

State Aid 2019

Contributing editor
Ulrich Soltész



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2014

Sixth edition

ISBN 978-1-83862-131-5

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



State Aid

2019

Contributing editor**Ulrich Soltész****Gleiss Lutz**

Lexology Getting The Deal Through is delighted to publish the sixth edition of *State Aid*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the Netherlands.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Ulrich Soltész of Gleiss Lutz, for his continued assistance with this volume.



London

June 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in July 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Overview	3	Netherlands	64
Ulrich Soltész Gleiss Lutz Isabel Taylor Slaughter and May		Marleen Botman and Georges Dictus Pels Rijcken & Droogleeveer Fortuijn	
Austria	7	Norway	71
Bernt Elsner and Marlene Wimmer-Nistelberger CMS Reich-Rohrwig Hainz		Svein Terje Tveit and Berit Svensli Solseth Arntzen de Besche	
Belgium	14	Portugal	80
Jacques Derenne and Dimitris Vallindas Sheppard, Mullin, Richter & Hampton LLP		Eduardo Maia Cadete and Philipp Melcher Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Denmark	25	Romania	89
Erik Kjær-Hansen and Josephine Alsing Gorrissen Federspiel		Alina Popescu and Magda Grigore MPR Partners Maravela, Popescu & Roman	
France	32	Spain	95
Edouard Sarrazin and Orianne Rivaud DLA Piper France LLP		Pedro Callol, Manuel Cañadas and Laura Moya Callol, Coca & Asociados SLP	
Germany	41	Sweden	102
Ulrich Soltész Gleiss Lutz		Mats Johnsson Hamilton	
Greece	48	Ukraine	107
Dimitris Vallindas Sheppard, Mullin, Richter & Hampton LLP		Igor Svechkar and Sergiy Glushchenko Asters	
Ireland	57	United Kingdom	114
Vincent JG Power A&L Goodbody		Ilan Sherr, Richard Jenkinson and Martin Strom DLA Piper	

Ireland

Vincent JG Power

A&L Goodbody

OVERVIEW

Policy and track record

- 1 | Outline your jurisdiction's state aid policy and track record of compliance and enforcement. What is the general attitude towards subsidies in your system?

In terms of policy, Ireland, like all EU member states, is willing to provide state aid. Apart from state aid to the banking sector during the financial crisis and alleged aid to Apple (a decision which is under appeal to the EU's General Court), Ireland ranks the lowest among EU member states in terms of providing state aid in 2017 (http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html). According to the European Commission's State Aid scoreboard, the total non-financial crisis state aid provided in 2017 by Ireland to the economy generally (with the exception of railways) was the second lowest in nine years, with state aid of only €674.4 million being provided by Ireland which puts Ireland in the lowest position in terms of the proportion that state aid represents as a percentage of GDP.

It is clear that the level of state aid being provided by Ireland is reducing almost continuously; for example, the level of state aid expenditure has fallen from €1.656 billion in 2010 to €674.4 million in 2017 (a fall of almost two-thirds). However, in regard to 'crisis aid' (relating primarily to the financial crisis), Ireland was among the four EU member states that provided the highest level of state aid to their banks between 2008 and 2014. The four member states that provided the most state aid in terms of recapitalisation of banks during those years were Spain, the UK, Germany and Ireland.

In terms of policy, Ireland does not favour unduly any state-owned businesses at the expense of private or foreign businesses. In terms of the nationality of recipients, Ireland has offered, and continues to offer, state aid on a non-discriminatory basis and does not favour unduly Irish-owned enterprises and has no policy of favouring national champions.

In terms of compliance with state aid, Ireland has a good and improving, but not perfect, record of compliance with EU state aid law. For example, it provided aid in the maritime and air transport sectors, which has been held to be unlawful (eg, Commission Decision 2000/625/EC of 13 June 2000 on the aid scheme implemented by Ireland to promote the transport of Irish livestock by sea to continental Europe, OJ 2000 L263/17; and Case SA29064 of 27 March 2013 on the unlawful state aid by Ireland to Aer Lingus, Aer Arann and Dublin Airport Authority, decision available at: www.ec.europa.eu/competition/state_aid/cases/240474/240474_1255299_30_2.pdf). The most dramatic exception to Ireland's otherwise good aid was the decision by the European Commission on 30 August 2016 in regard to Apple where the Commission held that Ireland had granted more than €13 billion of state aid to Apple by way of tax rulings (http://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf) but the decision is under appeal to the General Court (see Cases T-778/16 and T-892/16).

