocation of the milk levy as such on their own responsibility.
- (97) Moreover, the benefit enjoyed by the dairy industry was not a drain on the public exchequer because the milk levy was collected from operators belonging to the dairy industry, i.e. the selective 'advantage' was offset by a selective burden. This in itself was enough to rule out any preferential treatment or distortion of competition because the 'advantages' enjoyed by dairies and milk producers were offset by having to pay the levy.
- (98) In *Vent de Colère*, the Court of Justice had found a system of charges to constitute State aid because — following a change to the law — the burden was no longer offset solely by charges paid by members of the economic sector in question (energy) but by charges paid by all end-consumers of electricity resident in the national territory ⁽¹⁸⁾.

⁽¹⁴⁾ Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 38.

⁽¹⁵⁾ Judgment of the Court of 18 May 2002, *Stardust Marine*, C-482/99, ECLI:EU:C:2002:294, paragraph 52.

⁽¹⁶⁾ Judgment of the Court of 15 July 2004, *Pearle BV*, C-345/02, ECLI:EU:C:2004:448, paragraph 36.

⁽¹⁷⁾ Judgment of the Court of 27 September 2012, *Plans de Campagne*, T-139/09, ECLI:EU:T:2012:496, paragraph 62.

⁽¹⁸⁾ Judgment of the Court of 19 December 2013, *Vent de Colère*, C-262/12, ECLI:EU:C:2013:851, paragraph 11; and the opinion of Advocate-General Jääskinen of 11 July 2013, *Vent de Colère*, C-262/12, ECLI:EU:C:2013:469, inter alia, paragraph 49.

- (99) LVN also considered State aid not to exist in the event that it related to ‘collective operations’ implemented in the interests of a specific sector and funded on the basis of contributions collected from members of that sector.
- (100) The contested measures were intended solely to promote milk as a product and thus the collective interest of the dairy industry. The measures in question also partially protected consumer interests because the two purposes could not be separated from each other owing to the overlapping of interests that existed.
- (101) The role of the State was confined to making available to the dairy sector, through the MFG, a statutory compensation mechanism that — by its nature — guaranteed that the members of the dairy industry who benefited from the measures implemented for milk as a product were the ones who contributed to the costs. As in *Pearle*, *Doux Élevage* and *ValHor*, the State thus functioned solely as a facilitator enabling the compensation mechanism set up by the private sector to be made mandatory and thus ensuring a fair sharing of burdens ⁽¹⁹⁾.
- (102) The levy had been initiated by the *Land* associations and thus by the private sector. The levy was thus collected pursuant to Section 22 of the MFG solely in ‘consultation’ with the *Land* associations. The *Land* associations were themselves not a product of State action either but rather ‘voluntary’ organisations made up of members of the dairy industry (Section 14 of the MFG). The situation in Thuringia, where the *Land* association was not recognised until 1999, was clearly documented in this respect. At the request of the Thuringian Farmers’ Association, the competent Ministry ‘initiated the necessary formal administrative steps’ to collect the levy from dairies and milk collection centres. This made it blatantly clear that the milk levy was a purely private compensation mechanism, with the state acting solely as a facilitator in order to make payment of the levy mandatory ⁽²⁰⁾.
- (103) In summing up, LVN stressed what it considered to be the similarities and differences between various legal cases on the one hand and the MFG on the other.
- (104) In *ValHor* (Decision 2014/416/EU) (result: no aid), as in the case of the milk levy, the funds were collected and allocated essentially by a state-recognised private and voluntary interbranch organisation, the contributions paid by operators within the branch were used to fund collective operations for the benefit of the branch, the possibility provided for by law of state recognition of the private interbranch organisation did not in itself lead to the assumption of public control, the state could not in fact use the funds to support certain businesses, and the interbranch organisation itself decided on how the funds were to be used.
- (105) In *Vent de Colère* (C-262/12) (result: aid), unlike with the milk levy, the amount of the charge in question was fixed unilaterally by ministerial decree without the involvement of private parties, there was a state guarantee, the funds were managed by a public body and state penalty mechanisms were put in place.
- (106) In *Doux Élevage* (C-677/11) (result: no aid), as in the case of the milk levy, the funds were collected and allocated essentially by a state-recognised private and voluntary interbranch organisation, the possibility provided for by law of state recognition of the private interbranch organisation did not in itself lead to the assumption of public control, the funds came entirely from contributions collected from economic operators, the state could not in fact use the funds to support certain businesses, and the interbranch organisation itself decided on how the funds were to be used.
- (107) In *Plans de Campagne* (T-139/09) (result: aid), unlike with the milk levy, an authority decided on the level of contributions, the income from contributions was topped up by State resources, measures were defined by the State (stamp of the State financial controller, etc.) without involvement on the part of branch committees, the latter had no discretion in applying the measures, and a representative of the Minister took part in committee meetings.
- (108) In *Pearle* (C-345/02) (result: no aid), as in the case of the milk levy, funds were used solely for the purposes of the branch in question, an association of a specific branch had asked a public body to collect contributions in order to implement certain measures for the benefit of that branch, and, unlike with the milk levy, a public and not a private professional association played an important role in collecting and allocating the compulsory levy, with the result that *Pearle* seemed to be more problematic than the milk levy.

⁽¹⁹⁾ Judgment of the Court of 15 July 2007, *Pearle BV*, C-345/02, ECLI:EU:C:2004:448, paragraph 37; Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 40; Decision 2014/416/EU.

⁽²⁰⁾ Judgment of the Court of 15 July 2004, *Pearle BV*, C-345/02, ECLI:EU:C:2004:448, paragraph 37; Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 40.

