

*Our lawyers have now submitted their observations on the ECJ (European Court of Justice) judgment to the CFI (Court of First Instance) and the Executive Summary is available here (insert pdf *). The BAA has also written to Yvette Cooper, Chief Secretary to the Treasury requesting, inter alia, "...we therefore do not think it can be appropriate policy for the Government to continue to apply the AGL in light of the ECJ's Judgment of 22 December 2008. Continued collection of the AGL will only result in more complex claims for repayment of higher amounts in the future. Rather, we call upon the Government to stop applying the AGL with immediate effect and to enter into discussions with the industry." If the Government does not suspend the Levy, the BAA will advise its members to withhold future payments following a predetermined legal protocol.*

* EXECUTIVE SUMMARY

The ECJ quashed the original Judgment of the CFI because it contained two fundamental legal errors.

The first fundamental legal error concerns the use of an incorrect definition of State aid, namely that a Member State does not trigger the application of EU State aid law if it imposes an environmental tax on one sector causing environmental harm but not on other sectors causing the same environmental harm. In the absence of a coherent environmental logic for the AGL, this particular "no aid" argument had become the cornerstone of the Commission's and the UK's defence. The argument was erroneously accepted by the CFI but it was comprehensively rejected by the ECJ. According to the ECJ, sectors that cause the same environmental damage must be treated similarly. Since the AGL does precisely the opposite, the inevitable conclusion is that the AGL involves the grant of State aid.

The second fundamental legal error is that the CFI did not conduct a comprehensive review of the facts, allowing the Commission and the UK Government a broad margin of discretion when deciding the scope of the AGL. According to the ECJ, this "vitiates in its entirety" the factual analysis of the CFI. As a result, the CFI needs to reassess all the BAA's pleas and arguments in a "comprehensive review" of the facts, based on a legally correct definition of State aid.

The ECJ also rejected a number of the BAA's less important pleas related to specific factual aspects. These findings of the ECJ are of a very limited nature and can have no bearing on the CFI's reassessment of the case. In an appeal against a CFI Judgment the jurisdiction of the ECJ is limited to questions of law. The ECJ cannot review questions of fact. Furthermore, the ECJ specifically found that the fundamental legal error discussed in the paragraph above "vitiates in its entirety" the factual analysis of the CFI. In the circumstances, the ECJ cannot have made and cannot intend to have made findings of fact itself (or to confirm factual findings by the CFI).