However, Ireland has a strong record of ensuring that new fiscal or tax measures are not implemented unless and until they have been approved by the European Commission.

Moreover, the European Commission's database of cases between 2000 and 1 May 2019 (www.ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3) indicated that there were only three negative decisions with recovery against Ireland (eg, there were 64 against Germany).

In terms of enforcement, Ireland's courts have been willing to enforce the repayment of state aid where needed (see, for example, in the case of alleged aid provided by Belgium to an Irish company, the Irish High Court admitted the case to its list: *Kingdom of Belgium v Ryanair Limited* [2006] IEHC 213 but the case did not proceed because the European Commission decision was annulled in the EU's General Court in Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, ECLI:EU:T:2008:585) and see also the sentiments of the Irish High Court in *Ryanair Limited v Revenue Commissioners* [2013] IEHC 327).

In terms of economic sectors, there have been several state aid schemes in Ireland relating to, for example, property, agriculture, food, telecommunications, training, forestry and transport. In recent times, the most significant state aid cases have involved aid provided to banks: in the period between 2008 and 2014, the value of recapitalisation was €91 billion, the value of guarantees was €554 billion, the value of asset relief interventions was €122 billion and the value of liquidity measures other than guarantees was €40 billion.

Despite over 45 years of membership of the EU (Ireland having acceded in 1973), however, there is not a well-developed system of state aid law in Ireland, and until the recent banking crisis and the Apple case, the topic was not widely appreciated or understood in Ireland generally. Hence, there is not an extensive body of Irish case law on state aid. However, when EU matters do come before Irish courts, there is a strong likelihood that the Irish courts are strongly influenced (understandably) by, and aware of, EU precedent and would not depart lightly or easily from EU practice.

With a possible Brexit, Ireland has become more concerned about the state aid implications of Brexit on two fronts: the need for EU clearance for aid that Ireland will be providing to its own businesses affected by Brexit (particularly, the agricultural sector) but also a desire for the EU to impose a state aid regime on UK businesses post-Brexit; otherwise there could be unfair competition from businesses benefiting from UK state aid post-Brexit.

Relevant authorities

- 2 | Which national authorities monitor compliance with state aid rules and have primary responsibility for dealing with the European Commission on state aid matters?

In Ireland, state aid compliance is monitored by central, rather than local, government. In Ireland, there is no specific designated national

authority to monitor compliance with state aid law and there is no body that has primary responsibility for dealing with the European Commission on state aid matters. In practice, the Department of Finance (ie, the Treasury) has a central role in state aid matters, monitors developments in the area and engages with the European Commission on state aid generally. Typically, the relevant government department (eg, the Department of Business, Enterprise and Innovation, the Department of Transport, Tourism and Sport or the Department of Agriculture, Food and the Marine) will be involved in sectoral aid. The Department of An Taoiseach (ie, the prime minister's office) is involved in high profile and difficult cases.

In specific cases, the relevant government department, typically along with the Department of Finance, interacts with the European Commission on state aid matters and typically involves the Irish Permanent Representation to the European Union (which could be regarded as Ireland's embassy to the European Union) in Brussels in their discussions with the European Commission.

Legal issues relating to state aid are typically monitored and dealt with on behalf of the state by the Attorney General's Office, but where there is litigation, the Chief State Solicitor's Office will be involved.

The Competition and Consumer Protection Commission (CCPC) (www.ccpc.ie, Ireland's national competition agency, formerly the Competition Authority until 31 October 2014) monitors distortions of competition in the Irish market but does not have any significant legislative role in regard to state aid.

3 | Which bodies are primarily in charge of granting aid and receiving aid applications?

State aid may be granted by any state body (or other body using state resources), whether a government department (eg, *Star Marina Limited v Minister for Agriculture Food and the Marine* [2014] IEHC 112), government agency (eg, the Industrial Development Authority), local authority (eg, Cork County Council in the *Swansea Cork Ferries* case (IP/89/397, 31 May 1989)) or central agency (eg, the Revenue Commissioners – for tax breaks, for example, as in the *Alleged Aid to Apple* decision), but these agencies are usually very careful about ensuring that any assistance is lawful aid.

