

State Aid
Ireland

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GCR | **Know-how**

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National state aid control - competent authorities

1 Which authority is responsible for oversight of national state aid, in particular the notification of aid measures to the European Commission and the monitoring of the compliance of national measures with EU state aid rules and decisions?

In Ireland, there is no national central authority responsible for state aid control and for dealing with the European Commission (the Commission) on state aid matters.

The Department of Finance, which manages national monetary affairs and policy, plays a role in a large proportion of state aid matters and engages with the Commission in relation to state aid.

In practice, other government departments such as the Department of Agriculture; Department of Communications; or the Department of Jobs, Enterprise and Innovation are involved in aid specific to the sector they are responsible for. In practice, these departments liaise with the Department of Finance and the Commission on state aid matters in specific cases.

While Ireland is the addressee of Commission state aid decisions, the Permanent Representation to the European Union and Department of Foreign Affairs would generally have some role in discussions between the EU and the Irish government, but these authorities have a minimal role in oversight or monitoring of compliance of Irish government measures with state aid rules.

The advice of the Attorney General's Office may be sought in identifying compliance with the state aid rules.

The Irish courts provide oversight of state aid given by the Irish government, eg through hearing cases alleging breaches by the Irish authorities of the “standstill obligation” under article 108(3) TFEU.

2 What are the competences and investigatory, enforcement and supervisory powers of the national authority responsible for state aid control and what is the legal basis for these powers? Can it grant interim measures?

The Department of Finance and the relevant government departments have no specific powers to investigate and enforce state aid compliance. However, any undertaking that submits incomplete or misleading information to a granting authority risks either not receiving the aid, or a subsequent claim by the granting authority for restitution. The claim by the national authority could be pursued before the Irish courts, which have the powers to order recovery of state aid.

As noted in our reply to question one, the Irish courts are responsible for oversight / enforcement of state aid rules. Irish courts may grant interim measures, eg to suspend the implementation of a government measure where

it is alleged that it breaches the standstill obligation under article 108(3) TFEU. An Irish court would likely be obliged to grant interim measures in these circumstances if it was necessary to protect the rights of individuals affected by the potential unlawful implementation of the state aid.

Contractual provisions may be inserted into contracts granting state aid to recipients providing for a right of action of the government authority should, for example, the Commission find that the grant consisted of incompatible state aid.

3 Do the national authorities accept state aid complaints made by competitors, or other interested parties? How would they handle a competitor complaint? Do limitation periods apply?

Irish government authorities are inappropriate fora for state aid complaints made by competitors. The national competition authority, the Competition and Consumer Protection Commission (the CCPC) may not investigate state aid matters and may only become involved if there is another competition law element to the complaint.

Complainants would normally address complaints to the Commission or initiate proceedings before the Irish courts if illegal state aid is alleged. The Irish courts must protect individuals affected by a breach or potential breach of the standstill obligation in article 108(3) TFEU (see ‘Role of national courts’ section below). There have been a number of instances of the Irish courts hearing complaints alleging illegal aid (eg, *Dellway Investments Limited and Others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4, *David Pierce trading as Swords Memorials and Andrew Pierce Monuments v The Dublin Cemeteries Committee, Glasnevin Cemetery Monument Works Limited and Glasnevin Crematorium Limited* [2010] 1 ILRM 349 *O’Shea v West Wood Club Limited* [2015] IEHC 24) and *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* [2015] IEHC 800).

We are not aware of a consumer association initiating Irish court proceedings alleging the granting of illegal state aid. The standing of a consumer association to take such proceedings would likely be examined by the Irish court seized of the matter. The Irish court would be obliged to consider EU law providing that national rules on standing cannot limit legal standing only to competitors of the beneficiary concerned. See question 20 for further details.

No specific limitation periods apply to state aid allegations made in Irish court proceedings, subject to normal Irish law limitation periods. See our reply to question 22 below for further detail on Irish limitation periods.

4 Does the national state aid authority regularly cooperate or exchange information with authorities from other member states?

There is no formal structure for the Irish state aid granting authorities to cooperate or exchange information with authorities from other member states. However, there are inter-governmental fora at which information can be exchanged, including at EU level. The Irish authorities have close contacts with the Commission, as the overall watchdog for monitoring state aid compliance throughout the EU.

5 Who represents your country in state aid proceedings before the European Commission? Does this authority have specific investigatory powers?

During the investigation, the Commission will correspond with the Minister for Foreign Affairs through Ireland's Permanent Representation to the European Union in Brussels. In practice, the government department or authority that has granted or proposes to grant the state aid can make representations to the Commission, whether via the Department of Foreign Affairs or otherwise.

Irish government departments do not have specific state aid investigatory powers to request information or impose fines for not submitting requested information.

6 Who represents your country in state aid proceedings before the EU courts?

Ireland is represented by the Chief State Solicitors Office in state aid proceedings before the EU courts, typically assisted by independent counsel.

7 Is there a national register or other central source of data on national aid measures? Are the various state aid reports, complaints, decisions, etc, published?

There is no national register on state aid measures, reports, complaints or decisions. The relevant government departments do, however, have state aid sections on their websites with data pertaining to that department.

National substantive and procedural rules

8 Describe recent developments regarding state aid cases before national authorities.

The main court case dealing with state aid in the past 12 months was *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* which was an appeal from a Circuit Court ruling on a preliminary issue as to the jurisdiction of that court to consider issues relating to state aid in the context of a claim for the payment of commercial rates. The plaintiff had issued three demands against the defendant claiming arrears of commercial rates in respect of a leisure premises operated by the defendant. The defendant pleaded that the plaintiff was operating leisure facilities in competition with it; that the funding received by the plaintiff from commercial rates and from other state sources constituted unlawful state aid, and that the rates were therefore unenforceable.

The High Court held that the Circuit Court had jurisdiction to determine whether the funding from rates amounted to state aid, but the Circuit Court did not have jurisdiction to determine the compatibility of the aid with the internal market (only the Commission has jurisdiction to rule on compatibility of aid).

The High Court also held that where the Commission had not been notified of state aid, a breach of EU law would follow. However, where the failure to notify state aid relied upon by the claimant related to the payment of tax, the obligation to notify the Commission could only be relied upon if the claimant's tax payment formed an integral part of the state aid. The appropriate remedy for cases such as the one before the court would not be

to simply grant the appellant an exemption from the rates concerned as such a solution would only compound the breach of EU law. In the context of a counterclaim for damages by the defendant for breach of the standstill obligation, the High Court also held that EU law does not require the availability of damages against the recipient of unlawful state aid and any claim for damages has to be governed by reference to national law.

9 Do national provisions regarding the application or enforcement of EU state aid rules exist?

Very limited specific national provisions regarding the application or enforcement of EU state aid rules exist in Ireland. State aid measures and schemes implemented by Ireland are generally governed by the relevant EU primary and secondary laws, and European Commission sector-specific and horizontal guidelines.