Germany's comments of 3 December 2014

- (109) Germany did not initially respond to the comments submitted by interested parties in February 2014. Germany responded to an additional opinion of LVN dated 8 July 2014 by letter dated 3 December 2014, as follows:
- (110) In their comments in the formal investigation procedure concerning the milk levy provided for in the MFG, the German *Länder* in question had focused on two aspects: the consistency of the measures implemented with the material requirements of the State aid rules (in particular as regards their compatibility with the requirements of the Agriculture Exemption Regulation and the current agricultural guidelines), and the question whether there was any 'favouring' relevant to the State aid rules within the meaning of Article 107(1) TFEU.
- (111) LVN's comments of 8 July 2014 and the current decisional practice of the European Courts and the European Commission gave rise to the need for additional comments of a fundamental nature concerning whether State aid within the meaning of Article 107(1) TFEU indeed existed, and in particular whether the constituent element of aid being granted 'through state resources' applied.
- (112) LVN's comments of 8 July 2014 and an examination of the abovementioned Judgments at least gave rise to doubts as to whether the element of aid being granted 'through state resources' applied in this case and whether, therefore, the collection and allocation of the milk levy constituted State aid. The reasons for this were as follows:
- (113) As had emerged from the *Val'Hor* Decision (Decision 2014/416/EU) and in *Doux Élevage* (C-677/11), measures funded and implemented by private interbranch organisations did not constitute State aid. The *Land* associations for milk that existed in the individual *Länder* were organisations that could be regarded as comparable to the organisations referred to in *Val'Hor* and *Doux Élevage*. State bodies had never been members of these *Land* associations. They took part in meetings without any voting rights and thus essentially as external guests. The involvement of state bodies in implementing the milk levy or monitoring compliance with the legal conditions set out in the MFG did not alter the fact that the *Land* associations were the competent body for selecting projects.
- (114) In actual fact, it was the respective *Land* associations that managed revenues from the levy and determined how they should be allocated. No state influence as a result of the 'monitoring' or 'adoption' of the *Land* associations' proposals by state bodies existed in reality since the latter merely operated as provided for in Section 22(2) of the MFG and sought to examine whether the statutory requirements of Section 22 of the MFG were being met. The levy resources were used in accordance with the proposals which the *Land* associations themselves made concerning their allocation, a fact which, in accordance with the Judgment of the Court of Justice of 16 May 2002 in *Stardust Marine* (C-482/99), clearly indicated that they were not State resources.
- (115) The *Land* associations were purely private organisations. This fact, together with the observation that the *Land* associations managed the milk levy and how it was used, was a clear indication that the milk levy should, in line with the abovementioned case-law, not be classified as State aid.
- (116) The existence of State aid was further disproved by the fact that the milk levy resources were purely private resources. They were resources derived from the assets of the private undertakings that were required to pay the levy. In the case of the milk levy, there was no state funding or guarantee, in contrast to the situation in Cases C-262/12 (*Vent de Colère*) and T-139/09 (*Plans de Campagne*), in which it was found that State aid existed for this very reason.
- (117) Moreover, the milk levy was a collective, industry-wide measure which, in accordance with the current legal situation as established in *Val'Hor* (Decision 2014/416/EU) and *Doux Élevage* (C-677/11), militated against the existence of State aid.
- (118) It was also doubtful whether any advantage was conferred by the scheme, something that it would have to do if it were to be assumed to constitute aid. This was because the advantages enjoyed by dairies and milk producers were fully cancelled out or 'neutralised' by the levies paid by dairies and thus indirectly by milk producers. This was also confirmed by the Judgment of 19 December 2013 of the Court of Justice in *Vent de Colère* (C-262/12), in which it was also deemed that State aid existed because the costs were no longer met solely by operators in the branch but by all domestic electricity consumers.

- (119) It followed from these points, some of which had emerged from a re-examination of the milk levy scheme and from the fact that the German *Länder* in question were maintaining their current position, that doubts existed as to whether the milk levy system did constitute State aid. This question, and in particular whether the 'State resources' element existed, had to be answered by the European Commission.

3. ASSESSMENT

Sub-measures not constituting aid

Support for scientists

- (120) With regard to the matter of support for scientists (see recital 61), the Commission finds that this support benefits private individuals. The Commission also assumes that those scientists were engaged in independent research and development to increase knowledge and understanding within the meaning of paragraph 19 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ⁽²¹⁾. The Commission believes in this case that the activity in question is a non-economic activity.
- (121) Only persons engaging in economic activities may be classified as undertakings under Article 107(1) TFEU. Consequently, the support granted to scientists under this sub-measure does not constitute aid within the meaning of Article 107(1) TFEU.

Lectures at Fachhochschule Hannover

- (122) With regard to the lectures given by VDM employees at Fachhochschule Hannover (see recital 62), the Commission finds that courses at public technical universities fall within the scope of state-run public education.
- (123) Union case-law has established that public education organised within the national educational system funded and supervised by the state may be regarded as a non-economic activity. The Court has thus stated that, 'by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the state does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas' ⁽²²⁾.
- (124) The lectures form part of the teaching programme of a public higher education institution. The public education organised by this institution should be regarded as a non-economic activity (see recital 123). The Commission takes it that teaching activities are secondary activities and, as such, not an economic activity ⁽²³⁾. Where there is no economic activity, there can be no favouring of undertakings within the meaning of Article 107(1) of the TFEU. Consequently, this activity does not constitute State aid within the meaning of that provision.

Sub-measures constituting aid

- (125) Article 107(1) TFEU lays down that any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.

Aid granted by the state or through state resources

- (126) It must be examined on the basis of the available information and, in particular, the comments submitted by the parties involved and by the German authorities whether the milk levy resources constitute State aid within the meaning of Article 107(1) TFEU.

⁽²¹⁾ OJ C 8, 11.1.2012, p. 4.

⁽²²⁾ Judgment of the Court of 11 September 2007, *Commission v Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68. See also Decision of the Commission of 25 April 2001 in Case N 118/00 — Public subsidies for professional sports clubs, and the Decision of the EFTA Surveillance Authority in Case 68123 — Norway — *Nasjonal digital læringsarena*, 12 October 2011, p. 9.

⁽²³⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, paragraph 27 (OJ C 198, 27.6.2014, p. 1).