Applications for assistance that could amount to state aid are typically made to the institution providing the state aid. In Ireland, there is no central state aid agency to grant or approve aid and the decisions of all agencies or entities involved are subject to EU law (including, where appropriate, the European Commission's approval). State agencies involved in the provision of potential state aid seek to ensure that there is awareness of, and compliance with, the state aid rules (eg, the state tourist body has issued guidance on compliance: www.failteireland.ie/FailteIreland/media/WebsiteStructure/Documents/2_Develop_Your_Business/6_Funding/Failte-Ireland-State-Aid-Handbook-2016.pdf).

General procedural and substantive framework

4 | Describe the general procedural and substantive framework.

State aid is generally a public, rather than private, law issue in Ireland. There are no specific Irish codes, statutes or guidelines that serve as a basis for the granting of subsidies, but all expenditure or use of state resources must ultimately be grounded in legislation and operated in accordance with the Constitution of Ireland and, ultimately, EU law. There is no special Irish state aid regime over and above what is necessary to implement EU law. In that respect, state aid issues have to be addressed in the context of the pre-existing Irish legal regime. This means that EU law will be superior to Irish law where the two legal systems conflict (in accordance with the EU principle of supremacy and article 29 of the Irish Constitution), laws have to be adopted by

the Irish Parliament (in accordance with the Constitution), decisions affecting legal rights are invariably taken by the courts, the courts must administer justice in public and all public bodies (eg, those granting or administering state aid) must comply with fair procedures and operate in accordance with constitutional or administrative justice or both. Where a state body has discretion (eg, a minister having discretion), the discretion must be exercised fairly, properly and lawfully. The Irish courts are willing to interfere with such discretion where they believe that it was not exercised in accordance with fair procedures.

National legislation

5 | Identify and describe the main national legislation implementing European state aid rules.

There is no main national legislation implementing EU state aid rules. Any directive adopted by the EU will be implemented, typically, by way of a statutory instrument (ie, a legally binding ministerial order) or primary legislation, but there is no overarching national legislation implementing EU state aid rules.

PROGRAMMES

National schemes

6 | What are the most significant national schemes in place governing the application and the granting of aid, that have been approved by the Commission or that qualify for block exemptions?

There have been several state aid schemes approved for Ireland over time, including schemes relating to, for example, tonnage tax for ships, the production of alumina, the financing of state broadcasters, the Voluntary Health Insurance Board (a mutual health insurer), agriculture, roads, afforestation, the organic sector, airports, forestry, seafood, training and the audiovisual sector. In the banking sector, there have also been schemes approved in regard to the eligible liabilities guarantee scheme, as well as aid to specific banks and the National Asset Management Agency. There have been a number of recent schemes introduced to deal with Brexit, small and medium-sized enterprises in financial difficulty and credit unions. There may be more Brexit-related schemes depending on the outcome of Brexit. It is also possible that there may be more health-related programmes; for example, the Commission held on 24 April 2018 that Ireland's sugar tax did not involve the provision of state aid.

General Block Exemption Regulation

7 | Are there any specific rules in place on the implementation of the General Block Exemption Regulation (GBER)?

No, there are no specific rules in place on the implementation of the GBER in Ireland. The GBER is operational and applies in Ireland by virtue of being an EU regulation.

PUBLIC OWNERSHIP AND SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

Public undertakings, public holdings in company capital and public-private partnerships

8 | Do state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships play a significant role in your country?

To date, state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships have not

played a significant role in Ireland. However, Ireland must comply with EU state aid law in regard to such matters. There have been some cases where state aid was at issue in privatisations (eg, the sale of B&I Line), and in the health insurance sector (eg, leading to the General Court's judgment in Case T-289/03 *BUPA* [2008] ECR II-81, ECLI:EU:T:2008:29).

SGEI

9 | Are there any specific national rules on SGEI? Is the concept of SGEI well developed in your jurisdiction?

There are no specific national rules on services of general economic interest (SGEI). However, SGEI has arisen in various specific contexts (eg, bus and rail transport in the context of Regulation 1370/2007) as well as health insurance (eg, Case T-289/03 *BUPA* [2008] ECR II-81, ECLI:EU:T:2008:29).

CONSIDERATIONS FOR AID RECIPIENTS

Legal right to state aid

10 | Is there a legal right for businesses to obtain state aid or is the granting of aid completely within the authorities' discretion?

There is no automatic legal right under Irish law to receive state aid. The granting of lawful aid is within the authorities' discretion unless the putative recipient can point to a legal right (eg, founded on a contract or statute) to receive the state aid and then it must be lawful state aid.