The National Asset Management Agency (NAMA) Act 2009 (the Act) provides that NAMA is to have regard to EU state aid law when it assesses the acquisition value of bank assets it acquires under the Act (section 75(2)). NAMA was established under the Act to remove distressed assets from the balance sheets of participating financial institutions. The Minister for Finance must also have regard to EU state aid law in making regulations under the Act relating to the determination by NAMA of the long-term economic value or market value of bank assets (section 79(1) of the Act). Section 208(11) of the Act also states that the Minister for Finance will not approve any restructuring plan of a financial institution pursuant to the Act if it does not comply with EU state aid law.

In terms of the enforcement of EU state aid rules, the Irish courts must provide remedies to third parties (eg, a competitor of a recipient of aid) for breaches of the standstill obligation contained in article 108(3) TFEU. For example, a competitor of a prospective recipient of state aid could take an action before the Irish courts seeking an injunction to prevent the payment of aid prior to it being declared compatible with the internal market by the European Commission. In the Irish context, this state aid action could be brought as a judicial review of the state's actions, and the applicant could seek to quash or injunct the decision of the state in granting the state aid. If the state aid has already been implemented in breach of article 108(3) TFEU, an aggrieved third party could seek a declaration from an Irish court that the aid must be recovered from the beneficiary, or could seek damages from the Irish state under the *Francovich/Brasserie du Pêcheur* requirements for demonstrating the right to damages for a breach of EU law by a member state. Irish courts may also hear cases taken by national authorities on foot of a European Commission decision ordering recovery of unlawful state aid, if efforts to recover the aid from the beneficiary have been unsuccessful. The Irish courts have been willing to hear these recovery cases, eg, *Kingdom of Belgium v Ryanair Limited* [2006] IEHC 213 and *Minister for Finance & Anor v Ryanair Limited* (Record Number 2013/3286/P).

10 What national laws or other provisions exist that implement EU state aid rules, in particular EU guidelines?

No national laws exist to implement EU state aid rules or guidelines, which are applied to aid measures and schemes in Ireland without implementation into Irish law. In practice, government departments and other state bodies that typically provide state aid would publish or provide guidance on the applicable EU rules for a particular sector or for access to certain aid schemes. If EU legislation on state aid were to be transposed into national law, it would typically be by way of statutory instrument.

11 Do national rules or guidelines exist regarding the application for, and the granting of, state support?

The relevant government department or state body issuing state aid under a scheme would generally publish guidance as to the basis for the scheme, eligible beneficiaries, details on its scope and purpose, eligible costs and the amount of aid and procedure on how to apply for support. For example, the Department of Agriculture, Food and the Marine administers aid schemes that apply to those particular sectors. The Department of Jobs, Enterprise and Innovation (as well as administering aid schemes under its remit) advises other government departments on compliance of the state aid schemes under their remit with EU rules.

12 How is the concept of ‘service of general economic interest’ (SGEI) defined on the national level? Did the definition recently lead to disputes, and, if so, how was the dispute adjudicated?

The concept of SGEI is not defined in Irish law or otherwise on a national level. Instead, the Department of Jobs, Enterprise and Innovation provides guidance on its website on the Altmark criteria and the SGEI Package that governs the notification of SGEI compensation to the EU Commission under article 108(3) TFEU.

There is no central database for undertakings that have been entrusted with a SGEI, but SGEI obligations have been applied in certain industries, for example health insurance (see Case T-289/03 *BUPA* [2008] ECR II-81) and Case SA.41702 *Ireland – Risk Equalisation Scheme*, bus transport, and electricity generation (see Case SA.37030 (2013/N) *Sale of State assets*).

We are not aware of any recent cases before the Irish courts dealing with the SGEI concept.

13 Do any studies on national enforcement of EU state aid rules exist? Describe the main subjects and results of these studies.

We are not aware of the existence of any such studies on national enforcement.

Role of national courts

14 List any other rules or actions at the national level that implement and enforce EU state aid rules.

There are no other measures at national level that implement and enforce EU state aid rules.

15 Must or may all national courts apply state aid rules? Or is specific jurisdiction for state aid cases exercised by dedicated national courts?

Thresholds apply in Irish court rules whereby civil claims of up to €15,000 are heard in the district court, claims up to €75,000 are heard in the circuit court, and claims upwards of €75,000 are heard in the High Court. Practically, given the amounts typically at issue in state aid cases, and the threshold of €200,000 over three years contained in the De Minimis Regulation (Commission Regulation (EC) No. 1407/2013), the vast majority of state aid cases before Irish courts are likely to arise at High Court level.

Within the High Court, a competition list applies whereby ‘competition proceedings’ (including proceedings concerning the application of articles 107 and 108 TFEU) may be heard before a specialist judge in charge of the competition list. If proceedings are accepted on to the competition list, certain case management procedures apply that are designed to ‘fast-track’ the proceedings.

The jurisdiction of the District Court to consider a defence of state aid was recently disputed in *O’Shea v West Wood Club Limited*, whereby the plaintiff was a collector of commercial rates on behalf of Dublin City Council, and the defendant operated swimming pools and leisure facilities in Dub-

lin. The defendant did not pay its rates, and complained before the district court in subsequent proceedings that since Dublin City Council also operated swimming pools and leisure facilities in competition with its own, state monies received by the Council via commercial rates distorted or threatened to distort competition on that market. It was also alleged that the Council enjoyed tax advantages for its leisure facilities that were not enjoyed by the defendant. The defendant claimed that the District Court should give it relief in terms of an exemption from the rates at issue, or damages in an amount at least equivalent to the rates to be paid. The District Court stated a case to the High Court, seeking an answer to whether it had jurisdiction to consider an argument by the defendant based on state aid. The question did not receive an answer owing to deficiencies in how the question was posed to the High Court, which resulted in the matter being remitted back to the district court leaving the question unan.

Subsequently, in *Dun Laoghaire-Rathdown County Council v West Wood Club Limited*, which considered similar issues and had a common defendant with *O’Shea v West Wood Club Limited*, the High Court ruled that the Circuit Court had jurisdiction to determine state aid issues (see question 8), but did not have jurisdiction to hear a counterclaim for damages based on a breach of state aid law as the amount sought exceeded the relevant Circuit Court jurisdictional thresholds. The Circuit Court had previously ruled that it had no jurisdiction to consider state aid arguments. No provision of Irish law prevents any lower Irish court from providing a remedy to a litigant for a breach of EU law

16 Is there a right to appeal against a national judgment on state aid? What are the grounds and which court hears appeals? Does such appeal entail a suspension of an eventual obligation to recover the aid?

Assuming the judgment is one of the High Court, an appeal lies to the Court of Appeal. The court rules for appealing a High Court judgment regarding state aid do not differ from those rules applying to any other High Court judgment. Leave to appeal to the Court of Appeal will normally need to be sought from the High Court (unless provided for by statute). If the High Court refuses leave to appeal, it may be sought from the Court of Appeal itself. An appeal will require the lodgement of a notice setting out:

- particulars of the decision that it is sought to appeal;
- the grounds of the appeal;
- the orders sought from the Court of Appeal;
- a list of the documents intended to be relied on by the appellant in the appeal, and
- particulars of the appellant and of the respondent.