- (127) According to settled case-law, it is not appropriate to distinguish between cases in which aid is granted directly by the state and those in which it is granted by a public or private body designated or established by that state ⁽²⁴⁾. However, for advantages to be capable of being categorised as State aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through state resources and, second, be imputable to the state ⁽²⁵⁾.
- (128) With regard to the measures described in Section 2 of this Decision, support is granted on the basis of the legal provisions of the *Länder* for which the Milk and Fat Law in turn forms the legal framework.
- (129) Specifically, the first sentence of Section 22(1) of the MFG provides that the *Land* governments, acting in consultation with the *Land* association or professional organisations, may support the dairy industry by collecting levies of up to 0,1 cent per kilogram of delivered milk jointly from dairies, milk collection centres and creameries. Under the second sentence of Section 22(1) of the MFG, *Land* Governments may, if requested to do so by the *Land* association or professional organisations, collect joint levies of up to 0,2 cents per kilogram of delivered milk if the levies provided for under the first sentence are not sufficient for the performance of tasks.
- (130) The *Land* Governments collect the milk levy in consultation with the *Land* association in question. However, 'consultation' represents a significantly weaker form of participation than 'agreement'. While 'agreement' means that another body (e.g. a legislative body or authority) must necessarily give its consent before a legal act is adopted, a decision that is to be adopted in 'consultation' with another body is not ultimately dependent on that other body's consent. This distinction between different forms of participation is made in some areas of German administrative law ⁽²⁶⁾. Because the first sentence of Section 22(1) of the MFG provides for the form of participation of 'consultation', the power to collect the levy and the decision to do so lie solely with the *Land* governments ⁽²⁷⁾. By contrast, the *Land* associations are only 'involved' in the preparation and technical implementation of the measures to be adopted under Section 22 (Section 14(1) MFG) and are subject in this respect to the supervision of the highest *Land* authority (Section 14(2) and (4) MFG).
- (131) The legal basis for collecting a milk levy in the individual German *Länder* is accordingly provided by *Land* regulations on the detailed arrangements for collecting the levy, including the amount of the levy ⁽²⁸⁾. It is therefore the state (represented by the respective *Land* Government) that regulates the levy's collection. As explained in recital 130 above, this is not altered by the fact that the regulations in question were issued in consultation with the respective *Land* association representing the dairy industry.
- (132) In the case in hand, a levy is collected from private undertakings. Revenues from this levy accrue to the respective *Land* budget before they are used to fund the various support measures and, under the first sentence of Section 22(3) of the MFG, must be managed separately within it. Under Section 23 of the respective budgetary ordinances (see recital 19), expenditure and commitment appropriations for payments to bodies outside the *Land* administration to meet specific purposes (subsidies) may only be made available if the *Land* has a significant interest in the bodies in question fulfilling a given purpose that cannot be satisfied, or not to the necessary extent, without subsidies. This requirement implies that there is a State interest in the measures being implemented. The fact that in Thuringia levy payments are made into the 'Milk levy' trust account of Landesvereinigung Thüringer Milch e. V. (recital 89, Section 3(1) of the Thuringia Levy Collection Regulation) is not contrary

⁽²⁴⁾ Judgment of the Court of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, ECLI:EU:C:2003:622, paragraph 23.

⁽²⁵⁾ Judgment of the Court of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, ECLI:EU:C:2003:622, paragraph 24.

⁽²⁶⁾ For example, Section 37(2), third sentence, of the German Building Code (BauGB), Sections 17(1) and (2), 18(3) and (4) and 22(5) of the Federal Nature Protection Act (BNatSchG), and Sections 2(7), 11(2) and (3), 12(7), 14(4), point 2, 26(3) and 35a(3) of the General Railways Act (AEG). With regard to the former Section 9 of the Federal Nature Protection Act, see paragraph 22 of the Judgment of the German Federal Administrative Court of 29.4.1993 in Case 7 A 4/93 ('... a Decision involving "consultation", in contrast to one involving "agreement", does not require any consensus. It means nothing more than the consultation (on an advisory basis) of the other authority, which thereby has the opportunity to introduce its ideas into the process') and, with regard to the former Section 18(2), first sentence, point 2, of the General Railways Act, paragraph 5 of the Judgment of the German Federal Administrative Court of 31.10.2000 in Case 11 VR 12/00 ('The consultation of the plaintiff provided for in Section 18(2), first sentence, point 2, of the General Railways Act which, in contrast to "agreement", does not require there to be any consensus ...') and paragraph 11 of its Judgment of 7.2.2005 in Case 9 VR 15/04 ('The consultation of the applicant, which was thus all that was required, [...], was effected by the planning approval authority by giving [...] the applicant an opportunity to submit comments').

⁽²⁷⁾ See also the sixth sentence of Section 22(1) MFG, which refers to the 'powers' of the *Land* Governments (and the possibility of delegating them to the highest *Land* authorities) and Section 23(2) MFG, under which levies are recoverable in accordance with the General Tax Code, which in turn requires a tax notice or similar administrative document to have been issued (cf. Sections 122 and 251 of the General Tax Code). Under Section 14(3) MFG, however, no public tasks may be transferred to the relevant *Land* association.

⁽²⁸⁾ The individual *Land* regulations are cited in recitals 21 to 28.

to that State interest. In Thuringia outstanding levies and interest are also collected in accordance with the provisions of the General Tax Code and its implementing provisions (Section 3(4) of the Thuringia Levy Collection Regulation). It is also in the nature of a trust account that the account holder's access to the funds available is not unrestricted, but subject to the statutory requirements set in this case by the State.