If the aid to be provided is unlawful aid (ie, prohibited aid), then it is submitted that it would be unlawful for an arm of the state (eg, a government minister) to provide the aid and an Irish court should refuse to permit the granting of the aid (eg, by way of an injunction) because the Irish court would be acting in breach of its obligations under EU law. There is also case law that shows that the state has been unwilling to provide assistance that it has learned is illegal state aid (eg, *Star Marina Limited v Minister for Agriculture Food and the Marine* [2014] IEHC 112).

Main award criteria

11 | What are the main criteria the national authorities will consider before making an award?

Irish law does not set out the criteria that any national authority needs to consider before making an award of state aid. The Irish authorities must be very mindful of, among other factors, the need to comply with EU law and will not provide any assistance that would amount to unlawful state aid.

Strategic considerations and best practice

12 | What are the main strategic considerations and best practices for successful applications for aid?

Anyone seeking state aid from Ireland should demonstrate how the proposed aid would assist in the fulfilment of an objective of national or regional policy. An examination of cases where state aid has been provided indicates that aid is provided where there is a specific need to meet a government policy aim (eg, to foster an industry such as tonnage tax in the shipping sector, to address regional development problems or to address a crisis such as special measures relating to dioxin contamination in Ireland). It will also be important to demonstrate that the aid would be lawful and, ideally, would be exempted aid not requiring authorisation by the European Commission. It is also worth bearing in mind the need to comply with the Regulation of Lobbying Act 2015 in terms of any lobbying of Designated Public Officials where the party lobbying is seeking state funds.

Challenging refusal to grant aid

13 | How may unsuccessful applicants challenge national authorities' refusal to grant aid?

Anyone that has been refused state aid can potentially sue the relevant entity that has refused the aid provided there are legal grounds to justify an action. Such a suit will normally be instituted in the High Court (which is a trial court). Such a claim could be on the basis of, for example, a breach of administrative law (eg, improper exercise of discretion). However, it is unclear as to the chances of success of such a claim and the courts will ordinarily be deferential to the executive arm of the state and regard this as a matter falling within the doctrine of the separation of powers (ie, judicial power does not interfere with the exercise of executive or legislative power unless the latter is being exercised in a manner that is unlawful).

Involvement in EU investigation and notification process

14 | To what extent is the aid recipient involved in the EU investigation and notification process?

In Ireland, the aid recipient's level of involvement varies from case to case. Ideally, recipients will seek to be involved at all stages of the investigation or notification but cannot insist on participation in matters which are between the European Commission and Ireland. Even in cases where a recipient is involved deeply in a case, there will be situations where Irish government officials will want to have private discussions with the European Commission. In practice, experience shows that a collaborative and interactive approach works best where the public officials can draw on the experience and expertise of the potential beneficiary (eg, by virtue of its knowledge of the sector) in engaging with the European Commission, while the aid recipient can contribute knowledge of the sector and 'coalface' information, which the European Commission normally finds very helpful in its deliberations.

STRATEGIC CONSIDERATIONS FOR COMPETITORS

Complaints about state aid

15 | To which national bodies should competitors address complaints about state aid? Do these bodies have enforcement powers, and do they cooperate with authorities in other member states?

Typically, complainants address their concerns directly to the European Commission rather than addressing the issue domestically, as there is no national body (other than the courts) that is empowered to hear complaints about state aid and, even then, the role of national courts is limited in regard to EU state aid law.

The Irish courts (normally, the Irish High Court) may hear complaints about allegedly illegal state aid (eg, *Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4 and *Pierce trading as Swords Memorial & another v Dublin Cemeteries Committee & others* [2009] IESC 47). The Irish courts are likely to be influenced heavily by the approach taken by the European Commission (eg, *Pierce trading as Swords Memorial & another v Dublin Cemeteries Committee & others* [2009] IESC 47). The Irish courts are mindful of article 4(3) of the Treaty on European Union, which provides: '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full and mutual respect, assist each other in carrying out tasks which flow from the Treaties' (cited in, for example, *Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4).

Ireland's CCPC does not have the legal power to address state aid issues. However, consideration should be given to the possibility of a complaint to the CCPC in case there is another competition law issue involved that could interest the CCPC.

It is possible to complain to central government if alleged unlawful aid was provided (particularly if the aid was provided by local government), but one would typically make the complaint directly to the European Commission after putting the central government on notice of one's concerns and giving central government a reasonable time to comply.