If the High Court has ruled that state aid is to be recovered by the Irish authorities, an appeal to the Court of Appeal would not automatically entail a suspension of an eventual obligation to recover the aid. If the High Court ruling was pursuant to a European Commission decision that unlawful state aid had to be recovered, it is likely that the *Zuckerfabrik* criteria would be applied in any application to stay the High Court ruling pending appeal. See question 17 for further information on the *Zuckerfabrik* criteria. If the High Court ruling was not pursuant to such a European Commission decision, normal Irish law criteria for staying a court ruling may apply, ie, a balancing exercise ensuring justice will not be denied to either party.

17 Do national courts traditionally refer questions regarding the interpretation of EU state aid rules to the Court of Justice?

While it is possible for Irish courts to refer questions regarding the interpretation of state aid rules to the Court of Justice, we are not aware of any such references specific to the state aid rules in the TFEU or secondary legislation. There is no reason why a reference to the Court of Justice on the state aid rules would not be made by an Irish court if required. The dearth of references to the Court of Justice may indicate that the state aid issues raised before Irish courts to date did not require the assistance of the Court of Justice and could be adequately dealt with at national court level.

The Irish courts may be obliged to refer a question or questions to the Court of Justice in certain situations, for example where there is a question as to the validity of an act of the EU institutions (Case T-330/94, *Salt Union v Commission* [1996] ECR II-1475, paragraph 39), or where an aid beneficiary claims interim relief before the national court to suspend a recovery order of the Commission. The first limb of the *Zuckerfabrik* (Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*) test for grant of interim relief requires the national court to have serious doubts as to the validity of the EU act (typically the negative Commission recovery decision). If the validity of the EU act is not already at issue before the Court of Justice, the national court must make a reference.

Irish courts must also refer questions to the Court of Justice where there is uncertainty as to the interpretation of EU law (including state aid law), and there is no further judicial remedy from the relevant court's judgment, for example, if the case is before the Supreme Court, which is the court of final appeal under Irish law. The Court of Appeal may also be obliged to refer questions to the Court of Justice if there is uncertainty as to the interpretation of EU law, given that appeals to the Supreme Court from a judgment of the Court of Appeal are only permitted where the Supreme Court is satisfied that the decision involves a matter of general public importance, or in the interests of justice an appeal is necessary. The Court of Appeal was established by constitutional amendment in 2014, and we are not aware of the issue of whether it would be obliged to make a reference to the Court of Justice having arisen to date.

18 Describe recent developments regarding state aid cases before national courts.

Following a European Commission decision in July 2012 (Case SA.29064) finding that three airlines with significant operations at Irish airports (Ryanair, Aer Lingus and Aer Arann) received state aid through the structure of the air passenger departure tax in Ireland, whereby flights departing from Irish airports and landing 300 kilometres from Dublin airport were subject to a lower tax rate than all other flights departing from Irish airports, Ireland commenced proceedings to recover the aid from the recipients. Proceedings were commenced by Ireland during the course of 2013 – in parallel with proceedings issued by the airlines around the same time alleging that the two-tier air passenger departure tax was illegal under EU law, and that the airlines were therefore entitled to restitution of the tax paid or *Franovich* damages for breach of EU law. The parallel proceedings of the airlines progressed through the High Court (dealt with by the judge in charge of the Competition List) without going to full trial until February 2015, when the General Court annulled the Commission decision in Case T-500/12. At the time of writing, the recovery cases brought by Ireland have been stayed pending an appeal of the European Commission against the judgment of the General Court. See questions 8 and 14 regarding the *O'Shea v West Wood Club Limited* and *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* cases regarding District Court and Circuit Court jurisdiction to hear state aid arguments.

19 Can a government measure be challenged in court directly on the grounds of illegal state aid? Is there a preliminary administrative review procedure (and if so describe it)?

Yes. A challenge to a government measure on this basis would likely be challenged by way of an application for judicial review of the measure, which may seek for the court to injunct or quash the measure on grounds of illegality, or declare it invalid or unlawful, or both. The challenge would progress as with any other non-state aid related judicial review application. However, an application could be made to have the case placed on the Competition List of the High Court, where special procedural case management rules apply.

However, if the strict time-limits for bringing a judicial review application (within three months from the date when grounds for the application first arose) are not met, it may be possible for the government measure to be challenged before the Irish courts by way of a contractual or tortious claim, either of which may be brought within six years of the cause of action accruing.

20 Who has legal standing to challenge government measures in court for alleged illegal state aid?

While there are limited examples of legal standing issues arising in this context before the Irish courts, it is settled EU law that national rules on standing cannot limit legal standing only to competitors of the beneficiary concerned (Case C-147/02, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financien* [2005] ECR I-85). To do so may result in the undermining of the effectiveness of article 108(3) TFEU. The Court of Justice has ruled that legal standing to challenge illegal state aid measures may not be limited to parties affected by the alleged distortion of competition arising from the measures (*Streekgewest*, paragraph 19). Irish courts would likely follow the approach of the Court of Justice. If the plaintiff before the Irish court will or has suffered some economic loss (eg, has incurred an expense it would otherwise have not incurred) as a result of the alleged aid measure, it is likely that they will be deemed to have standing to challenge alleged illegal aid.

21 May national authorities argue in national court proceedings that a particular measure contains illegal state aid?

In theory, the Irish authorities could make this argument before an Irish court, for example if it were to decide not to disburse a grant or subsidy on the basis that it constitutes state aid, and were subsequently sued by the prospective beneficiary. The Irish courts would be obliged to prevent the payment from taking place if it were to find that the giving of the grant or subsidy would constitute illegal state aid. While such a decision of a national court would usually arise in the circumstances of a competitor challenging the granting of aid, the Irish court's obligations to prevent a breach of article 108(3) TFEU would not be altered by the identity of the entity arguing the existence or potential of the breach.

If the state aid was already disbursed, there is no procedural barrier to the disbursing Irish authority seeking recovery in an Irish court, although the court would have to find the existence of illegal aid and quantify it. The beneficiary may seek to prevent the state from arguing that the aid was illegal by claiming that the state is estopped from relying on its own illegal conduct, if the disbursing state authority represented that the measure did not constitute state aid. The beneficiary could claim that it enjoyed a legitimate expectation under Irish and/or EU law that the measure was not illegal state aid. Whether such arguments would succeed before the Irish courts is unclear and untested. However, the Court of Justice has held that only exceptional circumstances could justify a national court not recovering illegal aid. The Court of Justice has held that a beneficiary of illegal aid cannot, in principle, plead legitimate expectations against a Commission recovery order (Case C-5/89, *Commission*

v Germany [1990] ECR I-3437). However, this principle is subject to derogation if there are specific and concrete facts that have generated a legitimate expectation on the part of the beneficiary (Case 223/85, *RSV v Commission*, paragraph 17). The Court of Justice has held that precise assurances by the Commission that the measure in question does not constitute state aid, or that it is not covered by the standstill obligation, may generate a legitimate expectation that would prevent a national court ordering recovery of illegal aid (Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147). It is not clear to what extent a beneficiary could plead legitimate expectations before an Irish court where there is no Commission decision pertaining to the measure, or where the national authorities (not the Commission) have assured the beneficiary that the measure was not aid or was not covered by the standstill obligation.