- (133) In response to the arguments presented by the interested parties and the German authorities, the Commission finds as follows:
- (134) With regard to LVN's assertion that it is the *Land* associations that actually decide to collect the levy from dairies (recitals 83 to 87 and 91), the Commission considers that it is the Federal Government that, on the basis of Section 22(1) of the MFG, has empowered the *Land* Governments to collect a milk levy. That provision stipulates, inter alia, that the milk levy may normally amount to 0,1 cents per kilogram of delivered milk and that the *Land* Government may increase the levy to 0,2 cents per kilogram if requested to do so by the *Land* association or jointly by the professional organisations.
- (135) In addition, Section 22(2), points 1-6, of the MFG stipulates the purposes for which milk levy resources may be used.
- (136) Under the third sentence of Section 22(3) of the MFG, the *Land* association or professional associations must merely be consulted before the resources are used.
- (137) This indicates that, although the state (at Federal level) grants the *Land* associations certain rights of participation, it has nevertheless established a clear legal framework in determining the rates that must be applied in respect of the milk levy and how the resources are to be used, and it is ultimately up to the *Land* Government in question (or, in the case of delegation, the highest *Land* authorities) to decide on this matter. It would not, for example, be possible for the rate of the levy to be increased to more than 0,2 cents per kilogram if the *Land* associations were to request this or for the resources to be used for purposes other than those set out in Section 22(2), points 1-6, of the MFG. Moreover, the duty of consultation required regarding their use (third sentence of Section 22(3) MFG) does not in any way require the views of those consulted to be followed. The final decision as to how the resources are to be used lies with the respective *Land* authorities, i.e. with the State.
- (138) This distinguishes this case significantly from the *Doux Élevage* case cited by LVN. Collection of the milk levy and the allocation of the corresponding resources are regulated by the state at two levels, i.e. Federal and *Land*. In Germany, the legislator has not only granted the *Land* Governments the power to collect the levy but has also restricted the margin available at *Land* level to dispose of the resources generated from levies by Federal law. The *Land* associations are not able to seek to amend the objectives that may be promoted as set out in Section 22(2), points 1-6, of the MFG, for example by submitting a request to that end. A state restriction of this nature did not form part of the facts on which the *Val'Hor* and *Doux Élevage* cases were based.
- (139) Moreover, the MFG cannot be understood merely as a means of enforcing purely economic interests of an interbranch organisation. Section 14 thereof stipulates, for example, that, if they wish to participate, professional organisations acting for agriculture, dairies and the dairy trade must be represented within it, while an appropriate representation of consumers must also be ensured in the bodies of the association. With these requirements concerning participation and representation, the legislator (i.e. the state) is ensuring that, in pursuing the public policy objectives set out in the MFG, all interests going beyond the mere promotion of an economic sector are comprehensively represented.
- (140) Contrary to the situation in *Doux Élevage*, the promotion objectives set out in the MFG are not objectives that the interbranch organisations themselves have laid down and introduced ⁽²⁹⁾. Objectives 1 ('improving and sustaining quality on the basis of provisions issued under Section 10 of this Act or Section 37 of the *Milchgesetz* (Milk Act) of 31 July 1930 (Reich Law Gazette I, p. 421) and 2 ('improving hygiene during milking and the delivery, processing and distribution of milk and milk products') set out in Section 22(2) of the MFG in particular display

⁽²⁹⁾ Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 40.

characteristics that form part of a policy determined by state authorities ⁽³⁰⁾, contrary to the situation in *Doux Élevage*, and refer to public tasks that, in accordance with Section 14(3) MFG, may not *a priori* be transferred to the *Land* associations. In so far as Germany relies on Section 22(2), point 6, of the MFG in the present case, it is clear from the very wording of the law that the tasks are ‘tasks conferred in accordance with the Milk and Fat Law’ (and therefore not tasks laid down by VDM itself).

- (141) Also in contrast to the situation in *Doux Élevage*, the normal civil or commercial judicial process is not used to collect milk levies in the event of non-payment ⁽³¹⁾. This is because Section 23(2) of the MFG stipulates that levies are recoverable in accordance with the General Tax Code and its implementing provisions. In their respective milk levy collection regulations, the *Länder* in question likewise provided for recovery in accordance with the Code and its implementing provisions ⁽³²⁾. Under the German legal system, the Code is considered to form part of public law. In Germany, public debts are enforced through administrative channels, while under civil law they are enforced through the courts. In this respect, administrative channels are a more effective method than the courts because the public authorities are themselves able to create an enforcement order by adopting an administrative act ⁽³³⁾ which, in the case of claims under civil law, could only be challenged in the courts ⁽³⁴⁾. This indicates that the State is interested in collecting and, where appropriate, recovering outstanding levy payments as efficiently as possible and to the maximum possible extent, including in order to guarantee that the state objectives funded by levy resources are realised quickly.
- (142) This refutes LVN’s assertion that the milk levy resources are not state resources within the meaning of Article 107(1) TFEU.
- (143) This means that the revenues from the levy in question should be regarded as being under state control ⁽³⁵⁾ and that the measures funded by them were granted through state resources and are attributable to the state.

Selective advantage/Undertakings

- (144) VDM is a body which provides services of benefit to undertakings in the dairy industry, in particular dairies.
- (145) Germany and VDM dispute that VDM offers services as an undertaking in a market. In particular, VDM refers to its activities as those of an association, which the Court has judged to be commercial activities only in exceptional cases (see recitals 39 and 49).
- (146) In its judgment in Case T-193/02 *Piau v Commission* cited by Germany, the Court found that an association, i.e. FIFA, engaged in an economic activity. Germany has, conversely, been unable to cite any case-law in which it was explicitly found that the opposite was the case, i.e. that an association did not (necessarily) engage in any economic activity or that the activities of an association were excluded from the monitoring of aid.
- (147) It is indisputable that VDM engages in activities in the interests and to the benefit of its members. This is how VDM itself perceives its role, as is apparent from various descriptions of its activities on its website, e.g. ‘VDM represents the interests of the dairy sector within IDF’, ‘protecting and promoting the interests of the dairy industry’ and ‘representing dairy-industry interests during the legislative process in relation to the ministries’. LVN therefore also takes the view that the contested measures were intended solely to promote milk as a product and thus the collective interest of the dairy industry (see recitals 99-100 above).
- (148) The Commission thus maintains its view that the individual activities pursued by VMD display the characteristics of services. The services benefit dairies in the *Länder* that collect the milk levy.

⁽³⁰⁾ Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 31.

⁽³¹⁾ Judgment of the Court of 30 May 2013, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraph 32.

⁽³²⁾ See, for example, Section 6(3) of the regulation on a levy for milk (BayMilchUmlV) of 17 October 2007.

⁽³³⁾ See, for example, Section 5 of the regulation on a levy for milk (BayMilchUmlV) of 17 October 2007.

⁽³⁴⁾ See Judgment of the Court of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraphs 41 and 56.

⁽³⁵⁾ Judgment of the Court of 30 May, *Doux Élevage*, C-677/11, ECLI:EU:C:2013:348, paragraphs 32, 35 and 38.