In terms of bodies with powers, the most powerful one is undoubtedly the European Commission so complainants would be well placed to complain first and foremost to it before others.

Dealing with illegal or incompatible aid

16 How can competitors find out about possible illegal or incompatible aid from official sources? What publicity is given to the granting of aid?

In Ireland, there has traditionally been no national mandatory publication process (eg, website or public register) for state aid. There are public records of all money expended by the state, but the records are not necessarily at the level of granularity or detail that would make it possible to see every recipient of assistance or would identify assistance specifically as being state aid. However, the GBER's transparency provisions have been operated in Ireland and details of state aid provided since 1 July 2016 have to be published at <https://webgate.ec.europa.eu/competition/transparency/public/search/IE?resetSearch=true>.

Ireland has freedom of information legislation (embodied primarily in the Freedom of Information Act 2014), which may provide information necessary to identify illegal state aid, but there are limitations to the legislation (see question 17).

17 Give details of any legislation that gives competitors access to documents on state aid granted to beneficiaries.

There is no specific state aid-related Irish legislation. However, there is general legislation that may assist. The Freedom of Information Act 2014 provides access to those who request information on documentation held by various emanations of the state. There are various exceptions to the disclosure of information (eg, meetings of government, information received in confidence, commercial sensitivity and financial and economic interests of the state and public bodies). These exceptions may frustrate putative complainants about illegal state aid. The Regulation of Lobbying Act 2015 also provides high level information which may be useful to competitors seeking information about state aid.

18 What other publicly available sources can help competitors obtain information about possible illegal or incompatible aid?

Anyone concerned about potentially illegal state aid could also request a member of the Irish Parliament to pose 'parliamentary questions' to government ministers in Parliament, and this might assist in elucidating the information; or a member of the European Parliament could pose questions to the European Commission on possible state aid in Ireland. Equally, shareholders could pose questions at general meetings, but this latter route is unlikely to always elicit sufficient information particularly where the company was seeking to hide illegal state aid.

Other ways to counter illegal or incompatible aid

19 Apart from complaints to the national authorities and petitions to national and EU courts, how else may complainants counter illegal or incompatible aid?

Apart from complaints to the Irish authorities and petitions to Irish and EU courts, complainants could raise concerns with the media and third parties (eg, banks that are lending money to the venture or insolvency practitioners involved in the process), but there are few alternatives open to complainants in this context.

PRIVATE ENFORCEMENT IN NATIONAL COURTS

Relevant courts and standing

20 Which courts will hear private complaints against the award of state aid? Who has standing to bring an action?

In practice, the court that hears most private complaints against the award of state aid is the High Court of Ireland. This is a court of universal jurisdiction. Appeals from the High Court lie to the Court of Appeal, with the possibility of further appeal, in some cases, to the Supreme Court. There is the possibility that one of these courts may refer questions of EU law to the Court of Justice of the European Union (CJEU) by way of a preliminary reference (see question 24). However, an argument may be made before any Irish court that assistance amounts to illegal state aid because all courts are under a duty to comply with, and enforce, EU law.

It is worth recalling that the Irish Supreme Court has commented as follows in *Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4:

13. Article 108 [of the TFEU] lays down procedures for the review by the Commission of state aid. Firstly, the Commission is required, in cooperation with member states, to 'keep under constant review all systems of aid existing in those states' (existing aid). Secondly, Article 108(3) obliges member states to inform the Commission of any plans to grant new state aid. It is a fundamental feature of this scheme that the Commission has the exclusive function of ruling on the compatibility of aid, whether existing or new, with the internal market.

14. The courts of the member states are obliged to support the Commission in the exercise of its functions. Most importantly, they must give effect to the standstill provision of Article 108(3) and are obliged to make orders, where appropriate, restraining the state from implementing aid where the state in question has failed to notify the Commission or, where notice has been given, without awaiting the Commission decision on compatibility. Aid granted in contravention of Article 108(3) is described as 'unlawful aid' (see Commission Notice 2009/C 85/01 of 9 April 2009 on enforcement of state aid law by national courts, especially paragraph 28). The national court may also be obliged to make orders for the recovery of unlawful aid, a matter which does not arise in the present case. In addition, it is common case that the state duly notified the Commission of its intention to grant the aid in the present case. There is no suggestion of any deficiency in that notification.