We are not aware of any examples where the Irish authorities, in the absence of a Commission decision finding illegal aid, have made these arguments. It would be highly unusual for a disbursing authority to seek recovery of aid given without being required to do so by a Commission decision. The Irish authorities are generally careful to design aid schemes in compliance with applicable EU state aid rules, and where the Commission investigates measures that were not notified as state aid, the Irish authorities would generally defend its view that the measure was not aid, up to the point where it is compelled to recover because of a Commission decision finding that the measure constituted state aid.

It would be unprecedented to our knowledge for a regulator to challenge a government measure in court alleging it constitutes unlawful state aid. The standing and vires of a regulator to make such a challenge would likely be examined by the relevant court. It is more likely that the regulator would advocate directly with the relevant government department setting out its concerns as to the state aid nature of the proposed measure.

22 Do specific limitation periods apply for any party in a national court procedure invoking illegality under state aid rules?

No specific limitation periods apply in these circumstances. The limitation period applicable for a party invoking illegality under state aid rules in a national court proceeding would be the appropriate limitation period under Irish law. For example, if the case was taken by way of judicial review, the applicant would have three months from the date when grounds for the application first arose. If the claim was a tortious or contractual claim, the party claiming the illegality would in theory be limited to bringing the claim within six years of the illegal act, namely the granting of the illegal aid.

However, national courts are under an EU law obligation to protect the rights of individuals affected by the unlawful implementation of state aid, taking full account of the direct effect of article 108(3) TFEU and the interests of the EU. When a national court is confronted with illegal aid, it must draw all legal consequences from this unlawfulness under national law. It remains to be seen whether an Irish court would set aside the domestic limitation period in order to protect the rights of an individual claiming illegality of state aid.

In the recent case of *Dun Laoghaire-Rathdown County Council v West Wood Club Limited*, the High Court affirmed that the principles of equivalence and effectiveness applied when applying domestic procedural rules to rights deriving from EU state aid law. The procedural rules considered in this case were relating to the jurisdiction of various Irish courts to consider state aid issues, however the principles of equivalence and effectiveness are likely to apply to domestic rules on limitation periods. The High Court judge in *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* did state that the obligation on national courts to provide a remedy for a breach of EU law does not extend to breaching national procedural rules (eg, jurisdiction or

rules on limitation periods) where that is not necessary under the principles of equivalence and effectiveness.

23 Can a national court proceeding be brought in parallel to an investigation by the European Commission or a national authority? Under which circumstances will a national court stay proceedings pending a Commission procedure? And what are the consequences for national courts if the European Commission already came to the preliminary conclusion in the opening decision that the measure constitutes incompatible state aid?

There is no provision of Irish law that would stop a national court proceeding being brought in parallel to an investigation by the European Commission. The EU law obligation on national courts to protect the rights of individuals affected by the unlawful implementation of state aid (as recognised in Case C-368/04 – *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraphs 38 and 44) is likely to mean that national court proceedings where a breach of article 108(3) TFEU is alleged by an aggrieved party could proceed in parallel with a European Commission investigation. However, in *Shannon LNG Limited and Shannon LNG Energy Limited v Commission for Energy Regulation and others* [2013] IEHC 568, Cooke J in the High Court stated that it may be ‘unnecessary and possibly improper’ to make any determination relating to potential illegal aid where there is evidence that the alleged illegal aid is already the subject of a complaint to the European Commission, on the basis that the complainant’s position is protected due to the Commission investigation. However, the ruling in the *SFEI and others* case (Case C-39/94 [1996] ECR I-3547) is clear that the initiation by the Commission of an investigation under article 108 TFEU does not relieve national courts of their duties to safeguard the rights of individuals in the event of a breach of the standstill obligation’ under article 108(3) TFEU. The Commission Notice on the enforcement of state aid law by national courts (the Notice) also makes clear that national courts must, until the final decision of the Commission, preserve the rights of individuals faced with the potential breach by member state authorities of the standstill obligation. Therefore, it is unclear whether an Irish court would stay a proceeding pending the resolution of a Commission investigation without compelling reasons, for example, if the Irish court had doubts as to whether the disputed measure constituted state aid and wished to refer the matter to the Court of Justice for a preliminary ruling under article 267 TFEU (as envisaged in paragraph 13 of the Notice), or if the complainant / applicant’s position was fully protected by way of an existing Commission investigation.

The *Deutsche Lufthansa AG v Flughafen Frankfurt Hahn* judgment of the Court of Justice has yet to be considered by the Irish courts, but national judges would pay due regard to the binding effect of the judgment, and are likely to attach additional persuasive value to the Commission’s opening decision in deciding whether it needed to take measures to safeguard the interests of an aggrieved party and protect the effectiveness of the Commission’s opening decision.

24 What is the burden of proof in state aid cases before national courts?

The burden of proof applying to the question of whether a measure consists of state aid or not would be the normal civil burden of proof, namely whether, on the balance of probabilities, the measure contains state aid or not. As mentioned above, the Irish courts have not yet considered the implications on the burden of proof of the *Deutsche Lufthansa AG v Flughafen Frankfurt Hahn* case, but it may be the case that an Irish court would presume a measure consists of state aid if the Commission had included the measure in an opening decision under article 108(2) TFEU.

The Irish courts will also presume a measure contains state aid if the Commission has already found it to be state aid. The most obvious example of where this may occur is in recovery proceedings taken by a member state against an Irish domiciled defendant pursuant to a negative recovery decision of the Commission under article 14(1) of Council Regulation (EC) No. 659/1999 (the Procedural Regulation). The judgment of the Irish High Court in *Kingdom of Belgium v Ryanair Limited* [2006] IEHC 213 confirmed that a negative recovery decision of the Commission “has to be regarded by the Irish courts as having the force of law unless and until it is annulled by the CFI [now the General Court] or ultimately the ECJ, and its validity cannot be questioned in these proceedings”, which followed the judgment of the Court of Justice in Case 314/85 *Foto-Frost v Hauptzollamt Lubeck — Ost* [1987] ECR 4199. The Irish courts may also presume the existence of state aid if faced with litigation by a party confronted with a potential breach of the standstill obligation under article 108(3) TFEU, in a situation where the Commission has already decided that the contested measure constitutes aid that is incompatible with the internal market, but has not decided that recovery obligations apply, for example, because it has not been implemented at the date of the decision. Subsequent implementation of the incompatible aid may lead an aggrieved party to apply to national courts for protection of their rights, and an Irish court in these circumstances may presume the contested measure constitutes state aid.

25 Can the plaintiff seek interim measures from the courts, in particular to prevent the grant of aid? In what form and under what circumstances is interim relief granted?

Irish courts, like the courts of other member states, must protect the rights of individuals affected by the unlawful implementation of state aid. While we are not aware of any instances where a third party has applied to an Irish court for interim measures to prevent the payment of unlawful state aid to a designated recipient, Irish courts would be obliged to prevent the payment taking place (eg, by way of ex parte interim injunction or an injunction granted after hearing all parties) if it were to find that the measure constituted illegal state aid. This obligation is specifically mentioned in paragraph 28 of the Notice, and would be provided for in the Irish courts through injunctive relief. The test under Irish law for the grant of an injunction is set out in *Campus Oil v Minister for Energy* [1983] 1 IR 88:

Is there a serious issue to be tried?