- (149) Several of the activities referred to by VDM itself on its website display characteristics of services in the sense that their purpose is to represent the interests of the dairies and milk producers concerned in relation to the German authorities and the legislator and in international bodies ⁽³⁶⁾.
- (150) The provision of such services benefits the dairies concerned and supports them in the exercise of their core business: the production and sale of milk and dairy products, which are undoubtedly economic activities.
- (151) VDM carries out its activities under the headings 'advice to state bodies', 'involvement in standardisation and harmonisation' and 'provision of general information' in the interests and on behalf of its members. Those activities, which are directly related to its economic activities, save the dairies from having to implement such initiatives themselves — and from having to provide the necessary funding — in order to create a (market) environment conducive to their sales. Members of VDM include Milchindustrie-Verband e.V. (MIV) and Deutsche Bauernverband e.V. (DBV). The membership of MIV is in turn made up of German dairies, including those covered by this Decision, in the *Länder* that collect the milk levy.
- (152) The 'advice to state bodies' and 'involvement in standardisation and harmonisation' are activities which represent interests in the political process and are intended to shape opinion through different channels (legislation, technical standardisation, etc.). Ultimately this affects the legal conditions underlying the dairies' production and marketing activities. The 'provision of general information' measure also benefits the dairies concerned as it promotes sales by highlighting the benefits of milk as a product.
- (153) No questions are raised in this respect by VDM's assertion that the content of its activity involved 'channelling the democratically formulated opinion of its members into the legislative process'. The fact is that VDM does not represent general interests but rather the interests of its members, the aim being to channel the dairy industry's views into the legislative and regulatory process and thus to bring its influence to bear in that process.
- (154) With regard to the activity of 'standardisation and harmonisation', VDM has explained that, acting on behalf of the entire dairy sector, it is involved in standardisation and harmonisation at national and international level in cooperation with the competent standards organisations such as ISO, IDF, CEN and DIN (see recital 53).
- (155) In this context, the Commission notes that it is the said standardisation bodies that are primarily responsible for bringing about standardisation and harmonisation. VDM does not act as a neutral party (or independent advisor) in that process but rather it channels the viewpoints of the dairy industry into the standardisation process).
- (156) In this regard too, the Commission therefore concludes that VDM offers services as a private association. The beneficiaries — if not the recipients — of those services are again the dairies in the *Länder* in question (i.e. the members of VDM's member associations), whose interests are represented by VDM vis-à-vis the standardisation bodies.

⁽³⁶⁾ The following statements can be found on the VDM website (<http://www.idf-germany.com/>): 'VDM represents the interests of the dairy sector within IDF'; 'protecting and promoting the interests of the dairy industry'; 'representing dairy-industry interests during the legislative process in relation to the ministries'; '... the consultation on all dairy-industry issues directly or indirectly benefits the individual milk producers or dairies'; '[VDM] therefore ensures that German interests are taken into account ... by all international bodies'; '[its role is to] present a consensus view on the interests of the dairy industry to the relevant federal authorities'; '... to promote agreement between the federal authorities and the dairy industry'; 'VDM helps to ensure that the dairy industry and the authorities speak with one voice'; 'Acting on behalf of the entire dairy sector, VDM is involved in standardisation and harmonisation...'; 'As the Federal Ministry of Food, Agriculture and Consumer Protection sends the German delegations to the meetings of the Codex Committees, VDM and its members' associations represent dairy-industry interests there too'; 'VDM represents the political position of the dairy industry'.

- (157) Similarly, the provision of general information (see recitals 59 and 60) constitutes a service. Whether this information is more general or more specific in nature does not alter the fact that its provision promotes the economic activity of the dairy industry.
- (158) The services in question which VDM provides selectively favour certain undertakings, namely those in the economic sector of the processing and marketing of milk in the *Länder* that collect the milk levy. In this context, the Commission does not share VDM's view that it is an umbrella organisation that represents general interests. Rather, the Commission sees VDM's activities as constituting a sector-specific representation of interests to the benefit of the dairies affiliated to it as members through the associations in the *Länder* concerned.

Distortion of competition and effect on trade

- (159) The Court of Justice has consistently held that strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid ⁽³⁷⁾. Aid for an undertaking that operates in a market where there is intra-Union trade is liable to affect trade between Member States ⁽³⁸⁾, even if the undertaking receiving it does not itself participate at all in intra-Community trade ⁽³⁹⁾. There was substantial intra-Union trade in agricultural products in the period 2001-2012. For example, intra-Community imports to and exports from Germany of products falling within heading 0401 of the Combined Nomenclature (milk and cream, not concentrated nor containing added sugar or other sweetening matter) ⁽⁴⁰⁾ were worth EUR 1,2 billion and EUR 957 million respectively in 2011 ⁽⁴¹⁾.
- (160) The measures being assessed in this Decision are designed to support activities in the agricultural sector, in particular the activities of dairies. As described above, trade in the products of dairies does exist within the Union. The Commission therefore takes the view that the measures at issue are such as to affect trade between the Member States.
- (161) In view of the substantial level of trade in dairy products, it can therefore be assumed that the sub-measures in question distort or threaten to distort competition and affect trade between Member States.

Existing aid/new aid

- (162) According to Article 108(1) TFEU, the Commission must, in cooperation with Member States, keep under constant review all existing systems of aid. To that end, the Commission can obtain from Member States all information necessary for the review of existing aid schemes and, if necessary, propose appropriate measures.
- (163) Article 1(b)(i) of Regulation (EC) No 659/1999 defines existing aid as all aid which existed prior to the entry into force of the Treaty in the respective Member State and is still applicable after the entry into force of the Treaty.
- (164) However, according to Article 1(c) of Regulation (EC) No 659/1999, any alteration to existing aid makes it 'new aid'. Article 4 of Commission Regulation (EC) No 794/2004 ⁽⁴²⁾ defines an alteration to existing aid as 'any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market'.
- (165) According to case-law ⁽⁴³⁾, the original scheme is transformed into a new aid scheme only if the change affects the essence of the provision; there can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.

⁽³⁷⁾ Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission*, C-730/79; ECLI:EU:C:1980:209, paragraphs 11-12.

⁽³⁸⁾ See in particular the Judgment of the Court of 13 July 1988, *French Republic v Commission*, 102/87, ECLI:EU:C:1988:391.

⁽³⁹⁾ Judgment of the Court of 14 January 2015, *Eventech Ltd v Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67.

⁽⁴⁰⁾ Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 304, 31.10.2012, p. 1).

⁽⁴¹⁾ Source: Eurostat.

⁽⁴²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

⁽⁴³⁾ Judgment of the Court of 30 April 2002, *Gibraltar v Commission*, T-195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 111.