Available grounds

21 What are the available grounds for bringing a private enforcement action?

The most likely basis for the claim will be articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) or any relevant measure adopted thereunder. A party seeking to strike down assistance

as illegal state aid might well seek a declaration from the Irish court that the assistance amounted to state aid or that any assistance provided should be given only in strict compliance with any European Commission approval (*Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4). It is possible to seek an injunction (eg, to prevent any action that would be contrary to EU law (eg, the provision of illegal state aid)).

Defence of an action

22 | Who defends an action challenging the legality of state aid? How may defendants defeat a challenge?

Such claims will ordinarily be defended by the state (ie, Ireland). The Attorney General is automatically joined as a defendant in any proceedings against the state. Typically, the body that received or provided the aid will also be a defendant (eg, the National Asset Management Agency in *Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4).

Compliance with EU law

23 | Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? Does an action by a competitor have suspensory effect? What is the national courts' track record for enforcement?

Bearing in mind that Ireland has been a member state of the EU for over 45 years, there have been very few cases on state aid before the Irish courts. However, in these relatively few cases, the courts have been willing to comply with EU state aid law and order compliance. It is very likely that the Irish courts will be guided by EU law and jurisprudence on compliance and enforcement.

The Irish courts have also been mindful of the relatively limited role of member state courts in this area and have not been willing to stray outside their limited role. For example, Cooke J in the High Court case of *Shannon LNG Limited & another v Commission for Energy Regulation & others* [2013] IEHC 568 said:

133. 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. . . 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.

The limited role of member state courts (including the Irish courts) was also recognised by the Supreme Court in *Dellway Investments Limited and others v National Asset Management Agency, Ireland and the Attorney General* [2011] IESC 4:

14. The courts of the member states are obliged to support the Commission in the exercise of its functions. Most importantly, they must give effect to the standstill provision of Article 108(3) and are obliged to make orders, where appropriate, restraining the state from implementing aid where the state in question has failed to notify the Commission or, where notice has been given, without awaiting the Commission decision on compatibility. Aid granted in contravention of Article 108(3) is described as 'unlawful aid' (see Commission Notice 2009/C 85/01 of 9 April 2009 on enforcement of state aid law by national courts, especially paragraph 28). The national court may also be obliged to make orders for the recovery of unlawful aid, a matter which does not arise in the present case...

The Irish courts will pay due regard to any clearance decision of the European Commission in regard to state aid (eg, *Quinn Insurance Limited (in administration) v Assurance Companies Act 1909* [2011] IEHC 382), but will nonetheless exercise their jurisdiction where it is proper to do so.

Referral by national courts to European Commission

24 | Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

It is possible for Irish courts and certain tribunals to refer certain questions to the CJEU under article 267 TFEU. The CJEU has jurisdiction to give preliminary rulings concerning:

- the interpretation of the treaties; and
- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU.

A state aid question will typically fall under the former heading. State aid issues typically arise, insofar as they do, before the Irish High Court and it has shown a willingness to refer EU law questions generally to the CJEU on EU matters generally. Equally, if a state aid issue arises in the Supreme Court (ie, the final court of appeal in Ireland), then it may even be obliged to bring the matter before the CJEU. If a state aid issue is raised in an Irish court and the conditions for the application of article 267 are met, then it is very likely that the Irish court will refer the matter to the CJEU.

It is also believed to be possible to stay proceedings before the national court and for the court or the parties to inquire of the Commission about the latter's views; or the Commission might, where appropriate and possible, offer its views by way of an amicus curiae type brief or intervention.

Burden of proof

25 | Which party bears the burden of proof? How easy is it to discharge?

In Irish courts, it is the party that asserts that the assistance is state aid and that it is either lawful or unlawful aid who bears the burden of proof. It must be proven on the basis of the 'balance of probabilities' (ie, the civil rather than the criminal standard of proof). It should be relatively easy in theory, provided all the facts are available, to demonstrate that the assistance is, or is not, aid but sometimes it is not always clear as to whether something amounts to aid. As Cooke J said in paragraph 123 of his judgment in *Shannon LNG Limited & another v Commission for Energy Regulation & others* [2013] IEHC 568:

[w]hile the principle of the hierarchy of norms means that the legislative measures considered in this judgment cannot be regarded as curtailing the inherent scope of the primary competition rules of the [TFEU], it is nevertheless the practical reality that

a party to litigation who seeks to assert that a commercial practice authorised or directed under the legislation infringes . . . the state aid rules, faces a difficult onus of proof.