Are damages an adequate remedy?

Does the balance of convenience lie with granting the injunction?

Where an injunction is being applied for in the context of seeking the prevention of unlawful state aid, the plaintiff may have to provide an undertaking as to damages, whereby the plaintiff undertakes to compensate the aid recipient for any losses arising from the grant of the injunction, if the plaintiff ultimately loses its case at the full trial of the matter (should the matter proceed to full trial).

26 What would the national court decide if it found a non-notified measure to contain state aid?

The Irish courts must draw all appropriate legal consequences, in accordance with national law, where an infringement of article 108(3) has occurred (paragraph 28 of the Notice; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France* [1991] ECR I-5505; Case C-39/94 *SFEI and Others*; Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469).

Under Irish law, Irish courts have a wide discretion as to the remedies they may order, and the appropriate remedy would depend on the circum-

stances of the case. If the state aid measure has not yet been implemented, but will be notified to the Commission in future prior to any implementation, there may be no decision of the court beyond a declaration finding that the measure constitutes state aid. National courts are not competent to assess the compatibility with the internal market of a state aid measure, and the Irish courts may be satisfied that a future Commission assessment of the notification will adequately protect the rights of individuals affected by the potential implementation of the measure. For example, Cooke J in *Shannon LNG Limited and Shannon LNG Energy Limited v Commission for Energy Regulation and others* [2013] IEHC 568 stated (at paragraph 133) that:

‘It must be borne in mind that in any event a national court has no function in deciding whether an alleged state aid is compatible or incompatible with the internal market: that is an exclusive competence of the European Commission. It is true that where there is prima facie evidence of the proposed grant of an aid which has not been notified to the European Commission as required by Article 108(3), a national court has jurisdiction based upon paragraph 4 of that Article to injunct its implementation. In the present case, however, quite apart from the fact that no actual aid has been identified as about to be granted and that the new regime will not in any event be introduced until at least October 2014, (see para. 51 above), the Court has evidence before it that the applicants’ contentions under this heading are the subject of a complaint (case No. SA 33518) made to the Commission in 2011, which is currently under consideration by it. It would therefore be unnecessary and possibly improper for this Court to make any determination in respect of these contentions given that if there is any substance to them, the applicants’ position will be fully protected by appropriate decision of the European Commission.’

If the state aid measure has not been notified, or will not be notified, to the Commission prior to its implementation, the Irish courts may order injunctive relief preventing the implementation of the measure pending Commission approval given the obligation on national courts to safeguard the interests of individuals affected by a breach of article 108(3) TFEU.

27 Can a national court order the recovery of non-notified state aid?

Irish courts can order the recovery of non-notified state aid, and in principle must do so (paragraph 30 of the Notice; Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49; Case C-39/94, *SFEI and others*, paragraphs 40 and 68), unless there are exceptional circumstances in which the recovery of the aid would not be appropriate (Case C-39/94 *SFEI and Others*, paragraphs 70 and 71).

28 What would a national court decide if it found a measure to contain aid, but saw grounds for the compatibility of such aid with the internal market?

Irish courts, like courts of other EU member states, may not assess the compatibility of an aid measure with the internal market. This assessment is the sole competence of the European Commission (Case C-199/06, *CELF*). If the measure had been implemented in breach of the standstill obligation under article 108(3), it is arguable that the Irish courts would need to take measures to safeguard the interests of individuals affected by the unlawful implementation of the aid, for example by ordering provisional recovery or ordering the cessation of the aid measure if was ongoing, regardless of any grounds for compatibility with the internal market.

29 Would the national court necessarily declare a guarantee invalid if it secures a loan constituting aid and was granted in breach of article 108(3) TFEU (standstill obligation)? Does it make a difference if the only aid beneficiary is the borrower and not the lender?

The Irish courts have not to our knowledge considered a situation where they have been asked to declare a guarantee invalid, where it constituted unlawful aid. The *Residex* judgment of the CJEU (Case C-275/10) provided that national courts may declare a guarantee invalid in these circumstances, but left it open to national courts to take ‘less onerous procedural measures ... to facilitate the restoration of the competitive situation which existed before that guarantee was provided’. Whether it is necessary in a given case to declare a guarantee invalid would be a matter of argument before the Irish courts, but it is arguable that where a guarantee is given by the state constituting unlawful aid to a borrower and a lender, it would be necessary to declare the guarantee invalid in order to restore the competitive position prior to the grant of the guarantee.

30 Can a competitor of the beneficiary or other affected third parties claim compensation for damages caused by the aid from the authority granting the state aid? Can a third party claim compensation for damages caused by failure to respect the standstill obligation?

A competitor of the beneficiary or other affected third party can certainly bring a damages claim before the Irish courts under EU law against the national authority based on the *Francovich/Brasserie du Pêcheur* criteria for breach of the standstill obligation under article 108(3) TFEU. We are not aware of any damages claims based on breaches of state aid law by the Irish authorities, however, based on Irish case law on damages sought from the state for breaches of other EU law obligations, we expect that the EU and Irish rules on damages would work in parallel, for example Irish rules on quantum may dictate that the plaintiff receive special damages (specified and vouched monetary losses actually incurred) and general damages (a general compensatory award) for a breach of EU law by the state (*Emerald Meats v Minister for Agriculture* [1997] 2 ILRM 275). Damages granted to a competitor of the beneficiary or other affected third party may also be reduced on the basis of a failure to mitigate the loss arising, as occurred in the case of *Ogieriakhi v Minister for Justice and Equality & Ors* (No. 2) [2014] IEHC 582, where the plaintiff’s *Francovich* damages (not related to a breach by Ireland of state aid law) were reduced on the basis of a failure to mitigate his loss.

Consequences of violation of state aid rules

31 Under national law, can a third party bring damages actions against the beneficiary?

While there are no rules prohibiting a third party claimant from seeking damages against a beneficiary, the recent High Court judgment in *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* affirmed that EU law does not require that damages be available as against the recipient of unlawful state aid, and that national law governs such claims. In that case, the High Court held that the Circuit Court would not have jurisdiction to hear a counterclaim for damages by the defendant based on state aid law on the basis that the amount sought exceeded the jurisdiction of the Circuit Court (see answer to question 15 above for detail on jurisdictional limits of the Irish courts).

EU law provides no basis for a claim for damages against a beneficiary (Case C-39/94 *SFEI and Others*, paragraphs 72 to 74), and while such a claim is in theory available to a claimant under Irish law, it may be difficult for a third party claimant to satisfy an Irish court that the beneficiary of state aid is a ‘wrongdoer’ or was negligent, where the obligation being breached (ie, to notify the Commission of the state aid and not implement it until approval)

lies with the Irish state, not with the beneficiary. The beneficiary may also lack the necessary relational proximity to the third party claimant necessary for a claim for damages based on tortious negligence principles (depending on the specific circumstances).