- (166) According to Article 108(3) TFEU, all new aid has to be notified to the European Commission and it cannot be put into effect before it has been approved by the Commission (standstill obligation).
- (167) According to Article 1(f) of Regulation (EC) No 659/1999, new aid put into effect in contravention of Article 108(3) TFEU is unlawful.
- (168) With the exception of the MFG itself (which is only a framework law and an enabling act, but is not the legal basis for the measures at issue), the German authorities have not presented any information demonstrating that a legal basis issued before 1958 was still applicable in its original version during the period of investigation. This applies both to the levy regulations which form the basis for funding the aid in question (those applicable in Baden-Württemberg and Bavaria, for example, date from 2004 and 2007 respectively (see recitals 21-22)) and to the *Land* budgetary ordinances which form the legal basis for use of the levy and whose intended use is bound merely by Section 22(2) MFG. On this basis, the *Land* authorities authorise the use of resources in the financial year in question by means of an appropriation notice.
- (169) The measures in question therefore constitute new aid that should have been notified pursuant to Article 108(3) TFEU. Because Germany has not at any time notified the aid scheme at issue, it is unlawful (Article 1(f) of Regulation (EC) No 659/1999).

Compatibility assessment

Applicable rules

- (170) Under Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the Union interest.
- (171) According to the Commission notice on the determination of the rules applicable to the assessment of unlawful aid ⁽⁴⁴⁾, any unlawful aid within the meaning of Article 1(f) of Regulation (EC) No 659/1999 is to be appraised in accordance with the rules applicable at the time the aid was granted.
- (172) Specific guidelines have applied for the agriculture sector since 1 January 2000. Aid granted during the period between 28 November 2001 and 31 December 2006 (hereinafter: 'the period 2001-2006') is to be assessed in the light of the 2000-2006 Guidelines.
- (173) Aid granted since 1 January 2007 (hereinafter: 'the period from 2007') will be assessed in the light of the 2007-2013 Guidelines.

First sub-measure (period 2001-2006): 'Role of advisor to state bodies' and 'standardisation and harmonisation activities'

- (174) For the purposes of examining whether aid promoting the provision of advice to state bodies (see recitals 51 and 52) and VDM's standardisation and harmonisation activities (see recitals 53 to 58) is compatible with the internal market, VDM referred to the provisions concerning technical support (recitals 67 and 68).
- (175) The provision of technical support is regulated by paragraph 14 of the 2000-2006 Guidelines. According to the third indent of point 14.1 of the 2000-2006 Guidelines, consultant's fees are fully compatible with the internal market. Dairies are undertakings for the processing and marketing of agricultural products. Aid to that sector falls, inter alia, within the scope of the 2000-2006 Guidelines (point 2.1 of the Guidelines). The purpose of the provision of the third indent of point 14.1 is to declare that support whose direct purpose is to improve the processing of agricultural products by disseminating the requisite knowledge is compatible with the internal market. VDM's advisory services were, however, aimed at state bodies. VDM's members, which include the dairies in the *Länder* that collect the milk levy, were, by contrast, beneficiaries only indirectly. The Commission finds that the aid in question cannot be declared compatible with the internal market under Section 14 of the 2000-2006 Guidelines.

⁽⁴⁴⁾ OJ C 119, 22.5.2002, p. 22.

- (176) Similarly, VDM's standardisation and harmonisation activities relate to advice provided to state (or state-recognised) bodies serving ultimately to represent the interests of VDM's members. In the final analysis, standardisation and harmonisation activities fall within the remit of state bodies, which implement rules and standards, especially those developed at the international level, generally by legislative or administrative means. An association such as the VDM can bring its influence to bear on the relevant procedures (negotiations in international bodies, legislation) only in an advisory capacity. Compatibility with the internal market under Section 14 of the 2000-2006 Guidelines is therefore excluded.
- (177) Compatibility with the internal market also cannot be achieved under provisions other than those referred to by the parties (nor has Germany invoked any other compatibility rules). The Commission therefore concludes that the aid granted to businesses operating in the processing and marketing sector in the 2001-2006 period is incompatible with the internal market.

First sub-measure (period from 2007): 'Role of advisor to state bodies' and 'standardisation and harmonisation activities'

- (178) For the period from 2007, the provisions on the compatibility of technical support with the internal market were amended.
- (179) The provision of technical support is regulated by Section IV.K of the 2007-2013 Guidelines. The aid benefited dairies in the *Länder* that collect the milk levy. Dairies are undertakings for the processing and marketing of agricultural products (see also recital 175).
- (180) With regard to the aid granted to marketing and processing businesses, paragraph 105 of the 2007-2013 Guidelines in conjunction with Article 5 of Commission Regulation (EC) No 70/2001 ⁽⁴⁵⁾ could be considered to constitute a provision establishing compatibility with the internal market. For the period from the date of entry into force of Commission Regulation (EC) No 800/2008 ⁽⁴⁶⁾, paragraph 105 must be read as referring to Articles 26 and 27 of that Regulation.
- (181) Both Article 5 of Regulation (EC) No 70/2001 and Articles 26 and 27 of Regulation (EC) No 800/2008 relate to consultancy services. From the perspective of the dairies, however, the case at issue is not about consultancy but rather, as stated in recitals 175 to 177, about the representation of interests.
- (182) Moreover, compatibility with the internal market also cannot be achieved under provisions other than those referred to by the parties (nor has Germany invoked any other compatibility requirements). VDM's activities in the areas of 'role of advisor to state bodies' and 'standardisation and harmonisation activities' in the 2007-2013 period are therefore not compatible with the internal market.
- (183) The Commission accordingly concludes that the aid granted to businesses operating in the processing and marketing sector in the period from 2007 is incompatible with the internal market.

Second sub-measure (period 2001-2006): Provision of general information

- (184) The aid granted in respect of the provision of general information (recitals 59 and 60) could be considered to be compatible with the internal market under the provisions concerning technical support.
- (185) As stated above in recital 175, the provision of technical support is regulated in Section 14 of the 2000-2006 Guidelines.

⁽⁴⁵⁾ Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33).