Deutsche Lufthansa scenario

26 | Should a competitor bring state aid proceedings to a national court when the Commission is already investigating the case? Do the national courts fully comply with the *Deutsche Lufthansa* case law? What is the added value of such a 'second track', namely an additional court procedure next to the complaint at the Commission?

There is no established practice in Ireland on this issue. If the Commission is investigating the matter, then ordinarily it is best to leave it to the Commission. The downside (but not in all circumstances) of opening a second track in Ireland is that the Irish court may well refer questions to the CJEU for a preliminary ruling thereby complicating and delaying matters. The upside (usually) of opening a second front in Ireland is that occasionally the European Commission can be somewhat political in its approach and decision-making so courts will have the advantage or disadvantage of being less political in approach, depending on one's perspective.

Economic evidence

27 | What is the role of economic evidence in the decision-making process?

The Irish courts are generally willing to accept economic evidence. However, the decision is ultimately one for the courts and not any economist giving evidence to the court or assisting the judge. The Irish courts are adversarial rather than inquisitive and, typically, they do not use assessors so the evidence will be submitted by expert witnesses called by the parties, capable of cross-examination by the other side, and the matter will ultimately be decided upon by the court.

Timeframe

28 | What is the usual time frame for court proceedings at first instance and on appeal?

If court proceedings are urgent in nature (eg, an application for an injunction), then proceedings can be instituted and concluded very quickly (eg, in a matter of hours, days or weeks if needed). If proceedings involve more long-term proceedings, then there could be much slower proceedings over a number of years. State aid matters are generally not short or quick cases.

Interim relief

29 | What are the conditions and procedures for grant of interim relief against unlawfully granted aid?

The conditions for the granting of an interlocutory injunction (the closest analogy) are usually as follows:

- there is a fair question to be determined at the trial of the action;
- damages will not be an adequate remedy for the plaintiff if he or she is successful at the trial; and
- the balance of convenience favours the granting of the injunction rather than refusal of the injunction.

Legal consequence of illegal aid

30 | What are the legal consequences if a national court establishes the presence of illegal aid? What happens in case of (illegal) state guarantees?

The situation in Ireland is no clearer in regard to the *Residex* case law than it is elsewhere and given the absence of case law in Ireland, it is likely that the Irish courts will follow the then prevailing EU thinking on the issue and given the uncertainty of the law, it is quite possible that the matter could be referred to the CJEU.

Damages

31 | What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? Can competitors claim damages from the state or the beneficiary? How do national courts calculate damages?

There is no practice yet established by the Irish courts in this regard. One would assume that the Irish courts will approach the matter on the basis of any EU or other member state precedent or practice.

STATE ACTIONS TO RECOVER INCOMPATIBLE AID

Relevant legislation

32 | What is the relevant legislation for the recovery of incompatible aid and who enforces it?

There is no specific Irish legislation on the recovery of incompatible state aid. The claim will be based on EU law.

Legal basis for recovery

33 | What is the legal basis for recovery? Are there any grounds for recovery that are purely based on national law?

The legal basis for recovery will ordinarily be an EU decision (eg, *Kingdom of Belgium v Ryanair* [2006] IEHC 213).

Commission-instigated infringement procedures

34 | Has the Commission ever opened infringement procedures before the CJEU because of non-recovery of aid under article 108(2) TFEU?

This is rare given Ireland's track record of compliance. However, on 4 October 2017, the Commission announced that it had referred Ireland to the CJEU for failure to recover allegedly illegal tax benefits from Apple. However, the case has been discontinued because steps were taken by Ireland to ensure that the aid is recovered (https://ec.europa.eu/ireland/news/state-aid-commission-decides-withdraw-court-action-against-ireland-failure-recover-illegal-aid_en).

Implementation of recovery

35 | How is recovery implemented?

If the recipient does not voluntarily return the illegal aid, then the procedure for recovery will normally be:

- a court procedure whereby there is an application to the court to seek recovery; or
- an amended tax assessment by the Revenue Commissioners where the illegal aid was a tax break and the beneficiary received illegal state aid.

Article 108(3) TFEU

36 | Can a public body rely on article 108(3) TFEU?

This issue has not been tested before the Irish courts but it would seem likely that a public body could do so because otherwise it would involve the court or the public body enforcing an illegality or nullity.

Defence against recovery order

37 | On which grounds can a beneficiary defend itself against a recovery order? How may beneficiaries of aid challenge recovery actions by the state?