If a third party claimant was able to demonstrate that the aid beneficiary breached another provision of competition law, namely articles 101 or 102 TFEU and their Irish law equivalents (sections 4 and 5 of the Competition Acts 2002–2014 (the Competition Act)), it would have a better chance of obtaining damages under Irish law. For example, if the third party claimant was able to prove that the aid beneficiary had used the aid to engage in predatory pricing, it may be able to claim damages for losses arising from a breach of article 102 TFEU/section 5 of the Competition Act.

32 What are the consequences of a violation of EU state aid rules for the validity and enforceability of the aid measure under national law? Are the consequences the same for unlawful aid that was not notified to the Commission and aid that the Commission has finally regarded as incompatible with the common market?

There is no provision of Irish law that automatically renders a measure invalid or unenforceable if it violates EU state aid rules. However, a non-notified state aid measure implemented by a state authority in breach of the standstill obligation may not be valid or enforceable to the extent that it consisted of state aid. The aid element of the measure may be subject to recovery from the beneficiary, but it would not necessarily be the case under Irish law that the aid measure would be invalid or unenforceable entirely. For example, an existing tax measure may have resulted in an underpayment by a benefitting party on the basis of an interpretation of the tax measure by the Irish tax authorities, but recovery of the quantum of aid coupled with appropriate future tax collection by the Irish tax authorities may result in the measure constituting the aid continuing to be valid and enforceable. The tax measure may continue to be valid and enforceable in its unchanged form, but interpreted differently so as to be compliant with state aid rules. However, another non-notified state aid measure may be incapable of validity or enforceability following a decision or judgment that it breaches the standstill obligation under article 108(3) TFEU, for example, a subsidy scheme providing ongoing payments to beneficiaries.

We do not see that there would be distinction in this regard between non-notified unlawful aid and aid that is notified to the Commission, but ultimately found as incompatible with the internal market, other than the likely requirement to recover aid from beneficiaries in the case of non-notified unlawful aid.

Enforcement by the European Commission

33 What are the consequences of a violation of EU state aid rules for the validity of a government regulation or contract containing the aid measure, and for subsequent regulations or contracts linked to the aid measure? Are the consequences the same for unlawful aid that was not notified to the Commission and aid that the Commission has finally regarded as incompatible with the common market?

As stated in question 32, there is no provision of Irish law that automatically renders a measure invalid or unenforceable if it violates EU state aid rules. However, a non-notified state aid measure contained in a regulation implemented by a state authority in breach of the standstill obligation may not be valid or enforceable to the extent that it consisted of state aid. The aid element of the measure may be subject to recovery from the beneficiary, but it would not necessarily be the case under Irish law that the regulation containing the aid measure would be invalid or unenforceable entirely. For example, an existing tax regulation may have resulted in an underpayment

by a benefitting party on the basis of an interpretation of the regulation by the Irish tax authorities, but recovery of the quantum of aid coupled with appropriate future tax collection by the Irish tax authorities may result in the regulation containing the aid continuing to be valid and enforceable. The unchanged tax regulation may continue to be valid and enforceable, but interpreted differently so as to be compliant with state aid rules. However, another non-notified regulation containing a state aid measure may be incapable of validity or enforceability following a decision or judgment that it breaches the standstill obligation under article 108(3) TFEU, for example, a subsidy scheme contained in a regulation providing ongoing payments to beneficiaries.

If a contract contains an unlawful state aid measure, it may be possible (depending on the circumstances) to apply the “blue pencil” test to the contract to sever the part containing the unlawful / unenforceable state aid measure from the remainder of the contract, allowing the contract to remain valid and enforceable with the state aid measure being “struck out”.

We do not see that there would be a distinction in this regard between non-notified unlawful aid and aid that is notified to the Commission, but ultimately found as incompatible with the internal market, other than the likely requirement to recover aid from beneficiaries in the case of non-notified unlawful aid.

34 Describe the major state aid investigations opened by the Commission against your country over the past 12 months. State whether these investigations were specific to your country or part of a broader investigation into several member states.

The only formal investigation opened by the Commission under article 108(2) TFEU against Ireland in the past 12 months was into the exemption from the air passenger departure tax (referenced in our answer to question 18 above) for transfer and transit passengers. The formal investigation followed from the General Court judgment in Case T-512/11 *Ryanair v Commission* where the General Court annulled the Commission decision that the non-application of the air passenger departure tax to transfer and transit passengers did not constitute state aid. The General Court found that the Commission should have initiated a formal investigation under article 108(2) TFEU as the excessive length of the Commission preliminary investigation and the incomplete and insufficient content of the investigation meant that it could be inferred that the Commission was not able to resolve the question whether the tax exemption was selective. The formal investigation (opened on 28 September 2015) appears to have been opened in response to the General Court judgment.

The most high-profile formal investigation involving Ireland is the pending investigation into the Irish authorities’ tax rulings in relation to Apple Inc and its subsidiaries (Case SA.38373).

The investigation covers tax rulings by the Irish tax authorities in 1991 and 2007 with regard to profit allocation between Apple branches for the purposes of calculating corporation tax due to the Irish authorities. In its opening decision, the Commission was concerned that the tax rulings resulted in Apple and its subsidiaries paying a lower level of corporation tax than other undertakings in a similar legal and factual situation. The case revolves around the transfer pricing arrangements used to allocate taxable profit between Apple and its subsidiaries.

The Commission’s preliminary view was that certain Irish tax rulings may constitute aid, and it opened a formal investigation under article 108(2) TFEU on 11 June 2014. This investigation is closely related to the state aid investigations into the tax regimes in the Netherlands (relating to Starbucks (Case SA.38374)) and Luxembourg (relating to Fiat Finance and Trade (SA.38375), Amazon (SA.38944) and McDonalds (SA.38945)). In October

2015, the Commission made negative decisions with recovery orders in both the *Starbucks* and *Fiat* cases.

35 Has the Commission suggested appropriate measures concerning existing aid measures in your country over the last 12 months?

The Commission has not suggested appropriate measures concerning existing aid measures in Ireland in the past 12 months.

36 Has the Commission ever opened specific investigations against your country following a sector inquiry?

The Commission has not opened specific investigations against Ireland following a sector inquiry.

37 Has your country ever been subject to an injunction by the Commission to suspend or provisionally recover aid?

Ireland has not been subject to an injunction by the Commission under articles 11(1) or 11(2) of the Procedural Regulation.

38 Has your country ever been subject to an infringement procedure under article 108(2) TFEU?

We are not aware of any infringement procedure under article 108(2) taken against Ireland for non-compliance with a negative decision of the Commission. The Irish authorities would typically be aware of their obligations under EU state aid rules, and would attempt to avoid a scenario where, firstly, an aid measure or scheme notified to the Commission is deemed incompatible with the internal market. The Irish authorities will generally attempt to design aid measures or schemes in a compatible manner. Secondly, they will also try to avoid implementing unlawful aid in breach of article 108(3) TFEU. There have been a small number of exceptions to this good record of compliance, eg most recently Case SA.29064 (mentioned above in our answer to question 18), where the Commission found illegal aid was granted to a number of Irish domiciled airlines through a dual-tier air passenger departure tax. As noted, this negative Commission decision was annulled by the General Court in February 2015. However, we are not aware of any incidences where a negative decision of the Commission has led to infringement proceedings against Ireland.