⁽⁴⁶⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

- (186) Section 14 of the Guidelines covers aid granted in connection with activities relating to the processing and marketing of agricultural products (see recital 175).
- (187) The Commission is of the view that this measure has contributed to the long-term viability of the sector while its effects on competition are likely to have been very limited (second sentence of paragraph 14.1 of the 2000-2006 Guidelines).
- (188) The aid was granted to cover the costs of disseminating general information.
- (189) The eligible costs relating to the provision of technical support are exhaustively listed in the five indents of paragraph 14.1 of the 2000-2006 Guidelines. The provision of the information in question may be regarded as measure for the dissemination of knowledge relating to new techniques pursuant to the fifth indent. The wording of the fifth indent allows a broad interpretation of the term 'dissemination of knowledge relating to new techniques'. The addition 'such as reasonable small-scale pilot projects or demonstration projects' should not be understood restrictively but rather, as the words 'such as' make clear, merely as an example. The provision of general information, in particular the publication of scientific findings and generic factual information about milk in a readily understandable form, may therefore be considered to be comparable with the dissemination of knowledge relating to new techniques. The purpose of the provision on compatibility in paragraph 14.1 was indeed to allow the promotion of measures which, like those at issue here, inform beneficiaries of new techniques in various areas relevant to agriculture such as good agricultural practice or animal welfare in dairy farming (see recital 59).
- (190) The Commission believes that this aid was in principle available to all 'eligible' natural and legal persons in the area concerned based on objectively defined conditions (first sentence of paragraph 14.2 of the 2000-2006 Guidelines), i.e. that such persons were able to benefit without restriction from the information provided.
- (191) Germany has provided an assurance that the total amount of aid granted in the period 2001-2006 did not exceed EUR 100 000 per beneficiary over a period of three years. To the extent that undertakings falling within the scope of the Commission's definition of small and medium-sized enterprises ⁽⁴⁷⁾ were granted an amount of more than EUR 100 000, the maximum permitted aid intensity did not exceed 50 % of eligible costs. For the purpose of calculating the amount of aid, the beneficiaries were regarded as being the persons availing themselves of such services, i.e. the dairies in the *Länder* that collect the milk levy.
- (192) The Commission concludes that the aid assessed in that section met the relevant conditions of the 2000-2006 Guidelines and was therefore compatible with the internal market in the period 2001-2006.

Second sub-measure (period from 2007): Provision of general information

- (193) As with the previous period, aid for the provision of general information is subject to the provisions concerning technical support.
- (194) These are laid down in Section IV.K of the 2007-2013 Guidelines. The aid benefited dairies in the *Länder* that collect the milk levy. Dairies are undertakings for the processing and marketing of agricultural products (see also recital 175).
- (195) Firstly, the 2007-2013 Guidelines provide that the Commission will under no circumstances authorise aid in favour of large companies (paragraph 106 of the Guidelines), meaning that any aid granted to such companies will not be declared compatible. It has not yet been examined whether aid granted to small and medium-sized enterprises is compatible with the internal market. In the following, therefore, the assessment of the compatibility of the aid granted is restricted to small and medium-sized enterprises.
- (196) With regard to the aid granted to dairies, which are businesses operating in the processing and marketing sector, paragraph 105 of the 2007-2013 Guidelines refers to the relevant provisions of Article 5 of Regulation (EC) No 70/2001. For the period from the date of entry into force of Regulation (EC) No 800/2008, that provision must be read as referring to Articles 26 and 27 of the Regulation.

⁽⁴⁷⁾ OJ L 107, 30.4.1996, p. 4.

- (197) None of the cited provisions of Regulations (EC) No 70/2001 and (EC) No 800/2008 provided for the dissemination of general information.
- (198) The Commission is also unable to identify any other provisions of EU law that enable such aid granted to businesses operating in the processing and marketing sector to be deemed compatible with the internal market (nor has Germany invoked any other compatibility rules).
- (199) The Commission concludes that the aid granted to processing and marketing businesses, i.e. to dairies, in the period from 2007 was incompatible with the internal market.

Parafiscal charges

- (200) Since the State aid in question was financed by a parafiscal charge (see recitals 13 to 17), the Commission must examine both the measures supported, i.e. the aid, and the way in which they were financed. Where the method of financing the aid, in particular through compulsory contributions, forms an integral part of the aid measure, the Commission must also take that method of financing into account when examining the aid ⁽⁴⁸⁾.
- (201) For a charge or part of a charge to be considered as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax must be necessarily allocated for the financing of the aid measure ⁽⁴⁹⁾, and the amount of the tax should have a direct impact on the amount of State aid ⁽⁵⁰⁾.
- (202) These two criteria have to be applied for the entire period under investigation.
- (203) The first criterion seems to be met since, under Section 22(1) of the MFG, the *Länder* have the option to impose the parafiscal charge at issue. At the same time, Section 22(2) and (2a) of the MFG lays down precisely what types of aid can be financed from the levy revenues. The Commission therefore finds that the revenues from the levy are earmarked and may be used only for the purposes laid down by law. In the light of the Positive Decision and this Decision, the Commission believes that the vast majority of support measures implemented in this context constitute aid. Moreover, the fact that the revenues from the levy are earmarked means that they cannot be used for other public tasks not referred to in Section 22(2) and (2a) of the MFG.
- (204) As regards the question whether the amount of the levy has a direct impact on the amount of State aid, attention is drawn to Section 22(3) of the MFG, according to which levy revenues must be kept separate and may not be used for administrative expenses incurred by the *Land* authorities. According to the information submitted by Germany, no State resources other than milk levy resources are used to finance the measures assessed in this Decision. This leads the Commission to conclude that the amount of the levy does indeed have a direct impact on the amount of State aid.
- (205) Where the levy forms an integral part of the aid measure, the Commission then has to examine whether it discriminates between imported products and national ones ⁽⁵¹⁾, or between exported national products and national products marketed on the domestic market ⁽⁵²⁾.
- (206) The milk levy does not apply to imports. Consequently, aid measures under the MFG do not discriminate against imported products.

⁽⁴⁸⁾ Judgment of the Court of 21 October 2003, *van Calster*, C-261/01 and C-262/01, ECLI:EU:C:2003:571, paragraph 49.

⁽⁴⁹⁾ Judgment of the Court of 13 January 2005, *Streekgewest Westelijk Noord-Brabant*, C-174/02, ECLI:EU:C:2005:10, paragraph 26; Judgment of the Court of 27 October 2005, *Nazairdis SAS and others v Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic)*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, ECLI:EU:C:2005:657, paragraphs 46 to 49.