In Ireland, there has been limited precedent because there are few negative decisions ordering recovery and therefore few beneficiaries of state aid who would challenge. The main strategy is to appeal the Commission decision in the General Court and seek to contest any claim for recovery before the Irish courts (as in *Ryanair/Charleroi*) or pay back the aid and challenge in the EU's General Court the underlying Commission decision. Based on the limited precedent of *Kingdom of Belgium v Ryanair* [2006] IEHC 213, it would appear that the Irish courts will be unlikely to frustrate the enforcement of an EU recovery decision.

Interim relief against recovery order

38 | Is there a possibility to obtain interim relief against a recovery order? How may aid recipients receive damages for recovery of incompatible aid?

If the European Commission has ordered the recovery of illegal state aid, then it is unlikely that an Irish court would grant interim relief preventing recovery of the aid (*Kingdom of Belgium v Ryanair* [2006] IEHC 213). Indeed, it would very probably be unlawful, under EU law, for an Irish court to undermine the work of the European Commission in the area of state aid. It is more likely that interim relief against such a European Commission recovery order should be sought from the EU General Court rather than the Irish court, as the latter would not have any jurisdiction to annul the European Commission's decision or have power to ignore it.

UPDATE AND TRENDS

Enforcement priorities and reform

39 | Are there any emerging trends or hot topics relating to state aid control in your jurisdiction? What are the priorities of the national authorities? Are there any current proposals to change the legislation? Are there any recent important cases in the field of fiscal aid (taxes), infrastructure or energy? Any sector enquiries?

State aid has become more prominent in Ireland in recent years. This is for several reasons. First, the Financial Crisis (when a significant amount of state aid was provided to Irish banks) has meant that the Irish public generally became familiar with the concept of aid and the need for European Commission approval. Second, the *Apple* case has made the issue of state aid much more prominent in the minds of Irish people. Third, business people have also become more familiar with state aid because of a plethora of state aid cases involving Irish companies (most notably, *Ryanair* and various agreements with airports).

Plaintiffs have become more inclined to utilise state aid arguments. While to date, the claim has not been successful, a sports club has sought to challenge the imposition of municipal rates by a local authority which also runs competing sports facilities with the benefit of alleged state aid (see *Dun Laoghaire Rathdown County Council v West Wood Club* [2018] IESCDT 63, [2018] IEHC 363). Plaintiffs in a banking

A&L Goodbody

Vincent JG Power

vpower@algoodbody.com

27-29 North Wall Quay
International Financial Services Centre
Dublin 1
Ireland
Tel: +353 1 649 2000
www.algoodbody.com

dispute have also used state aid in a banking dispute (eg, *Dowling and others v The Minister for Finance* [2018] IECA 300 and *Vincent Byrne v NAMA* [2018] IEHC 526). Equally, an anonymous complainant to the European Commission alleged that there had been illegal aid provided to Helplink South (a provider of emergency alarms for the elderly and disabled in Ireland) but the European Commission decided not to raise objections to the grants awarded to Helplink South on the basis that the grants were compatible with article 107(3)(c) TFEU.

Ireland has also obtained approval for 'Temporary restructuring support (extension of SA.49040)', which involved an aid scheme for temporary restructuring support to small and medium-sized enterprises (C(2018) 2641 final).

There have been various approvals in regard to state aid and credit unions (eg, the Seventh prolongation of the Credit Union restructuring and stabilisation scheme (C(2018) 2626 final) and the 13th Prolongation of the Credit Union Resolution Scheme 2018 (C(2013)3216 final)).

There have also been approvals for the agricultural sector (eg, *Teagasc Joint Pig Programme* C(2018) 7313 final) and *Carbery Food Ingredients Ltd (Aid for Investment in Processing and Marketing of Agricultural Products)* (C2019) 1411 final).

Tax has become a more regular subject matter of state aid cases in Ireland. Apart from the *Apple* case outlined above, travel tax and sugar tax have been the subject of cases (see, eg, *Aer Lingus v Minister for Finance and Ryanair v Minister for Finance* (and related cases) [2018] IEHC 198, [2018] IECA 222 and *Irish Tax on Sugar Sweetened Drinks* (C(2018) 2385 final) respectively) Ireland has also obtained permission for the 'Prolongation of the scheme on the Refund of Employers' Social Security Contributions in respect of Seafarers on certain vessels' (C(2018) 819 final).

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Foreign Investment Review	Patents	State Aid
Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)