Recovery of state aid

39 Has the European Commission ever undertaken on-site state aid monitoring visits based on article 22 of Council Regulation (EC) No. 659/1999 (Procedural Regulation)? How were the visits carried out? What measures were taken to assist the officials and experts carrying out the visit?

We are not aware of any on-site state aid monitoring visits undertaken by the Commission.

40 Which national authority orders the recovery of state aid following a Commission decision, a national authority decision or an enforceable judgment by a national court?

There is no prescribed manner by which national authorities must recover state aid following a Commission decision or a judgment by an Irish court. Irish authorities are not competent to order recovery of state aid. In our experience, following a Commission decision ordering recovery, the national authority which was responsible for distributing the state aid will contact the recipient seeking recovery of the aid. If the recipient resists, the national authority will issue proceedings before the Irish courts (most likely the High Court in the competition list (see answer to question 15)) for recovery of the aid. If an enforceable judgment of the courts is issued (and not appealed),

ordering the beneficiary to repay the aid to the national authority, the beneficiary would be in contempt of court if it were not to repay.

41 What legal or administrative actions are contemplated in the national law for the recovery of unlawful or incompatible state aid?

As noted under question 40, there is no prescribed action contemplated in Irish law for the recovery of illegal or incompatible state aid. The Irish authorities are likely to seek recovery of unlawful or incompatible aid by simply contacting the recipient and seeking agreement on the amount to be recovered (if the quantum of the aid has not already been calculated by the Commission or by an Irish court). In the case of a Commission decision finding unlawful or incompatible state aid, where no agreement is reached with the recipient on the recovery of the aid, the national authority will issue proceedings before the Irish courts seeking recovery of the aid. If the Irish courts were to order the beneficiary to repay aid (either following on from a Commission decision finding unlawful or incompatible state aid, or pursuant to a case taken by a party seeking a declaration that a measure was unlawful state aid), the beneficiary would be in contempt of court if it resisted repayment.

42 What actions are available to the national recovering authority seeking to force an unwilling beneficiary to refund the unlawful and incompatible state aid?

As noted under questions 40 and 41, a beneficiary unwilling to return state aid to the Irish authorities would likely be subject to proceedings before the Irish courts, where the authorities would seek a court order requiring the beneficiary to return the aid (plus the interest accrued on the aid). There are limited examples of this situation arising in Ireland, the most recent being the Commission decision in Case SA.29064, where Ryanair, Aer Lingus and Aer Arann were found to have received state aid through the Irish air passenger departure tax. The airlines resisted repayment and were subsequently sued for recovery of the aid before the Irish High Court (see question 18). Owing to the separation of powers between the national executive, legislature and judiciary contained in the Irish Constitution, national administrative bodies with responsibility for distributing state aid will generally not possess the power to issue enforceable administrative orders for recovery of aid. The relevant national authority must go to court to secure an order.

There are other possible ways in which recovery could be effected by the Irish authorities, depending on the nature of the aid measure and the authority granting the state aid. For example, in the case of aid being granted through a tax measure, there is potential for the tax authorities to attempt to effect recovery through an amended tax assessment, which can be ultimately appealed to the Irish courts. However, we are not aware of the Irish authorities pursuing this method of recovery in any previous cases.

43 Can an action be brought in national courts to challenge the validity of the national recovery order implementing the Commission's recovery decision or suspend the recovery order pending a final decision on validity?

See question 42. National recovery orders implementing the Commission's recovery decisions are possible through court action, with the possible exception of the above-mentioned amended tax assessment, which would itself be appealable by the aid beneficiary to the Irish courts. An aid beneficiary challenging recovery will be able to be heard before the Irish courts. However, the beneficiary will not be able to challenge the validity of the Commission's recovery decision where it could have challenged the decision directly before the EU courts (Case C-188/92, *TWD Textilwerke Deggendorf v Germany*; paragraph 66 of the Notice). If the beneficiary could not challenge the Commission decision before the EU courts (which would be unlikely), an Irish

court must, in principle, offer legal protection to the beneficiary. However, the Irish court would need to request a preliminary ruling under article 267 TFEU if the validity and lawfulness of the Commission decision were to be challenged by the aid beneficiary (Case C-119/05, *Luchini*, paragraph 53).

If an aid beneficiary were to challenge the negative Commission decision before the Irish courts and seek interim relief against the execution of the recovery decision, it would need to satisfy the strict *Zuckerfabrik* test for suspension of state aid recovery orders: (i) the national court has serious doubts as regards the validity of the Commission decision. If the validity of the Commission decision is not already an issue before the EU courts, the Irish court would be required to refer the question to the CJEU; (ii) the interim relief must be necessary to avoid serious and irreparable harm to the beneficiary; and (iii) the Irish court would need to take account of the EU interest.

The *Zuckerfabrik* test was applied by O'Neill J in the High Court in *Kingdom of Belgium v Ryanair*. The judge interpreted the first limb of the test as being similar to the Irish court judicial review jurisdiction on the ex parte application for leave, namely ascertaining that there are arguable grounds for contending that the decision is invalid. The judge decided that Ryanair (as aid beneficiary) had satisfied this test. On the second part of the test, the judge decided that Ryanair had put forward no evidence that came close to satisfying this test, given that the harm would be purely financial and capable of being borne by Ryanair. With regard to the third part of the test, O'Neill J identified the EU interest as the necessity to restore the equilibrium of the market by the recovery of the sums paid to Ryanair, and specifically 'whether or not the measure in question will be deprived of all effectiveness if not immediately implemented'. According to the judge, neither party put forward evidence on the effect of a delay in the recovery of the state aid on competition in the market, therefore he was unable to conclude that the non-recovery of the aid would have any significant impact on competition in the relevant market. The judge did note that, in theory, 'the competitive equilibrium of the market was disturbed by the payment of these aids and may continue to be so distorted by their non-recovery'. The second and third limbs of the *Zuckerfabrik* test were therefore not satisfied in this case.

The *Zuckerfabrik* test is extremely strict, and it is submitted that aid beneficiaries seeking interim relief before Irish courts will continue to struggle to meet the second limb of the test where the damage in repayment would be solely pecuniary, unless the recovery would send the aid recipient into bankruptcy. Aid beneficiaries seeking interim relief in the Irish courts may also struggle to satisfy the third limb of the test, where there is a binding Commission decision finding that the aid received distorted competition by favouring the beneficiary.

We are not aware of a case in Ireland where an aid beneficiary has sought to stay or suspend a recovery order issued by an Irish court pursuant to a Commission recovery decision, pending a final decision by the General Court or CJEU on the validity of the Commission decision. In our view, an Irish court would be unlikely to stay or suspend its recovery order pending proceedings at EU court level, given that member states are obliged to immediately and effectively execute Commission recovery decisions. The Irish court would be likely to consider article 278 TFEU, which provides that actions before the CJEU do not have suspensory effect on Commission decisions.

44 Can third parties force national authorities to recover or claim damages from national authorities for failure to implement a recovery decision by the European Commission?