⁽⁵⁰⁾ Judgment of the Court of 13 January 2005, *Streekgewest Westelijk Noord-Brabant*, C-174/02, ECLI:EU:C:2005:10, paragraph 28, and Judgment of the Court of 15 June 2006, *Air Liquide*, Joined Cases C-393/04 and C-41/05, ECLI:EU:C:2006:403, paragraph 46.

⁽⁵¹⁾ With regard to discrimination between domestic and exported products, see, inter alia, the Judgment of the Court of 23 April 2002, *Nygård*, C-234/99, ECLI:EU:C:2002:244, paragraphs 21-22.

⁽⁵²⁾ With regard to discrimination between domestic and imported products, see the Judgment of the Court of 11 March 1992, *Compagnie Commerciale de l'Ouest*, Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90, ECLI:EU:C:1992:118, paragraph 26.

- (207) Furthermore, the milk levy may be regarded as discriminatory internal taxation prohibited by Article 110 TFEU if, to the extent that the milk levies due on goods produced and processed on the domestic market are only partially offset by advantages deriving from the use made of levy revenues, the milk levy puts exported domestic products at a disadvantage. The German authorities have explained that, to their knowledge, undertakings that export dairy products do not suffer any disadvantages as a result of the collection of the levy. However, if an undertaking that has exported dairy products were in future to demonstrate that it had been disadvantaged by the collection of the levy, the levy amounts in question would, according to Germany's assurance, be refunded. On that basis the Commission believes that there is no risk of discrimination.
- (208) The Commission therefore finds that the levy does not constitute an infringement of the provisions of Article 110 TFEU ⁽⁵³⁾.
- (209) It should also be examined whether charging the milk levy does not run counter to the objectives of the common organisation of markets in the agricultural sector. In this respect, it has to be assessed whether the milk levy interferes with the prices of domestic end products and thus whether domestic products are discriminated against compared to imported products ⁽⁵⁴⁾. In this regard, the Commission notes that milk is sold at retail level in Germany at prices apparently not below EUR 0,45 per litre. The milk levy amounts to not more than EUR 0,0015 per kg and therefore represents only a marginal fraction of the retail price. The Commission therefore concludes that collecting the milk levy does not run counter to the objectives of the common organisation of the relevant market.

Conclusion

- (210) Article 15(1) of Regulation (EC) No 659/1999 lays down that the powers of the Commission to recover aid are subject to a limitation period of 10 years. According to Article 15(2) of Regulation (EC) No 659/1999, any action taken by the Commission with regard to unlawful aid interrupts this limitation period.
- (211) Further to Germany's submission of the 2010 annual report on State aid in the agricultural sector, the Commission asked Germany by letter of 28 November 2011 to provide additional information on the scheme. This action by the Commission interrupted the limitation period. In line with the ten-year limitation period referred to in the previous recital, this Decision therefore relates to the period from 28 November 2001.
- (212) The Commission finds that Germany has unlawfully granted the aid in question in breach of Articles 107 and 108 TFEU. The aid benefited undertakings in the milk processing and marketing sector throughout Germany. The aid is partially compatible with the internal market (recital 192) and partially incompatible with the internal market (recitals 177, 183, 199).
- (213) The Commission considers it reasonable for the aid that is incompatible with the internal market to be recovered as follows: The payments made to VDM from milk levy resources for the measures which it implemented should be returned to the dairies concerned in line with the amounts of milk levy paid by them in order to determine the aid to be recovered. The Commission is willing to discuss with Germany other ways in which the funds in question might be allocated to the beneficiaries,

HAS ADOPTED THIS DECISION:

Article 1

The financial support for the scientific community granted by Germany through Verband der Milchwirtschaft e.V. does not constitute aid within the meaning of Article 107(1) TFEU.

The financial support granted by Germany through Verband der Milchwirtschaft e.V. in connection with lectures given at Fachhochschule Hannover does not constitute aid within the meaning of Article 107(1) TFEU.

The financial support granted by Germany in connection with the role of Verband der Milchwirtschaft e.V. as a provider of general information and an advisor to state bodies and regarding standardisation and harmonisation activities constitutes State aid within the meaning of Article 107(1) TFEU.

⁽⁵³⁾ Judgment of the Court of 21 October 2003, *van Calster*, C-261/01 and C-262/01, ECLI:EU:C:2003:571, paragraph 48.

⁽⁵⁴⁾ Judgment of the Court of 22 May 2003, *Freskot*, C-355/00, ECLI:EU:C:2003:298, paragraphs 18-32.

Article 2

The aid granted unlawfully by Germany in breach of Article 108(3) TFEU in connection with the role of Verband der Milchwirtschaft e.V. as a provider of general information in the period between 28 November 2001 and 31 December 2006 is compatible with the internal market.

Article 3

The aid granted unlawfully by Germany in breach of Article 108(3) TFEU in connection with the role of Verband der Milchwirtschaft e.V. as an advisor to state bodies and regarding standardisation and harmonisation activities is incompatible with the internal market.

The aid granted unlawfully by Germany in breach of Article 108(3) TFEU in connection with the role of Verband der Milchwirtschaft e.V. as a provider of general information in the period from 1 January 2007 is incompatible with the internal market.

Article 4

1. German shall recover the incompatible aid granted under the scheme referred to in Article 3 from the beneficiaries.
2. The amount to be recovered shall bear interest from the date on which it was put at the disposal of the beneficiaries until its actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽⁵⁵⁾ amending Regulation (EC) No 794/2004.
4. Germany shall cancel all outstanding payments of aid under the scheme referred to in Article 3 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 3 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months of the date of its notification.

Article 6

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:
 - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 3 and the total amount of aid received by each of them under the scheme;
 - (b) the total amount (principal and recovery interest) to be recovered from each beneficiary;

⁽⁵⁵⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (c) a detailed description of the measures already taken or planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the recovery of the aid granted under the scheme referred to in Article 3 has been completed. Upon request by the Commission, Germany shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Federal Republic of Germany.

Germany is requested to forward a copy of this Decision to the beneficiaries of the aid without delay.

Done at Brussels, 16 December 2015.

For the Commission
Phil HOGAN
Member of the Commission