We are not aware of an Irish precedent for third parties forcing national authorities to recover state aid, whether on foot of a Commission recovery decision or not. However, given national courts must draw all legal consequences from unlawfully granted aid, there is no Irish law impediment to a

third party seeking a declaration from an Irish court (by way of the judicial review procedure outlined at questions 9 and 19) that a measure consists of state aid and must be recovered. We are also not aware of any Irish cases of a third party claiming damages from national authorities for failure to implement a recovery decision of the Commission, however given that the Notice explicitly provides that failure by member states to comply with a recovery decision can give rise to damages pursuant to the *Franovich and Brasserie du Pêcheur* jurisprudence, it is open to a claimant to seek damages from the Irish state before the Irish courts for non-implementation of a recovery decision, subject to demonstrating that it suffered a direct loss as a result of the non-implementation.

45 What defences by beneficiaries against recovery have been accepted by national authorities or courts?

We are aware of a limited number of cases where Irish domiciled beneficiaries of state aid have successfully resisted recovery following a negative Commission decision. In the *Aughinish Alumina* case (Case C78/2001), the initial negative Commission decision from 2005 finding that Ireland had given state aid to Aughinish Alumina by way of an exemption from excise duty for mineral oils used for the production of alumina in the Shannon region (appealed by both Ireland and Aughinish Alumina) has been the subject of a long-running EU court battle, where the General Court has twice annulled the Commission's negative recovery decision (Case T-50/06 and Case T-50/06 RENV), and the General Court's judgments have in turn twice been annulled by the Court of Justice (Case C-89/08 and Case C-272/12 P) and referred back to the General Court. The General Court rejected the appeals of Ireland and Aughinish Alumina in April 2016.

It appears from the Commission's database of active pending recovery decisions that the aid has not been recovered by Ireland from Aughinish Alumina, and we are not aware of any Irish court proceedings taken by the Irish state seeking to compel recovery of the aid.

In Case SA.29064 (see questions 18 and 42), the Irish state commenced proceedings against the named beneficiary airlines in the Irish High Court. The airlines defended the proceedings (and submitted counterclaims) on the basis of an allegation that the air passenger departure tax was illegal under article 56 TFEU and Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, such that the airlines were entitled to restitution of sums paid pursuant to the tax or *Franovich* damages. Recovery of the aid has not been effected by the Irish authorities. In February 2015, the General Court annulled the Commission decision (Cases T-473/12 and T-500/12), therefore recovery is unlikely to happen prior to either a new Commission decision finding that the airlines benefited from state aid through the tax, or the successful appeal by the Commission of the General Court's judgment. The Commission has lodged an appeal to the CJEU (Case C-164/15 P).

Main areas of state aid

46 What is the situation under national law if recovery was ordered by a national court owing to the violation of the standstill obligation but the aid is later declared compatible with the common market by the European Commission?

We are not aware of a situation where this has occurred in the Irish context, however we expect that in a situation where the aid has been repaid pursuant to a national court order, the Irish authorities would act to re-implement the state aid (undoing the repayment) following on from a declaration of compatibility by the Commission. It is likely that the re-implemented aid would also include any interest paid by the supposed beneficiary on foot of

the national court recovery order. However, there is no Irish law obligation on the authorities to implement the state aid for a second time.

47 Which sectors have received the highest amounts of aid in the past five years?

The below information was sourced from the European Commission state aid register of cases available at: www.ec.europa.eu/competition/state_aid/register

Financial and Insurance

Forty-three state aid measures

With the exception of the aid to Quinn Insurance (Case SA.33023), the measures fall into four broad categories: the recapitalisation and restructuring of banks; the Eligible Liabilities Guarantee (ELG) Scheme; the transfer of assets to the National Assets Management Agency (NAMA); and the Credit Union Resolution Scheme.

The majority of state aid granted by Ireland in the financial and insurance sector stems from the recapitalisation of Irish banks, a process which began in early 2009. The total amount injected by the government into the covered banks is approximately €64.1 billion.

The ELG was a scheme to guarantee, inter alia, deposits of over €100,000 in Irish banks and originally covered a total of almost €139 billion. No money was paid out on foot of this scheme.

The only Commission state aid decision in the past 12 months relating to the recapitalisation of Irish banks was Case SA.33442 relating to the restructuring plan of Irish Life & Permanent Group, which cleared €2.7 billion of recapitalisation; €1.1 billion of Standby State Investment; guarantees on issued liabilities up to €41.3 billion under the Credit Institution Financial Support scheme and the ELG schemes, and the guarantees on Emergency Liquidity Assistance up to €8.1 billion.

In the past 12 months, the Commission also approved (under article 106(2) TFEU) compensation granted under the risk equalisation scheme operating in the private health insurance industry for the period 2016–2020 (Case SA.41702). The former state monopolist Vhi Healthcare is the net beneficiary of the risk equalisation scheme, however it is not possible to ascertain the precise amount of the state aid from the Commission decision.

The transfer of assets to NAMA was done in nine tranches (or bundles). While the amount of state aid given in relation to tranches 1 and 3–9 is publicly available, the amount of aid given in relation to tranche 2 is uncertain. This means that the figure of €4.9 billion understates to some degree the amount of aid given in relation to the scheme.

The Credit Union Resolution Scheme involves the provision of €500 million by the government to support the resolution of failing credit unions. To date, €27.3 million has been granted. The Commission prolonged the Credit Union Resolution Scheme in a series of state aid decisions issued in the past 12 months.

Total: Approximately €74 billion.

Agriculture, Forestry and Fishing

Sixteen state aid measures

Agriculture, forestry and fishing is one of the main recipients of aid largely owing to government forestry grants as part of national seven-year schemes. The seven-year schemes cover the periods 2008–2014 and 2014–2020 and therefore do not perfectly cover the relevant five year timeframe. The below figure covers both periods, and therefore overstates the amount of state aid attributable solely to the past five years.

Total: €1,121,706,000

Energy*Three state aid measures*

Although only three measures have been the subject of state aid, the large amount of money provided makes this sector one of the highest recipients of aid over the past five years. Both the Renewable Feed in Tariff (RFT) Scheme and the Biomass Electricity Generation (BEG) schemes are part of a nationwide strategy to encourage alternative sources of energy involving a grant of around €1 billion each. The RFT and BEG Schemes will be in operation until 2035 and 2030, respectively. The full amount of the grant available has been included as it is not possible to quantify the amounts paid out to date from the schemes.

Total: €1,985,000,000

Other

48 Provide information on amounts of state aid paid out under approved state aid schemes and individually approved state aid for the past five years.

State aid schemes

The schemes in question include NAMA and the various agriculture, forestry and energy schemes mentioned above. Due to the various timeframes of the schemes in question, it is impossible to quantify only the state aid given in the past five years and the amount given is therefore likely to be overstated.

Total: €9,978,636,000.

Individually approved state aid

The amount of individually approved state aid includes the cost of the recapitalisation of the Irish banks, a process that began in early 2009. Therefore it is impossible to just provide figures for state aid afforded to the banking sector solely in the past five years. As above, this may lead to the total amount of aid being overstated.

Total: Approximately €78 billion.

49 Provide information on any other special features of your country's state aid regime not covered above.

There are no additional features to note.

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